13032

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BG/LVL/2018/0005**
Property	:	**29 Princelet St., London, E1 5LP**
Applicant	:	**Karim Hassan Brohi**
		Represented by Monty Palfrey, Counsel
		(instructed by Breeze & Wyles Solicitors Limited)
Respondent	:	**Betterkey Limited**
		Represented by Henry Webb, Counsel
Date of Application	:	**14 June 2018**
Type of Application	:	**Section 35 Landlord and Tenant Act 1987 ("the 1987 Act")**
		Variation of terms of lease
Tribunal	:	**Judge J. Oxlade** **C. Gowman BSc MCIEH MCMI**
Date and venue of Hearing	:	**29 August 2018** **10 Alfred Place, London, WC1E7LR**

DECISION

The Tribunal records the following:

(i) the Applicant lessee concedes that part of the application set out at paragraph 4 of grounds of the claim, in light of the Respondent's

lessor's concession (a) made at paragraphs 12 to 14 of the Respondent's statement of case that there exists an easement for the lessee of Upper Floors, 29 Princelet Street, London E1 (" the flat"), to keep an electricity meter at 106 Brick Lane and to enjoy ancillary rights to access and repair it, in accordance with Wheeldon v Burrows and section 62 of the Law of Property Act 1925, and (b) at the hearing, that the lessor would secure a key to enable access to take place by the lessee and successors in title;

(ii) the Applicant lessee will (a) indemnity the Respondent lessor of any reasonable costs (if any) incurred by it, as the Respondent lessor shall be liable to pay to its' mortgagee arising from this order and (b) such other reasonable legal costs as the Respondent lessor shall incur in completing the Deed of Variation in accordance with this decision and in registering it with the Land Registry.

AND finds for the following reasons that:

The Applicant lessee's lease is varied in accordance with the Deed of Variation at pages 10 to 14 of the application, save that the parties agreed the wording of the Schedule (page 2 onwards) as recorded in Annex A hereof.

REASONS

1. Upper Floors, 29 Princelet Street, London E1 (formerly 106a Brick Lane)("the flat") is a three-storey maisonette, situated on the first, second and third floors of 106 Brick Lane located directly above two shops (106 and 106A), both occupying the ground floor, though 106 also has a basement. The flat has a separate entrance at street level, and which forms part of the demise.

2. The flat was let on a long lease ("the lease") of 129 years from 23rd July 1999.

Application

3. On 14th June 2018 the lessee made application, pursuant to section 35 of the 1987 Act, for a variation of the lease ("the lease") on the basis that it failed to make satisfactory provision with respect to:

   (a) the repair or maintenance of the building containing the flat (s35(2)(a)(ii))
   (b) the repair or maintenance of any installations (s35(2)(c)),
   (c) the provision of maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (s35(2)(d)), and
   (d) the insurance of the building containing the flat (s35(2)(b)).

4. The basis of the application was fully set out in the grounds for the claim, attached to the application:

(a) in respect of s35(2)(a)(ii), it was said that the lease provides that the lessee will repair and maintain those parts of the premises which (could loosely be described as) forming or falling within the perimeter of the flat and which are for its sole use; however, no part of the lease provided for the *maintenance or repair* of the structure below the flat or any common parts, and the only lessor liability was very limited and in respect of the obligation to give "subjacent and lateral support shelter and protection for the benefit of the demised premises". Though there was a term of the lease (clause 2(5)), which enabled the lessor to recover costs against the lessee for costs incurred, in repairing etc. party walls, this fell short of a positive obligation to maintain ("point 1") within the flat lease;

(b) As a follow on point, in respect of s35(2)(c), it was said that the lease failed to provide for the repair and maintenance of shared services, including the supply of utilities, ("point 2");

(c) In respect of a second s35(2)(c) or s35(2)(d) point, the electricity meter serving the flat was located within 106 Brick lane, accessed via a door which serves 106 and the basement; yet the lease made no provision for the lessee to access the adjoining land to maintain/repair/read the meter, ("point 3");

(d) Finally, whilst the lease provided for the lessee to insure his own flat, the lease made no provision for the lessor to insure the remainder of the building; an arrangement where one part of the building is insured by one party and another part by another party, was unsatisfactory as it could give rise to significant issues as to whether items are covered, and if so by whom ("point 4").

5. The applicant set out proposed covenants, and this was contained within an attached Deed of Variation.

The Lessor's response

6. Pursuant to directions made on 22nd June 2018, the Respondent set out its case, in a Statement of case.

7. Though a point was taken as to the failure to serve interested parties, this point was not pursued by the Respondent at the hearing.

8. The lessor's position was that there was no basis for saying that the lease failed to make satisfactory provision.

9. Broadly speaking, as to points 1 and 2, the three leases relating to the three premises provided a comprehensive scheme for repair; there was no basis for implying further obligations, Gavin v CHA [2013] EWCA Civ 580. The leases provided that each lessee was liable to maintain and repair their own premises, and where necessary there was provision for the lessor to recover

costs associated with repairing those parts common to all. So, the lessee of the premises had options:

- Schedule 1 of the lease defined the demise, and clause 2(3) imposed on the lessee a responsibility to maintain his demise; there was separate provision under clause 2(5) for the lessee to contribute ½ of the expenses incurred in repairing those items in common,
- the lease of 106 (demised to Abdul Wahid dated 20th December 2005 for a term of 20 years) mirrored the flat lease as to definition of premises, as to repair covenants, and recovery of payment for expenses for repair, and
- the lease of 106A (demised to David Saphra dated 8th September 1998 for a term of 125 years) is slightly different, incorporating a sub-lease of the premises dated 3rd September 1981, and placing the obligation on that lessee to repair the premises, but not the main structure, walls and brickwork, which the lessor undertook to do.

10. Further, Paragraph 1, Second Schedule provided for subjacent and lateral support, shelter, protection; the lessee would have rights to carry out the work himself, if needed; Gale on the Law of Easements.

11. As to common parts and service maintenance and repair, there were no common parts in the form of passages, stairways, entranceways; so, the issue was limited to conduits serving all 3 premises; as the flat lease provided an obligation to pay ½ of the expenses incurred in repairing them, this imported on the lessor an implied obligation to repair them; it was so obvious that it went without saying and need not be expressed.

12. The lessor's *alternative argument* was that even if satisfactory provision was not made in the flat lease, the Tribunal should exercise its discretion against making the variation as 38(6)(a)(i) applied: the variation would be likely substantially to prejudice" to the (i) lessor and (ii) other lessees, and so should not be granted; the lessor had already a covenant within the flat lease ("the 3(b) point") to enforce the covenants under the other leases for repair of those parts of the building, other than the demised premises. Further, what was proposed would mean that the lessor would simply assume the responsibilities otherwise provided in the leases and cut across the obligations owed by other tenants. This was not reasonable, and so s38(6)(b) applied.

13. As to point 3 - that part of the application relating to an easement for access/maintenance/repair of the electricity meter in 106 - this was misconceived: the meter pre-existed the lease of 2005, and so there was a pre-existing right under the rule in Wheeldon v Burrows and alternatively section 62 of the Law of Property Act 1925 ("LPA 1925") applied. Further, there was

an express right contained in the lease at Paragraph 4, Part 1 of the Second Schedule and so on reasonable notice, there was a right to repair it.

14. As to point 4 - insurance - the lessor had assumed responsibility for insuring the whole building as a necessary expedience, as the Lessee had failed to do so. The lessor would be willing to accept the obligation, but the proposed variation stopped short of addressing the lessee's contribution; this should cover not just the premium, but the costs of obtaining a valuation and reasonable management fees, and payment of interest for late insurance premiums. The lessor at paragraph 20 proposed an alternative wording for 2(14)(c).

15. As to compensation payable, the Lessor would incur costs, specifically in respect of the mortgagee of the lessor (the Nationwide) against which the lessee should provide an indemnity.

Applicant's reply

16. In a statement of reply dated 3rd August 2018, the lessee maintained the application.

17. As to point 1, whilst the lease for 106 made provision to keep the demised premises in repair on substantially similar terms to the lessee, the lease of 106 expired on 20th December 2025 – so for a substantially shorter period than the flat lease; during that gap there would be no covenant for repair under the lease. The same point applied to 106A, which would expire on 7th September 2123, whereas the subject lease would expire on 22nd July 2128. There would be periods of time where no covenants for repair existed ("the voids in time" argument).

18. Accordingly, it was not a comprehensive scheme, as claimed by the lessor. Further, it was said that this was not currently acceptable security from the lender's perspective, though there was no evidence adduced on this point.

19. The effect of the lessor's 3(b) argument – that it provides for the lessor to be compelled to enforce covenants under the other leases – would mean the lessor bringing a claim against itself, though the costs would be underwritten by the flat lessee. Further, having to make use of a third party (the lessor) to enforce a covenant was not a satisfactory arrangement, particularly where there was no cap on costs and expenses, or limitation provided in the lease by the words "reasonable".

20. Further, the lessor's obligation to ensure "support, shelter, and protection", did not stretch as far as imposing an obligation to repair and maintain. The reliance on Gale on Easements did not clearly indicate a right to go onto land

to repair and maintain generally - as opposed to simply providing support. The question arose as to exercising this on land not in the possession of the person granting the easement arose.

21. As to the *substantial prejudice* argument; the respective positions of the leases of 106 and 106A did not need to change; their leases simply dealt with the positions as between themselves and the lessor and the obligations to maintain and repair owed by lessees to the lessor, under the leases of 106 and 106A will simply be performed by the lessees of those premises, rather than the lessor.

22. As to point 2, the lessee should not rely on implied obligations – there being room for arguments about the existence/scope of it – it makes common sense and is "more satisfactory" to include an express term within the flat lease.

23. As to point 3, in view of the lessor's willingness to acknowledge the Wheeldon v Burrows rule/section 62 LPA 1925, the lessee was content to accept and not pursue the point.

24. As to point 4, whilst conceded that the current lessee had failed to insure his part of the building, this was because he had not known of it; he had then tried to do so, but the insurance companies declined to do so in view of the non-standard wording. The lessee had not understood that this was intended to be a short-term arrangement.

25. However, in view of the lessor's willingness to do so in future as part of insuring the building as a whole, this should be recorded in a clause. The alternative wording proposed was not accepted. Various points were made as to limitations on costs.

26. As to any indemnity needed, by way of compensation, this should be limited to costs.

Hearing

27. The application was listed for hearing on 29th August 2018, at which hearing both parties were represented by Counsel and in preparation for which both had filed documents, contained within a bundle of documents, which we have read.

28. At the commencement of the hearing, Mr. Palfrey provided Google maps, showing the building containing the units, viewed from both Brick Lane and Princelet Street; from this we were able to see the entrances to the premises, and were told that the electrical meter to the flat was located behind the white-framed black door which provided an entrance to 106.

29. We were asked to record as a preamble to the decision that point 3 was resolved; the Respondent had agreed as per 59 of the bundle, that there was an easement for the lessee to keep the meter at 106, and to enjoy ancillary rights to access it in accordance with Wheeldon v Burrows and section 62 of the Law of Property Act 1925. Further, that the lessor would obtain and supply a key to enable the first lessee to access the meter. Accordingly, we record it.

30. On enquiry as to whether or not the service on interested parties point remained open to dispute, Mr. Palfrey said that not only had there been service of the application on the other lessees (which had not been met with a response), but as the Applicant sought only a variation of his own lease, there was no need for service. Mr. Webb said that the Respondent conceded service was not in issue and so need not occupy the Tribunal.

31. Both Counsel accepted that there was no authoritative case law on the application of section 35 and the wording "fails to make satisfactory provision".

The Applicant's oral arguments

32. Mr. Palfrey ran through the application, and the provisions of the lease.

33. The application set out the main point (point 1) that the lessee had an obligation to repair the top slice of the building, but there was no requirement on the freeholder to maintain that which was below. In respect of one (106) commercial lease responsibility was shifted to the commercial lessee, but not so for the other (106A).

34. There were discrete issues. One arising because the demised premises were clearly demarcated by a horizontal division at ½ the depth of the structure between the first floor of the flat and ceilings of the shop below. Yet, the demised premises of 106 (page 79) at clause 1(d)(i) did not define the division in the same way – referring only to the ceiling (not joists) – so there could be a void in responsibility for this area of the building, to whom no one owed responsibility. Further, the commercial lease of 106 expires in 7 years' time, after which there is no obligation on anyone to keep in repair – it would revert to the freeholder, who would only have obligations under the lease to offer support. Any suggestion of an implied term to be read into the flat lease to oblige the lessor, could only be in relation to the obligation to support – and it extended no further. In the worst case scenario, any disrepair which falls short of a failure to offer support, would not give rise to any obligation on the freeholder. That would be in sharp contrast to that which is required of the

lessee under the lease now, set out in clause 3(5) and (6). The lessee of the flat would be considerably worse off once the commercial lease of 106 expires in 7 years' time.

35. As for 106A, at 4.2 (page 110) the landlord covenanted with the commercial lessee to "keep the main structure walls brickwork roof and other parts of the building in which the premises forms part"; however, oddly the landlord had not covenanted with the flat lessee to do so. To require the freeholder to do so, the flat lessee would have to sue the freeholder as lessor under 3(b)(ii) to do so; it is an open chequebook and completely unworkable.

36. In summary, the arrangement over maintenance and repair as between the flat lessee and lessor, is inadequate; the lessor owes no direct obligation to the flat lessee to repair that part below nor is there a clear enforceable route to doing so. Hence the application.

37. At this stage we enquired, and Mr. Webb confirmed that if the Tribunal concluded (a) that the statutory test in section 35 of "fails to make satisfactory provision" was made out and (b) there was no prejudice to the lessor, then there would be no argument as to the wording of the variation sought at page 10.

38. As to point 2, there was an issue as to common services; by clause 5 the flat lessee had covenanted to pay ½ services charged but there were no common parts. However, there were common services – such as utilities – but no obligation on the lessor to maintain them. If there needs to be repair to common soil pipe or re-wiring of the common supply, there was no positive obligation; it is far from satisfactory to rely on an implied obligation as the lessor argues – a positive obligation to pay should mirror a positive obligation to maintain/repair. By way of illustration, the lessor had a positive obligation in the commercial lease of 106 and the lessee had a positive obligation to make a financial contribution; there was a mirrored covenant in express terms there and should also apply to the flat lease.

39. It was conceded that the Respondent had a fair point that the proposed wording did not accommodate a caveat (as per 4(3) of the lease as in the lease of 106 that "the lessor shall not be in breach of the covenant unless and until it has received written notice from the lessee" .. and the flat lessee would accommodate this argument and provide a proposed alteration to the wording.

40. As to point 4, the flat lease provides that the lessee has an obligation to insure the flat, but no positive obligation on the lessor to insure the remainder of the building. There is therefore no guarantee of subsidiary protection; yet, the

lessor under the commercial leases is obliged to insure that part of the building relating to the commercial leases.

41. We heard submissions from Mr. Palfry as to competing wording for the insurance clause; however, we do not need to recite them here, because at the end of the hearing the representatives agreed appropriate wording, subject to findings as to whether or not there was satisfactory provision or not.

The Respondent's oral arguments

42. In reply in respect of the main structure, the lessor highlighted that there were two elements to the response; did the lease fail to make satisfactory provision and would the variation sought cause substantial prejudice.

43. The starting point was to consider that this arrangement was a "hands off" management arrangement by the lessor; this is the lease that was drafted, traded, bought. It had the benefit of leaving the lessee in control, with freedom to decide, for example, whether or not windows should be replaced, without having to liaise with the lessor over whether management had been effective and at reasonable cost and in accordance with the lease. This was the bargain struck by the parties. In short, the lessor had not taken on obligations to be responsible.

44. If there were problems with the arrangement, it left the lessee with three reasonable alternatives.

45. Option 1: as long as there were long leases granted to others which included obligations to repair, then to ask the lessor under 3(b) point to enforce, and who would have an obligation to act if requested. As long as there were commercial covenants the flat lessee could pay to enforce them. Were it otherwise the lessor would assume all risks and not be able to guarantee to recover 100% of the outlay.

46. Option 2: the tenant could do the work himself, using the covenant granting the right to shelter/support/protection. Whilst there may be matters left out, the question was whether or not it was satisfactory - not perfect. Gale on easements assisted on how extensive it could be.

47. Option 3: the tenant could rely on insurance cover, which the lessor was willing to arrange. It would be an implied term that any insurance monies obtained would be applied for the benefit of the lessee. If there were subsidence, this would fall within the provisions of insurance.

48. In short, this was a comprehensive scheme. There was nothing unusual, odd, or unacceptable about it. A decision of the LVT (LON/LVL/33/06) was

noteworthy; making the point that the legislation was not there to improve a parties position, having bought a lease with which they were dissatisfied; it was not part of the Tribunal's function to interfere with it unless it failed to make satisfactory provision; not there to rectify a poorly drafted lease. In that case the Tribunal accepted that the Applicant's proposed variation would be doing "violence" to the original intention.

49. Reference was made to the case of Gavin v One Housing Group [2013] EWCA 580, where Patten LJ reviewed the case law on retained parts, looked at the case of Gordon v Selico which required that prior notice was a precursor to negligence from an adjoining occupier. Correlative implied obligations were not approved save where otherwise compliance would be physically impossible. He asked himself whether the lease itself excludes the possibility of implied terms, and which depended on the "reasonable man" test.

50. In this case the lessee asserts that the lease has a history of being unsatisfactory to lenders, but has adduced no evidence on this point; no witness statements had been filed by either party. So, the argument comes down to lease construction as a abstract matter.

51. If the statutory test was held to have been satisfied the next question is substantial prejudice. There are three identifiable areas: the burden of management which the landlord had not intended to assume; the nature of his liability; the costs of complying with the covenant. As to the burdens of management, at the moment he has no requirement to manage the building, save that small section forming 106A. Had the lessor known he would have to assume responsibility for the whole building, he may have set up the structure in a completely different way. As to the nature of the liability, it is very much more than collecting rent, which hitherto he has enjoyed. As to costs, if the lessee wants covenants enforced he can – currently – put his hand in his pocket to make that take place, but in future, the lessor is unlikely to cover all of his costs. In reality the lessor would always protect his own interest and so if the lessee thinks differently, he can meet the costs.

52. The lessee suggested that the absence of a commercial tenant would give rise to the spectre of the landlord suing himself in a different guise, and so there would be an open cheque book; however, there is a great difference between meeting the costs up front and being proactive, as opposed to adopting primary liability for management and potential damages. A section in Dowling on Dilapidations was helpfully provided.

53. As to point 2 (common services), as there were no common parts, this was limited to common conduits/sewers. It has been accepted in the statement of case that there would be some implied obligation on the landlord to do some

works, and if not sufficient then the relevant clause should be modelled on clause 4(3) of the lease of 106 (page 95) so that it is conditional on notice.

54. Submissions were made as to the wording of the insurance terms of the lease, but as stated above, as the parties resolved this we need say nothing further about this.

55. One issue not previously canvassed is the compensation payable to the lessor to cover the costs of having any deed of variation covered; section 38(10) was invoked, to require the lessee to pay compensation in respect of any loss or disadvantage that he was likely to suffer. There was an email from Nationwide Building Society, setting out costs. Counsel were to discuss this at the end of the hearing. Further, the lessee should pay the landlord's costs of entering into the deed of variation, and lodging, in accordance with Baystone v Perkins.

56. We asked Mr Webb to address the issue of the void. Whilst noting that there were differences in definition, the lease of 106 says "shall include the ceiling, structure..." so ½ the void was not excluded. "Structure" is sufficiently wide to include the joists which hold it is place. It was sufficiently clear.

57. As to lessor's costs of meeting the application, aside from the compensation route, the lessor could not recover costs, save as to rule 13 2002 Act; these could only be made after the event and in limited circumstances.

The Applicant's final reply

58. By way of reply Mr. Palfry said that on point 1, the Tribunal was taken through the lessee's 3 options, but the commercial leases were for shorter periods – one in 7 years – and there would be nothing to stop the Respondent letting on different terms, so leaving the flat lessee without redress under the lease. Further, the third option was to resort to insurance claims, but this did not cover issues with the building arising from a failure to maintain.

59. As to the issue of the burden of management of the flat, where none was envisaged; clearly he assumes an obligation to maintain and repair the commercial part of the building forming 106A, so the lessor was not "hands off" as claimed, and has not walked away from the building. The lessor clearly still has commercial interests in the building. Further, the lessee of the flat was not seeking management, just the assumption of repair and maintenance as a direct covenant.

60. At the end of the hearing we reserved our decision.

Findings

61. A Tribunal presented with an application such as this would be assisted by case law from the Higher Courts, establishing the principles to be applied; failing that, Hansard, as an aid to interpretation. Neither was provided to us, Counsel for both sides agreeing that there was no binding authority on the point - though Mr Webb had secured a copy of a 2006 case from the LVT, which set out that Tribunal's view of the "ground rules", which are quite generalised, and with which Mr. Palfrey did not take issue. We find that it is generally of assistance, and leads us to the conclusion that a Tribunal should be slow to interfere; leases are rarely perfect and the legislation is not designed to strive for that.

62. Perhaps it seems too obvious to say so, but we consider that the legislation requires us to focus on whether the subject lease is deficient in such a way that it fails to make satisfactory provision; when considering that we need to establish what *it* provides and so we should focus on the subject lease, as opposed to what other leases in the scheme provide. Further, the lease should be the place to find to find a solution as to how the relationship of lessee and lessor is governed and how responsibilities are divided, without the lessee having to scratch around to supplement it with easements and implied terms which are open to substantial differences of opinion.

63. We find that the Applicant lessee has satisfied us on a balance or probabilities that this lease fails to make satisfactory provision, in various ways.

64. The point of greatest contention was the maintenance and repair of the building "below" the demised premises. We accept as compelling the argument made by the Applicant, that for maintenance and repair for the building below the demised premises, the Applicant lessee is dependent on the clauses found in the commercial leases granted by the lessor; yet, these provisions can be varied by agreement, they can be surrendered, and both will expire at some point earlier than the subject lease - and in respect of 106 it will take place in 7 years' time, so is not a fanciful concern. Whilst it was pointed out that the Applicant lessee can require the lessor to enforce the covenants in the commercial leases, this is inevitably dependent on what they currently contain now or may contain in future. We did not find an answer to this in the argument advanced by the lessor that he was positively obliged to offer support/shelter/protection under the terms of the lease; this fell well short of an ongoing obligation to maintain or repair but which falling short of ensuring support/shelter/protection. For the same reasons, the Applicant lessee doing so where the lessor had failed to do so, would have the general right to maintain and repair. Neither did we consider that the case law unequivocally supported an argument that the lessor's ability to recover costs for maintenance and repair (by clause 2(5)) gave rise to a positive obligation to maintain and repair.

65. There were additional arguments made as to the Applicant lessee being in an invidious situation of seeking to enforce the lease terms against the freeholder - who had taken the lease at the end of it, or an earlier surrender – and being exposed to uncontrolled costs. However, we did not find that a strong

argument. There were subsidiary points, as to arguments over definition. The Applicant's lease was clear as to the definition of the demise including ½ in depth of the structure between the first floor of the premises and the ceilings of the shop below; whilst it would have been preferable for the lease of 106 to adopt the same wording, any sensible construction of the lease of 106 would reach the same conclusion.

66. It was argued by the lessor that the scheme as currently designed was comprehensive, and was a hands' off management approach. Clearly that was not the case in light of the covenant that the lessor would maintain the structure of 106A. Nor did we consider it was comprehensive, for the Respondent lessor to submit that an option would be for the Applicant lessee to resort to insurance monies; these would not cover repair and maintenance.

67. Similarly, we found in respect of point 2, that the lease failed to make suitable provision for maintenance of common services. It was latterly argued in oral argument that this was not significant in view of the configuration of the building – being only sewers and electrical wires in common usage – and that there was room for an implied term in view of the ability of the lessor to recover costs. However, the case law does not unequivocally support that position.

68. The lessees point 4 is that the lessor is already obliged under the commercial leases, to insure the lower parts of the building; however, there is no obligation so stated in the flat lease. We find that the first argument is made out; clearly the lessee needs to have reassurance by clear covenant that the lessor will insure the remainder of the building. However, the lessee goes one step further, and says that the lessor should arrange insurance for the whole of the building, as there can be unnecessary arguments between insurance companies used in neighbouring properties as to who is liable; whilst logical, we find that the Applicant lessee argument is not supported by evidence, and really amounts to the lessee seeking to strike a different bargain. However, having found for the lessee on the first point 4 argument, we understand that the parties have agreed the terms of the draft variation as to insurance.

69. The Respondent's secondary arguments against points 1 (and to a lesser extent point 2) were that variation would be likely to substantially prejudice the lessor (s38(a)) and would not be reasonable in the circumstances (s38b). However, we reject the arguments advanced. The commercial leases do not require variation, and nothing that the lessor will do by virtue of the Deed of Variation, will change how he operates the commercial leases. Nor has the lessor walked away from the building; it retains liability for maintenance and repair of 106A. Further, the lessor already insures the lower parts of the building by virtue of the commercial leases, and so plays a part in ensuring that they can be insured, and would - in the event of a claim – hold insurance monies in trust to distribute it and make good defects. Though it was said that the lessor could be exposed to not recovering all his costs of taking on such responsibility, this was not detailed.

70. The “reasonableness” test is rather odd; one might always say that parties should simply stick to the bargain that they made, in which case a variation would never take place other than by agreement – so the legislation is looking to address other points. In this case, having found against the lessor’s argument that a change would lead to substantial prejudice, and in light of the parties having ironed out the wording of a Deed of Variation which accommodate many of the lessor’s points, we do not find that there is a sustainable separate argument to encourage us to exercise our discretion under section 38(6)(b) against ordering the variation.

71. In light of the above, we find that the Applicant lessee has established on a balance of probabilities that the lease fails to make satisfactory provision under 35(2)(a)(ii),(b), and (d), and decline to exercise discretion against ordering the lease be varied on the basis of substantial prejudice to the Respondent lessor or that it would be unreasonable.

72. We have recorded the agreements, as asked, as to the electric meter, the compensation payable for the costs incurred by the Respondent lessor – subject to limitations – and were not otherwise asked to make orders for compensation.

73. We attach at Annex A the agreed Deed of Variation, as agreed in principle by Counsel.

....

Judge J. Oxlade

11th October 2018

Annex A

1. Tenant’s Covenants

1.1. Clause 2(14)(b) of the lease is deleted; and the following additional clauses are inserted;

“2(14)(b) Not to do or permit to suffer to be done any act or thing which may render void of voidable any policy or policies of insurance in respect of the

Building or as may cause an increased premium or premiums to be payable in respect thereof

2(14)(c) To pay within seven days of the demand a fair proportion as assessed by the Landlord acting reasonably of the reasonable costs incurred by the Landlord in insuring the Building in accordance with the provisions of clause 3(c). Such costs shall include any professional costs reasonably incurred by the landlord in instructing an agent, solicitor, or other professional person in connection with it performance of its obligations under clause 3(c) and/or in recovering the sum due from the Tenant pursuant to this clause. In the event that the Landlord provides the service under clause 3(c) and the demand for payment under this clause itself, then it shall be entitled to a management fee in the sum of £250 per annum".

2. Landlord's Covenants

There shall be inserted in the Lease the following additional clauses:

"3(c) To insure and keep insured the Building (unless such insurance shall be vitiated by any act or default of the Tenant or any party claiming through the Tenant) against loss or damage by fire explosion storm tempest earthquake aircraft terrorism and such other risks (if any) as the Landlord shall think fit in an insurance office of repute in the full reinstatement value thereof inducing an amount to cover professional fees and other incidental expenses in connection with the rebuilding and reinstatement of the Building and to produce to the Tennant upon reasonable request a copy of the insurance policy and the receipt for payment of the last premium falling due and in the event of the Building or any part of it being damaged or destroyed as soon as reasonably practicable to lay out the insurance monies in the repair rebuilding or reinstatement of such part of the Building so damaged or destroyed
3(d) To keep in good and substantial repair the main structure walls brickwork and foundations of the Building (other than the Demised premises)
3(e) To keep in good and substantial repair the party walls fences sewers drains channels sanitary apparatus pipes wires passageways stairways entranceways road pavements and other things the use of which is common to the Demised Premises and to the other parts of the Building subject to payment by the Tenant of one-half of the expenses reasonably and properly so incurred in accordance with the provisions of clause 2(5) provided that the Lessor shall not be in breach of this covenant unless and until it has received written notice from the Lessee of nay disrepair and failed to remedy the same within a reasonable time".