



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

Case Reference : CHI/21UG/LVT/2016/0005

Property : Motcombe Court, Bedford Avenue, Bexhill-on-Sea, East Sussex TN40 1NQ

Applicant : Motcombe Court RTM Limited

Representative : Clifford Dann LLP

Respondent : The Leaseholders

Representative :

Type of Application : Landlord and Tenant Act 1987-variation of a lease by a party to the lease

Tribunal Member : Mr D Banfield FRICS

Date of Decision : 24 October 2016

Summary of decision

The Tribunal determines pursuant to section 37 of the Landlord and Tenant Act 1987 that each and every lease of flats at the development known as Motcombe Court, Bedford Avenue, Bexhill-on-Sea, East Sussex TN40 1NQ be varied in the terms set out in paragraphs 7 and 8 of this Decision.

It is further ordered that all the clauses, covenants, conditions and provisions of each lease shall continue in full force and effect and shall henceforth be construed as if such amendments were originally contained therein.

It is further ordered that the Chief Land Registrar shall make such entries on the registers of the titles hereby affected or to open a new title or titles as shall be deemed appropriate for the purpose of recording and giving effect to the terms of this order.

Background

1. The Applicant seeks to vary all 29 of the leases under Section 37 of the Landlord and Tenant Act 1987 (the Act)
2. Attached to the application is a schedule indicating that all of the lessees have approved the variations 3 of whom do so with varying conditions. Also attached are 25 letters from lessees in respect of 26 flats confirming their agreement to the variations.
3. The tribunal made Directions on 23 August 2016 indicating that unless an objection was received the matter would be determined by written representations and requiring the Applicant to send a copy of the application and the Tribunal's Directions to each of the Lessees.
4. The Directions requested any party objecting to the proposals to complete a form and, if they wished to take an active part in the proceedings to request a copy of the bundle. The Tribunal has not received a request for an oral hearing and no forms indicating objections to the application have been received. The matter is therefore determined on the papers already received from the Applicant.

The Evidence and submissions

5. The Applicant states that it wishes to carry out urgent repairs and that in a previous Tribunal's decision (CHI/21UG/LAM/2014/0014) the Tribunal stated:
 - Para 48 " The Tribunal also bears in mind the defects in the lease, and that collecting in the funds for the works in advance of the costs being incurred is dependent on the goodwill of the Lessees. This goodwill could be dissipated if the RTM loses the right to manage."
 - Para 50 "It is suggested that active consideration be given to seeking a variation of the leases under Section 37 (or possibly Section 35) of the Act to permit the cost of major works to be collected in advance through the service charge, and for a reserve or sinking fund to be created"
6. The variations sought are as follows:-
7. to delete Clause 3 (1)(D) in its entirety and replace with:-

Clause 3(1) (D) To pay to the Lessor or any RTM Company acting in place of the Lessor on demand and without deduction all costs, expenses and disbursements (including but not limited to those incurred by engaging the services of any managing agents, solicitors, barristers, surveyors and/or any other professional person) inclusive of any VAT on a full indemnity basis (both during and after the end of the

term) in connection with, in contemplation of, or incidental to any of the following:

- (a) The collection of rent, insurance, service charge(including any Estimated service charge) or any other sum due under the lease;
- (b) The enforcement of any of the Lessee's covenants or obligations;
- (c) The preparation and service of any Notice pursuant to Section 146 or 147 of the Law of Property Act 1925 or any actual or contemplated proceedings notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court;
- (d) The preparation and service of any Notice in connection with this Lease under Section 17 of the Landlord and Tenant (Covenants) Act 1995;
- (e) The preparation and service of any Notice following inspection of the state of repair and condition of the Property;
- (f) The consideration or granting of any consent or approval applied for under this Lease."

8. To delete the following from Clause 4(ii)(B)

AND PROVIDED FURTHER that the Lessor or its Agents shall not in the exercise of their discretion demand payment of the Estimated sums which in the aggregate in respect of the whole block in any year shall exceed the aggregate of the amount actually spent by the Lessor in complying with its covenants set forth in Clause 6(B) and 6(D) hereof during the immediately preceding year plus ten per centum of such amount."

9. The ground for making the variations sought are that whilst the lease enables the Lessor to demand its estimated expenditure in advance, that power is subject to the limitation that the estimate must not exceed the actual expenditure (+10%) incurred in the preceding year.

10. As stated above letters agreeing to the variations have been produced in respect of 26 flats. Two qualified agreements and one objection have been received as follows;

- "No objection to the variation proposed BUT ONLY ON CONDITION that they will NOT be used in the development of a steadily increasing reserve fund nor the establishment of a sinking fund during the next five years during which the Leaseholders will be required to provide large contributions for major works in order to bring the block up to a reasonable state of repair."
- "I confirm that I have no objection to the variations proposed with the Exception of the formation of a sinking fund, with which I disagree very strongly."

- “The facts stated in no way apply to my lease.
 - i. Never May 1972. Fact: 2 Oct 1992.
 - ii. Clause 4 (ii) B No mention whatsoever of £84.
 - iii. There is a proviso; 21 days grace from due date of 24 June & 25 Dec. without penalty. This inclusion is vital as mail does not always reach me in time.
 - iv. I regret that I cannot agree to the inadequate renewals of outdated unfair, practices

The Law

11. Section 37 of the Act states:

(1) Subject to the following provisions of this section, an application may be made to [a leasehold valuation tribunal] 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 leases are varied to the same effect.

(4) An application under this section in respect of any leases may be made by the landlord of any of the tenants under the leases.

(5) Any such application may 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 provides that:

(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 subsection (6) and (7) make an order varying each of the leases in such manner as its specified in the order.

Section 38 provides;

(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 any variation would be likely to 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

Decision

12. The Tribunal is satisfied that the requisite percentage of parties, (including the landlord), consenting to the agreed lease variation has been met. Further, the Tribunal is also satisfied that not more than 10 per cent of the total parties concerned disagree with the proposals and that the statutory criteria have therefore been met.
13. The Tribunal is satisfied that the Applicant's object in seeking the lease variation cannot be met unless all subject leases are varied to the same effect and that none of the reasons for not granting an order as set out in section 38 applies.
14. The Tribunal therefore makes an order varying the lease in the terms of the Order attached.
15. No application for compensation has been made under section 38 of the Act and no order for compensation is therefore made.

D Banfield FRICS
24 October 2016

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. 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.
2. 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.
3. 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.