

10334



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

**Case Reference** : **LON/00BE/LVT/2014/0006**

**Property** : **101-103 Cobourg Road London SE5  
0HU**

**Applicant** : **Wyndhams Court Properties Ltd**

**Representative** : **Mr S Newman, Solicitor of D & S  
Property Management**

**Respondent** : **Mrs J M Kennedy and Mr C N  
Kennedy (Flats 2 & 3 ) (1)  
Ms S V Lewis (Flat 6) (2)  
A A Akintokun and I O Akintokun  
(Flat 8) (3)  
Ms J D Samuel (Flat 12) (4)**

**Representative** : **Mr B Amunwa of Counsel  
(Respondent 1)  
Mr A Akintokun (Respondent 3) in  
person  
Mr E Orobator, lay representative  
(Respondent 4)  
Respondent 2 did not appear and  
was not represented.**

**Type of Application** : **Variation of lease, ss35-40  
Landlord and Tenant Act 1987**

**Tribunal Members** : **Mrs F J Silverman Dip Fr LLM  
Mr F Coffey FRICS**

**Date and venue of  
Hearing** : **10 Alfred Place, London WC1E 7LR  
15 October 2014**

**Date of Decision** : **15 October 2014**

---

## DECISION

---

The Tribunal declines to grant the Applicant's application under section 35 Landlord and Tenant Act 1987 for the reasons set out below.

### REASONS

1 The Applicant landlords are the freeholders of the premises known as **101-103 Cobourg Road London SE5 0HU**

2 The Premises are divided into 15 flats and the Respondent tenants are the lessees of the flat(s) listed against their name(s) on the front sheet to this decision. The Tribunal notes that the remaining 10 flats in the block are owned by the Applicant landlord and are let by them on assured shorthold tenancies.

3 The current application, brought under s 35 Landlord and Tenant Act 1987, seeks to vary the provisions in the Respondents' leases so that the Respondents become liable to indemnify the Applicant for the latter's costs incurred in enforcing the tenants' covenants imposed by the leases. The wording of the proposed variation is set out verbatim in the attached Schedule.

4 The leases as presently drafted do not allow the landlord to recover the costs of enforcement (except in limited circumstances following service of a s146 notice) from a defaulting tenant but do allow those costs to be added to the service charge payable by the tenants in the proportions specified in their respective leases. The Applicant argued that it was unfair to require all tenants to pay as part of their service charge a proportion of the costs incurred by the landlord in recovering arrears or damages from a defaulting tenant and that the costs so incurred should be borne wholly and exclusively by the defaulter.

5 The Applicant brought an application to the Tribunal (dated 21 July 2014) asking the Tribunal to vary the leases for the reasons cited above and in the manner set out in the annexed Schedule.

6 Following Directions issued by the Tribunal on 14 August 2014 a hearing of this matter came before a Tribunal sitting in London on 15 October 2014. The second Respondent was neither present nor represented at the hearing. The third Respondent (Mr Akintokun, on behalf of himself and his wife) attended the Tribunal in person. He told the Tribunal that he had not responded to the application because he had not known of it until so informed by his bank about a month ago. He had now seen some of the papers relating to it, understood the nature of the application and opposed it. The Tribunal informed him that he would not be able to take part in the current hearing, except as an observer, because he had not filed a response in accordance with the Directions. The Tribunal would however consider an application to adjourn the proceedings to a later date if he wished to make a formal response. Mr Akintokun said that as the first and fourth Respondents were

present and represented he was content for the hearing to proceed and did not wish apply for an adjournment.

7 The Tribunal did not consider it necessary in the circumstances of this case to inspect the property.

8 The Tribunal is satisfied that all the Respondents and other interested parties (tenants' lenders ) have now been informed of the proposals to vary the leases.

9 An agreed bundle of documents was presented to the Tribunal for its consideration. Page references below are references to pages in that bundle.

10 The first and fourth Respondent had both objected to the Application and had responded by filing a statement of case with the Tribunal. The Tribunal was not satisfied that the second Respondent had consented to the variation ( as asserted by the Applicant). The alleged consent took the form of a text message from a third party who is not the registered proprietor of the relevant flat (Flat 6) (page 209). No evidence was adduced to demonstrate that the third party who had sent the text message had authority to act on behalf of the registered proprietor. No response had been received from the third Respondent for the reasons cited in paragraph 6 above.

11 The Applicant stated that the leases were defective in that they did not allow the landlord to recover the costs of enforcement of breach of covenant or non-payment of service charge from a defaulting tenant except in the limited circumstances relating to ss 146 -7 Law of Property Act 1925. This meant that non-defaulting tenants were being required to pay a proportion of those costs as part of their own service charge and the proposed amendment would benefit non-defaulting tenants who would thereby be protected from this situation. He agreed that he had, on his client's instructions, drafted a 'strong clause' and said that the Tribunal could vary it if necessary. He accepted that the clause as drafted enabled the landlord to recover all costs on a full indemnity basis from a tenant even in circumstances where the landlord's enforcement action had not been successful.

12 On behalf of the first Respondent the Tribunal was reminded that the property was in severe disrepair and that there was a history of litigation between the landlord and the four tenants who were the Respondents in the present case. It was argued that the proposed variation as drafted would give the landlord carte blanche to recover its costs and by removing the landlord's costs risk entirely provided very little incentive to it not to litigate irrespective of the merits of any particular case. It was also pointed out that any benefit to be derived from the clause was wholly to the advantage of the landlord who bore 69% of the maintenance costs because the only leases with service charge liability were held by the four Respondents to the present action. It was further stated that such an amendment would prejudice the Respondents whose ability to defend actions brought by the landlord would be adversely affected by the costs threat contained in the proposed clause. Such a clause could also have an unquantified detrimental effect on the market value and saleability of the tenants' leases, the unquantifiable nature of this detriment making the award of compensation in return for acceptance of the variation an unacceptable alternative. Further, the clause was not reasonable and this was not a situation where the Tribunal should re-write the clause. The Tribunal was referred to paragraph 107 of the Shellpoint decision as authority for the first Respondent's submissions.

13 The fourth Respondent agreed with the first Respondent's submissions and suggested that the proposed alteration was for the landlord's benefit alone and that there had been no offer of consultation or mediation from the landlord.

14 The Applicant conceded that the drafting of his clause had been 'strong' (his word) and suggested that he was prepared to modify its wording in order to achieve his desired variation. The Tribunal adjourned for 45 minutes to permit him to re-draft his proposed clause which was presented to the Tribunal and the parties after the adjournment.

15 Despite the fact that the Applicant had made some modifications to the wording of his proposed clause, neither the first nor the fourth Respondent was prepared to accept the clause considering that the amendment had made little substantial difference to the effect of the clause and that as trust between landlord and tenant had broken down they were not prepared to accept the clause in its amended form.

16 The Tribunal refused the Respondent's request to cross-examine the Respondents. The Tribunal had heard submissions from the first and fourth Respondent's representatives but no witness evidence, either through a witness statement or orally was presented to the Tribunal and the fourth Respondent was not present in person.

17 Having considered the submissions of all parties and having read the documents supplied to the Tribunal in the agreed bundle the Tribunal is not satisfied that the clause proposed by the Applicant, either in its original or amended form of wording is a suitable variation to the Respondents' leases. As drafted (whether in its original or amended version) the clause would allow the landlord to recover his costs of litigation even from a tenant who had successfully defended an action brought against him by the landlord without there being any reciprocity for the landlord to pay the tenant's wasted costs. The Tribunal is of the opinion that the clause as written, in both its original and later amended form is poorly drafted, draconian in effect, unnecessary in the context of the leases which are the subject of the application and fails to meet the criteria set out in s35 of the Landlord and Tenant Act 1987 for the reasons explained by the first Respondent's Counsel as cited in paragraph 12 above.

18 The Tribunal was unable to deal with the first Respondent's application for a variation of their leases or for the fourth Respondent's application for a Declaration both of which would need to be dealt with by separate applications to the Tribunal as would any application by the fourth Respondent for a wasted costs order against the Applicant.

19 The Law

**Section 36 Landlord and Tenant Act 1987. 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.

### **Section 36 Landlord and Tenant Act 1987**

#### **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 court 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.

### **Section 37 Landlord and Tenant Act 1987**

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

(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.

### **Section 38 Landlord and Tenant Act 1987**

#### **Orders by the court 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 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.

(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 court with respect to the leases specified in the application under section 36,

the court 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 court with respect to the leases specified in the application, the court 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 court 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 court 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) 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.

(7) The court 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) 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.

### **Section 39 Landlord and Tenant Act 1987**

#### **Effect of orders varying leases: applications by third parties.**

(1) Any variation effected by an order under section 38 shall be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title of those parties), whether or not they were parties to the proceedings in which the order was made or were served with a notice by virtue of section 35(5).

(2) Without prejudice to the generality of subsection (1), any variation effected by any such order shall be binding on any surety who has guaranteed the performance of any obligation varied by the order; and the surety shall accordingly be taken to have guaranteed the performance of that obligation as so varied.

(3) Where any such order has been made and a person was, by virtue of section 35(5), required to be served with a notice relating to the proceedings in which it was made, but he was not so served, he may—

(a) bring an action for damages for breach of statutory duty against the person by whom any such notice was so required to be served in respect of that person's failure to serve it;

(b) apply to the court for the cancellation or modification of the variation in question.

(4) The court may, on an application under subsection (3)(b) with respect to any variation of a lease—

(a) by order cancel that variation or modify it in such manner as is specified in the order, or

(b) make such an order as is mentioned in section 38(10) in favour of the person making the application, as it thinks fit.

(5) Where a variation is cancelled or modified under paragraph (a) of subsection (4)—

(a) the cancellation or modification shall take effect as from the date of the making of the order under that paragraph or as from such later date as may be specified in the order, and

(b) the court may by order direct that a memorandum of the cancellation or modification shall be endorsed on such documents as are specified in the order;

and, in a case where a variation is so modified, subsections (1) and (2) above shall, as from the date when the modification takes effect, apply to the



variation as modified.

Judge F J Silverman as Chairman  
**Date 15 October 2014**

Note:  
Appeals

1. 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.
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

## **SCHEDULE (wording of variation requested by Applicant)**

‘To pay to the Lessors on demand and on a full indemnity basis all costs and expenses (including any solicitors, managing agents or professional fees ,costs and expenses and any VAT there on (sic) properly incurred by the Lessors (both during and after the end of the Term) in connection with or in contemplation of any of the following:

- 1) the enforcement of the Lessees Covenants including but not exclusively making applications or the First Tier Property Chamber (or such replacement statutory forums) pursuant to section 27A of the Landlord and Tenant Act 1985 (as amended or subsequent replacement legislation) and section 168(4) of the Commonhold and Leasehold Reform Act 2002( as amended or subsequent replacement legislation) and any subsequent appeals to the Upper Tribunal Property Chamber (or such replacement statutory forums ) with regard to determining whether or not the Lessee has breached the Lessees (sic) covenants contained in the lease ;or
- 2) preparing and serving any notice in connection with the lease under section 146 or 147 of the Law of Property Act 1925 or taking any proceedings under either of those sections notwithstanding that forfeiture is avoided otherwise than by relief by the court ;or
- 3) preparing and serving any notice in connection with this lease under section 17 of the Landlord and Tenant (Covenants) Act 1995; or
- 4) preparing and serving any notice under Clause 3(1)(d) of this lease ; or
- 5) preparing the undertaking of all repairs or any works to the building required to be undertaken by the Lessors as a direct result of the Lessees breach of any of the covenants contained in this lease notwithstanding that any such breech (sic) has been caused by the lessee or any of his tenants whether or not the Landlord is aware of the tenant or sub tenant. It is deemed that the lessee is responsible for all actions of his tenant or sub tenant .’