12704

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/21UG/LVT/2017/0005**
Property	:	**Motcombe Court Bedford Avenue Bexhill on Sea East Sussex TN40 1NQ**
Applicant	:	**Motcombe Court RTM Ltd**
Representative	:	**Mr J Groves**
Respondent	:	**Various lessees of Motcombe Court**
Representative	:	**Mr Below**
Type of Application	:	**Variation of lease, ss35-40 Landlord and Tenant Act 1987**
Tribunal Member	:	**Mrs F J Silverman Dip Fr LLM** **Ms C Barton BSc MRICS**
Date and venue of hearing	:	**Bexhill** **30 January 2018**
Date of Decision	:	**5 February 2018**

DECISION AND ORDER

The Tribunal grants the Applicant's application under section 37 Landlord and Tenant Act 1987 for the reasons set out below.
The Tribunal orders that the leases which are the subject of the application are to be varied by the addition of the words 'until a

suitable alternative heating system is introduced to all individual flats' to Clauses 6 (xi) and (xii) of the existing leases.

REASONS

1 The Applicant is the RTM company of the property situate and known as Motcombe Court Bedford Avenue Bexhill on Sea East Sussex TN40 1NQ (the property) which comprises twenty-nine flats each of which is let on a long lease by the landlord and in respect of which the Applicant, as the appointed RTM company is entitled to recover ground rent and service charge from the leaseholders. The Respondents are the leasehold owners of the various flats at the property.

2 The Applicant avers that all the leases relating to the property are in the same form and seeks an order under s 37 Landlord and Tenant Act 1987 to vary the provisions in the Respondents' leases in order to relieve the landlord and RTM company of the obligation to provide heat and hot water to each individual flat through a communal system.

3 The current application was filed with the Tribunal on 10 July 2017 and Directions subsequently issued by the Tribunal provided that the matter should be determined without an oral hearing. Three tenants objected to that Direction and therefore the matter was determined following an inspection of the property and oral hearing which took place at Bexhill on 30 January 2018.

4 In accordance with the Directions the Applicant filed a bundle of documents with the Tribunal reference to which is made below.

5 The Tribunal inspected the property immediately before the oral hearing. The property comprises a block of 29 flats arranged over six storeys in a purpose-built block thought to have been constructed in 1938. The property is situate on the corner of a quiet residential road close to the town centre and all amenities including public transport and the railway station. The rear of the property overlooks an enclosed area of lawn and the sea front which is accessible on foot within a few yards' walk. There do not appear to be any parking facilities attached to the property but on street parking is available nearby. The exterior of the property is in good decorative condition surrounded by a small area of clean well maintained ground. The windows are modern double-glazed units. The Tribunal was shown the boiler room housed within the basement area of the property which contains two large boilers (one defunct) and associated equipment together with the oil tank serving the boilers. Although working, the single functioning boiler was clearly aged and in need of replacement. The fire cut-off safety switch consisted of a single taut wire strung across the room which the Tribunal considers is unlikely to comply with current regulations. The boiler room can be accessed by a staircase from the interior ground floor lobby of the property additionally, the corridor outside the boiler room has two lifts, one for passengers the other for goods, which provide access to all the upper floors. The common parts of the property were clean and well maintained with a beautifully polished brass staircase handrail. The large bulky radiators appeared to be the originals as installed in the property when constructed and those in the common parts as

seen by the Tribunal were cold. The Tribunal was shown the interior of two flats, number 23 on the top floor of the building and flat 16 on the second floor. With the exception of a power shower, the water pressure from the hot water taps in flat 23 was almost non-existent. The water flowed at trickle rate both in the kitchen sink and bath and was patently inadequate for normal domestic use. The pressure in flat 16 on a lower floor was a little better but the hot water took several minutes to reach hand hot heat. The Tribunal was also shown defective plumbing and pipework in flat 16.

6 The provisions set out in section 37 Landlord and Tenant Act 1987 (the Act) permit a party to apply for a lease to be varied where, inter alia, at least 75% of the parties (including the landlord) support the proposed variation and no more than 10% of the parties object to it. In the present case 76.6% of the parties, including the landlord support the application and 10% object. The Tribunal finds therefore that the provisions of s37 (5) and (6) are satisfied. During the course of the hearing Mrs Bromley, authorised to speak on behalf of her mother Mrs Irving, a tenant, asked the Tribunal to note that Mrs Irving's name had incorrectly been added to the list of objectors whereas in fact she agreed with the Applicant's proposals. This alteration increases the percentage in favour of the application to 80% and reduces those against to 6.6%.

7 The Applicant's case is that the present communal heating and hot water system is old, malfunctioning and expensive to maintain and that it is in the interests of all the leaseholders to decommission that system and to replace it with individual gas fired central heating boilers within each flat. The Applicant would retain responsibility for the heating of the common parts. A report commissioned by the Applicant from Pinnacle ESP (hearing bundle, Appendix A) dated 14 March 2017 recommends this course of action and cites not only the life-expired condition of the present plant but also the economic advantages to individual tenants of control over their own supply and costs. The proposals also included renewal of pipework and the Tribunal was shown three sections of pipe which had been removed from the existing system. These samples supported the Applicant's assertion that the existing pipework was badly corroded and furred up which prevented the movement of a proper flow of water to the taps and radiators served by the system.

8 Mr Groves for the Applicant detailed the costs of running the current system including substantial sums for repairs and explained the estimated running costs of the new system which apart from the initial capital outlay should result in a lower annual cost to each tenant. One major expense would be the renewal of pipework to the building estimated to cost a total of £22,000 plus VAT with the additional cost to each tenant of the installation of individual boilers of between £5,400-£6,300.

9 The Tribunal noted that the proposals put forward by the Applicant are only in outline form and Mr Groves said that a full investigation into the various options was yet to be carried out together with full consultation with the tenants and compliance with the s20 procedures.

10 For the Applicant, Mr James of Pinnacle answered questions put to him by the Tribunal relating to his report dated 14 March 2017, relied on by the Applicant in support of their case. Mr James holds a BSc (Hons) in building services engineering and has 15 years' experience in the business. He maintained that with the use of a header tank and pump there would be sufficient water pressure to serve the new systems on every floor. He said

that gas pressure had not been checked but that he had no concerns about it because the gas piping in the property had been renewed about three years ago. Although his report had been prepared almost a year before the hearing he maintained that the figures quoted were still valid. He agreed that additional costs would be incurred if asbestos needed to be removed from the property. In this respect Mr Groves said that an R & D survey for the property (covering asbestos) had already been carried out. It was envisaged that either a small gas boiler system or electric radiators would be installed to heat the common parts. The time scale for the works was estimated at eight weeks. The sum of £250 per flat had been included in the costings to cover any internal redecoration necessitated by the works, the costs of external redecoration, if any, necessitated by the installation of external flues had not been included in the calculations.

11 The Respondents' main case (Tab 6) bases their objections to the change on the grounds of cost but provides no alternate costing to challenge those put forward by the Applicant. For the Respondents Mr Below said that he was disappointed with the superficial nature of the Pinnacle report. He did not think that leaks in the pipes were a common occurrence as asserted by the Applicant. He said that the report made no reference to the major disturbance which would be caused to the tenants while the works were being carried out and he considered that the estimates in the report were suspect. He suggested that the current system which he estimated to cost about £810 per annum per flat plus a share of £9,000 for repairs was less expensive than the proposed new system and that his enquiries of another local block of flats (Caledonia Court) which had individual heating systems revealed that the individual systems were more expensive than this property's communal system. He also maintained that gas was a more expensive fuel than oil. Mr Below asserted that he believed the condition of the water distribution pipework was not as bad as had been claimed and questioned the choice of Pinnace ESP. He maintained that thermal imaging could have been used to locate pipework and to record its condition.

12 Mrs Benn, a tenant, expressed the view that she opposed the proposals on personal grounds. She had lived at Motcombe Court for thirty years and had specifically chosen to purchase a flat in a block which had a communal heating and hot water system and did not want an individual system which she would have to maintain and repair. She questioned the number of breakdowns quoted by the Applicants and cited the benefits of oil on the grounds of efficiency and affordability. She also believed that the older cast iron radiators in the communal areas retained heat better than modern ones. Mrs Benn said that the presence of individual systems each needing to be serviced and repaired would increase the number of workmen visiting the property and consequently increase the wear and tear on the building.

13 The Respondents' filed case cited no legal grounds to challenge the Applicant's case but in his oral submissions Mr Below stated that the Applicant was unable to proceed because it did not satisfy the requisite majority as set out in the Act. The Tribunal explained to Mr Bellow that it was satisfied that the Applicant had complied with the requirements of the Act (see paragraph 6 above).

14 While the Tribunal understands the Respondents' concerns, particularly regarding disturbance and cost, it recognises as a fact that the existing communal heating and hot water system serving the property is

beyond economic repair and considers that on balance the most sensible way forward is to proceed with the installation of new individual boilers to each flat. This necessitates the variation of the tenants' leases in the manner proposed by the Applicants and the Tribunal makes an order to that effect. The Tribunal has considered the question of prejudice and concludes that such an order does not unduly prejudice either of the tenants who opposed this application.

15 If the Applicant had carried out the proposed works without first having obtained an order to vary the landlord's obligations under the lease, the landlord would have committed a breach of covenant. Similarly, the Applicant would not be able to justify expending large sums of the tenants' money in exploring all the detailed options for an alternative source of heating without first having secured the necessary alteration to the lease covenants. The Tribunal therefore regards the proposals which were put before it as a viable method of achieving the desired objective but accepts Mr Groves' assurance that further investigations will be carried out before fully detailed proposals are discussed with the tenants in conjunction with s20 procedures.

16 The Applicant's proposed variations to Clauses 6 (xi) and (xii) add the following words to the existing clauses: 'until a suitable alternative heating system is introduced to all individual flats'. This wording is approved by the Tribunal.

17 For the above reasons the Tribunal grants the application to vary the tenants' leases and orders that the leases which are the subject of the application are to be varied by the addition of the words set out in paragraph 16 above.

18 The Law

Section 35 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.

proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Judge F J Silverman as Chairman
Date 5 February 2018

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