FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/LVT/2019/0008**
Property	**:**	**Bevan House, Boswell Street, London, WC1N 3BT**
Applicant	**:**	**Bevan House Management Company Ltd**
Representative	**:**	**Corker Clifford LLP**
Respondents	**:**	**Leaseholders at Bevan Court**
Representative	**:**	**N/A**
Type of application	**:**	**Variation of leases at Bevan House by a majority**
Tribunal members	**:**	**(1) Judge Amran Vance** **(2) Mr W R Shaw FRICS**
Date and venue of hearing	**:**	**27 November 2019 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**20 February 2020**

DECISION

NB: Numbers in square brackets and in bold below refer to pages in the Applicant's hearing bundle, unless otherwise stated. The tribunal has also been provided with a bundle provided by Ms Barden.

Decisions of the tribunal

(1) We order that the leases of the lessees at Bevan House are varied in accordance with the terms of the draft order accompanying this decision, and as set out below. The variations are not to have retrospective effect.

The application

(2) The Applicant, a lessee-owned company, is the freehold proprietor of Bevan House, Boswell Street, London, WC1 3BT ("the Building"), a seven-storey property comprising 33 residential flats, all let on long leases. It applies, under the majority variation provisions of section 37 Landlord and Tenant Act 1987 ("the Act"), to vary the terms of all the leases in two ways. Firstly, to make provision for a formal sinking fund to defray the costs of major building works, backdated to 2016. Secondly, to provide for the recovery of an insurance excess from a lessee, where a successful insurance claim is made as a consequence of that lessee's breach of covenant of his or her lease.

(3) The lessees' leases do not currently make provision for a sinking or reserve fund. It is the Applicant's position that at an AGM of the Applicant company on 29 February 2016, it was unanimously agreed by those shareholding lessees present that a reserve fund should be established. Many, but not all lessees have made significant contributions to this informal fund since that date.

(4) In February 2018, Corker Clifford LLP, the Applicant's representative in this application took over responsibility for management of the Building. Its advice to the Applicant was that whilst such a fund, which it referred to as a sinking rather than a reserve fund, was a sensible idea, it was preferable that it be expressly provided for in the lessees' leases. Counsel was instructed, who advised that the best way to proceed would be to make an application to this tribunal seeking a variation of all the leases under section 37 of the Act, and to seek that the variation be applied retrospectively, so that any lessees who had not paid contributions following the agreement at the AGM were obliged to do so.

(5) In a letter dated 2 May 2018 **[178]** Corker Clifford wrote to lessees notifying them of the prospective section 37 application, asking them to confirm, by signing and returning an accompanying form, if they agreed to the form of proposed lease variation "in principle". The text of a proposed variation to clauses 26(c) and (d) of the Sixth Schedule of the leases was set out in the letter. Those variations concerned the

setting up of a sinking fund. At this point, there was no intention to seek a variation in respect of insurance excess.

(6) On 4 June 2018, Corker Clifford wrote again to lessees **[184]**, stating that 22 lessees had consented to the application, two had opposed it, and 10 had not responded. In that letter it answered 14 questions that had been raised by lessees.

(7) On 5 November 2018, Corker Clifford wrote again to lessees **[191]** stating that as 25 positive responses had now been received, with two negative, there was a sufficient majority in favour to proceed with this application. In that letter it informed lessees that the Applicant had also decided to seek a variation to deal with liability for insurance excess in the event of an insurance claim on the buildings insurance policy. The text of the proposed variations was set out in an appendix to the letter, and lessees were asked to return an accompanying form if they consented to the proposed variations.

(8) This application was made on 18 July 2019. Accompanying the application form were two schedules setting out what the Applicant understood to be the position of the lessee of each flat as at 11 July 2019. The Applicant has proceeded on the basis that for both proposed variations, 25 lessees consented, one objected, and the positions of seven were unknown. The Respondents to the application were named as those leaseholders who had objected to the application.

(9) The tribunal issued directions on 22 July 2019, indicating that the application would be determined, on the basis of written representations from the parties, in the week commencing 16 September 2019, unless by 23 August 2019 a party requested an oral hearing. Any lessee who wished to submit comments or representations in respect of the application were directed to send these to the Applicant by 12 August 2019. The directions required the applicant to give notice of the application to any persons not named as parties, who it believed was likely to be affected by any variation of the lease, to provide the tribunal with their details, and to inform that person that they could apply to the tribunal to be joined as parties.

(10) One lessee, Mr Denis Becker (Flat 15) who was not identified as an objecting respondent to the application, did not receive notice of the Application from the Applicant and nor did the Applicant provide him with a copy of the tribunal's directions. We refer to this omission, and its relevance below.

(11) No request for an oral hearing was received by 23 August 2019, and the application was considered by a tribunal chairperson, on the papers, on 16 September 2019. On that date, the tribunal wrote to Corker Clifford **[137]** stating that confirmation should be requested from all lessees that they were aware that the sinking fund variation sought was intended to be retrospective, and that once that information was available, the application would again be placed before a tribunal for

determination. Corker Clifford replied on 23 September 2019 **[138]**, drawing attention to its letter to lessees of 2 May 2018, and its statement of case, accompanying its application, in which the retrospective nature of the application was explained. The application was re-listed for a paper determination in the week commencing 21 October 2019.

(12) Between 17 and 22 October 2019, several lessees wrote to the tribunal setting out their objections to the application and on 22 October 2019, Judge Vance reviewed the application and directed that the following individuals were to be treated as Respondents objecting to the application:

(a) Dr Bhan (Flat 8)

(b) Nigel Cawthorne (Flat D)

(c) Rosemary Barden (Flats 3 and 4)

(d) Susan Foster (Flat 13)

(e) John Phillip McAleer (Flat 5)

(13) Judge Vance also concluded that considering the objections received, the application should be determined at an oral hearing on 27 November 2019. Directions were issued for the provision of statements of case from the objecting Respondents and the Applicant.

(14) It is important to note that when the Applicant submitted its application the positions of Ms Barden, Mr McAleer, and Dr Bhan and his wife were recorded as "Unknown" as none of them had responded to the correspondence sent by Corker Clifford to lessees, and none had returned consent forms.

(15) On 4 November 2019, Ms Foster wrote to the tribunal stating that she wished to withdraw her objection to the application as the reason for the retrospective sinking fund variation had been explained to her.

(16) Further objections to the application were received by the tribunal from Mr Cawthorne on 15 November 2019, and from Dr Bahn on 19 November 2019.

(17) On 22 November 2019, the tribunal received an email from Denis Becker, the lessee of Flat 15, in which he said that he had only found out, following a conversation with neighbours, that this tribunal application had been made. In that email he states that he was aware of the Applicant's intention to seek to amend the terms of the lessee's leases in relation to the sinking fund and in respect of insurance claims. He says that he had been *"compelled by Mr Corker to agree to the lease changes and threatened with costly legal action, which eventually materialised in the form of a court case at the First-Tier Tribunal Property Chamber, Case Ref: LON/00AG/LBC/2019/0010."*

The Hearing

(18) The Applicant was represented by Ms Gourlay of counsel. Also present were: (a) Ms Rosemarie Barden, who was represented by her daughter, Amanda Parnell; (b) Nigel Cawthorne; (c) Dr Girdari Bhan and Mrs Supriya Bhan; and (d) Susan Dow, representing Mr John McAleer

(19) Following further directions issued on 1 November 2019, the Applicant's a statement of case was due on 7 November 2019, but was not received by the tribunal until 11 November 2019. None of the lessees present objected to the Applicant being entitled to rely upon that document and we admitted it into evidence. Nor did we consider the fact that the Applicant provided copies of the hearing bundle to objecting lessees one day later than directed (on 8 November 2019) had interfered with their ability to prepare for the hearing. We were satisfied that the hearing should proceed.

(20) At the hearing, it was identified that the Applicant's representative had not taken steps to notify the lessees' mortgage lenders of this application, as it had been directed to do in the tribunal's directions of 22 July 2019. It had instead notified lessees, in a letter dated 29 July 2019 **[212]** that it "might be sensible" for them to notify their mortgage lender. This was not adequate. The tribunal's directions of 22 July 2019 imposed a responsibility on the Applicant to give notice to any other interested person that was likely to be affected by the proposed variation, which could include mortgage lenders and guarantors, and to notify them that they could apply to the tribunal to be joined as parties.

(21) We therefore notified the parties that whilst we would hear the application, we would not make a final decision on it until the Applicant had complied with further directions that required it, by 9 December 2019, to send to every mortgage lender it can identify from searches at the Land Registry, copies of the application and relevant documents, notifying those lenders of their entitlement to apply to be joined as a party (or interested person) to this application, and to make representations on the application before it was determined. Directions to that effect were issued on 29 November 2019.

(22) By letter dated 2 December 2019, Corker Clifford confirmed that it had written to every mortgagee of a flat within Bevan House, and enclosed a template of the letter sent. In accordance with the tribunal's directions of 29 November 2019, mortgagees were notified that if they wished to apply to be joined as a party (or interested person) to this application, and to make representations on the application before its determination, it must notify the tribunal by 23 December 2019.

(23) The tribunal has received no communication from any mortgagee following its directions of 29 November 2019. Ms Barden emailed the tribunal on 20 December 2019 stating that Barclays, the mortgagee of the two flats she owns, had informed her that it had received no communications from the Applicant or from Corker Clifford.

(24) By letter dated 21 January 2020, Corker Clifford wrote to the tribunal, stating that letters it had sent to Barclays Bank UK PLC, the mortgagees of Flats 3, 4 and 9, had been returned by the Royal Mail on 20 January 2020 marked "addressee gone away". Copies of the returned envelopes were enclosed, together with official copies of the Land Registry title for the three flats and a copy of the letter sent to the bank. These official copies record the address of the bank to be the address stated in the letter sent by Corker Clifford. The strongly evidence indicates, therefore, that the bank has not notified the Land Registry of its current address.

(25) We consider that Corker Clifford took all reasonable steps to comply with our directions of 29 November 2019 and we not consider it would accord with the tribunal's overriding objective to further delay issue of this determination because the bank has failed to keep the Land Registry informed of its correct address for service.

(26) However, a copy of this decision will be sent to Barclays Bank UK PLC at 1 Churchill Place, London, England, E14 5HP, which is its registered office address as specified at Companies House. The covering letter will draw its attention to paragraphs 20 to 26 of this decision, and the bank may, if it so wishes, apply to set aside the decision under rule 51 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

The Law

(27) Section 37 of the Act provides as follows:

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

(28) Section 38, so far as is relevant, provides as follows:

(1) – (2) .....

(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 subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order.

(4) – (5) .....

(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 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) .....

(8) A tribunal 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) A tribunal 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 a tribunal makes an order under this section varying a lease the tribunal 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 tribunal considers he is likely to suffer as a result of the variation.

The Applicants' Case

(29) The Applicant asserts that its application is intended to achieve equality across the Building, by requiring all lessees to contribute towards a reserve or sinking fund and to acknowledge that they would be liable for an insurance excess that arose because of their own default.

(30) Including the landlord, it calculated that there are 34 parties concerned, of whom 26 (76.47%) consented to the variations, and 2.94% opposed them. It therefore considered the requirements of section 37(5) to be met.

(31) Regarding the sinking fund variation, Ms Gourlay argued that it was imperative that all the leases be varied in the same way, to ensure parity of contribution and effective management of the Building, and that the variation be backdated to 2016, so that all lessees were liable to contribute their appropriate share.

(32) In her submission, the variation sought would not cause the lessees any prejudice, let alone any prejudice that warranted compensation. Many, she said had made voluntary contributions towards a fund since 2016, and the monies would, in any event, be used towards the costs of works that they would be required to contribute towards under the terms of their leases.

(33) As to the insurance excess variation, Ms Gourlay submitted that it was an unhappy fact that Bevan House has a poor insurance claims history concerning escapes of water. In a letter to lessees dated 4 June 2018 Corker Clifford's letter had stated that there had been eight claims in the last three years, the last one, in late 2017, being for £18,000. The object of the variation was, she said, to provide that a lessee whose flat is leaked-into will not face an uphill and expensive battle to recover the insurance excess from a lessee from whose flat the leak originated. She

argued that the variation causes no prejudice to lessees as the variation will only be engaged if a claim on the buildings insurance occurs and it will ease resolution of who is liable for the excess, rather than cause prejudice.

The Objecting Lessees' Position

(34) The lessees who objected to the application communicated their concerns in various letters or emails to the tribunal and not in a single statement of case. Several new points were raised at the hearing, but no objection was taken by Ms Gourlay to us considering them.

(35) One such point concerned whether the application was supported by a sufficient majority of lessees. Dr Bhan had carried out his own calculation, based on the consent forms that Corker Clifford asked lessees to complete and return in their letter of 5 November 2018. He arrived at a total percentage of consenting lessees of 70.58%, by: (a) disregarding the lessee of Flat 10 as consenting, and treating him as neutral; and (b) disregarding the returned form for Flat 2.

(36) His reasoning in respect of Flat 10 was that the consent recorded in that form should be disregarded because the form was unsigned. As to Flat 2, he disregarded the form because although handwritten on that form were words indicating that it was completed "for and on behalf of Mr Amjid Riaz", the lessee of Flat 2, *"Flat 3"* had been handwritten on the form and not "Flat 2". This, he said cast doubt on the authenticity of the completed form, sufficient to warrant it being disregarded as indicating consent.

(37) Ms Barden made the point that the lessees of six flats now object to this application, which is over the 10% threshold referred to in section 37(5)(b). She also submitted that the consent forms relied upon by the Applicant should have been witnessed, with each lessee required to specify their name, rather than only being asked to identify their Flat number. She also suggested that lessees were "not fully aware" that these slips were to be used for the purposes of this tribunal application.

(38) Mr Cawthorne stated that he had, initially consented to the application, but now considered that he had not been consulted properly. He wanted the application "put on hold" until further consultation had taken place.

(39) Ms Barden also objected to Corker Clifford sending the tribunal's directions of 22 July 2019 to lessees as an attachment to an email, under cover of their letter of 29 July 2019, rather than by post. Email, she suggested, said was an insecure method of communication, and not usually a valid means of serving notice on a person. We do not accept that criticism. The tribunal's directions only required the directions to be "sent" to the non-consenting Respondents. It did not specify that this had to be by a particular method. In our view, sending them by email was satisfactory, and we note that none of the Respondents

asserted that they had not received the directions that were sent by email.

(40) As to the need for the reserve/sinking fund variation, Ms Barden argued that:

(a) the Applicant appeared to want the variation so they could operate *both* the informal reserve fund that had been in place since 2016, as well as a formal sinking fund;

(b) no explanation had been provided as to how either fund would be calculated or how much would be demanded;

(c) no programme of proposed maintenance works had been identified;

(d) contributions towards a sinking/reserve fund should only be demanded in respect of an identified set of major works (Dr Bahn agreed with this submission) and consultation with lessees should take place before any budget was set for a reserve or sinking fund for such works; and

(e) lessees did not understand why backdating of the sinking/reserve was being sought.

(41) With regard to the insurance excess variation, Ms Barden submitted that:

(a) the Applicant had not consulted lessees about the insurance excess prior to Corker Clifford's letter of 5 November 2018. Their initial correspondence only referred to the proposed sinking fund variation. Further, the letter of 5 November did not make it clear that the consent form was to be used for the purposes of a tribunal application and did not advise lessees to seek legal advice; and

(b) the cost of insuring the Building has increased considerably over the past four years, and the excess payable for water damage has increased from £2,500 to £50,000. This increase in the excess was cited to her, by a prospective purchase of one of her flats, Flat 4, as a reason why they were pulling out from the purchase. She has, she said, been advised that it would be near impossible to sell a flat in the Building with this level of excess.

Decision and Reasons

Was the application supported by the required majority of parties?

(42) We are satisfied that the requirements of section 37(5) are met, namely that the application was not opposed by more than 10 per cent of the total number of relevant parties and at least 75 per cent of that number consented to it.

(43) As Ms Gourlay submitted, in *Dixon and others v Wellington Close Management Ltd* [2012] UKUT 95 (LC) the President of the Upper Tribunal confirmed that the relevant point in time at which these qualifying conditions must be assessed is when the application was made, namely, on 18 July 2019. The consent forms completed by lessees indicate that the lessees of 25 flats consented to each variation, with one objection. When the freeholders' consent is taken into account, which it must by reason of section 37(6)(b), 76.47% of parties concerned consented, and 2.94% opposed the variations.

(44) As the relevant date for ascertaining consent or opposition was 18 July 2019, it is irrelevant that Mr Cawthorne has recently changed his position since confirming his consent to the variations in an email dated 16 July 2019 **[90]**. The same is true of the other lessees that Ms Barden suggested had subsequently changed their minds about the application. Neither Ms Barden, Mr McAleer, or Dr Bhan and his wife, responded to the pre-application correspondence sent by Corker Clifford to lessees concerning the proposed variations. None have suggested that they did not receive the correspondence, and we note that copies of Corker Clifford's letters of 2 May 2018 and 5 November 2018, addressed to Ms Barden are contained in her hearing bundle. We are content that when viewed objectively, it is correct to treat them as neutral as at 18 July 2019, in other words neither consenting or objecting to the variations.

(45) We do not accept Dr Bahn's submission that because the form returned by the lessee of Flat 10 did not contain his handwritten signature, it should not be taken as a valid consent. The lessee of that Flat has typed his name at the bottom of the form, after the words "Signed". We do not consider there is any need for a lessee to provide *signed* consent and there is no evidence before us to suggest that the lessee in question did not, in fact, consent to the variations.

(46) Nor do we accept Ms Barden's submission that the consent forms relied upon by the Applicant should have been witnessed. There is no requirement for such formality. As to her suggestion that each lessee should have been required to specify their name, rather than just their Flat number, almost all of the lessees have, in fact, either specified their name, or their name can be identified from their signature. There is no evidence to suggest that the forms relied upon by the Applicant have been fabricated, or modified in any way, and there is no reason, in our view, to doubt their authenticity.

(47) As to the lessee of Flat 2, the evidence leads, in our view, to the clear conclusion that the inclusion of the words "Flat 3" was a mistake, and that the form was returned by or on behalf of the lessee of Flat 2, Mr Riaz. It clearly could not have been returned by the lessee of Flat 3, as the lessee of that flat is Ms Barden. The form is stamped by a solicitor and it appears to us likely that the solicitor made an error with the flat number. That error does not, in our view, invalidate the consent recorded by the document. Dr Bahn's challenge to the authenticity

amounts to a suggestion that the document is fabricated. However, there is no evidence to support such a contention. Neither Dr Bahn, nor any other lessee, appears to have contacted Mr Riaz or his solicitor to query authenticity, and nor does this suggestion appear to have been raised with Corker Clifford prior to Dr Bahn's submissions of 20 November, shortly before the hearing of the application The evidence does not support the dispute as to authenticity.

(48) We do not accept Ms Barden's suggestion that lessees were not fully aware that the consent forms they were asked to return to Corker Clifford were to be used for the purposes of this application, nor Mr Cawthorne's suggestion that he was not properly consulted about the variations. The Act does not prescribe a procedure that an Applicant must follow to identify the numbers in favour, or opposed, to a lease variation. Corker Clifford's letter to lessees of 5 November 2018 enclosed consent forms, at the end of an Appendix, that set out the text of the proposed variations. It read as follows:

> " Consent
>
> I/We consent to the above noted variations,
>
> Flat:
>
> Signed:
>
> Dated: "

(49) Whilst, in our view, it would have been preferable for Mr Corker to have given lessees the option to indicate their objection, as well their consent to either, or both, of the variations, at the end of the Appendix, we are nevertheless satisfied that, when read as a whole, the contents of the letter of 5 November 2018 were adequate to enable those lessees who were opposed to the variation to indicate their opposition, and that all lessees would have appreciated that that their consent, or opposition, was being sought for the purposes of a tribunal application.

(50) This is because there is specific reference, at point 7 on page 2 of the letter, to the Applicant's intention, *"assuming no objections are received from tenants within the next 14 says"* to apply to the tribunal to vary the leases. The full text of the two variations sought in this application, with explanatory comments, are set out in the Appendix, immediately below which is space for the lessees to sign if they consent to the variations. Further, at point 16 in the letter lessees are referred to the variations and are asked as follows, *"Please check you are happy with the same and confirm your agreement to the variations to Michael Corker as soon as possible (and certainly by 20 November 2018) by returning Appendix 1 to him (signed and dated)*."

(51) In addition, the letter of 5 November 2018 needs to be considered in the context of the previous correspondence sent by Corker Clifford to lessees, namely, its letters of 2 May 2018 and 4 June 2018. There is

specific reference to the Applicant contemplating making a section 37 application in Corker Clifford's earlier letter of 2 May 2018, based on counsel's advice, and that an application *"is likely to be successful provided 75% of tenants agree and no more than 10% disagree*". In the letter of 4 June 2018, Corker Clifford states that 22 positive and two negative initial responses had been received from lessees and that *"If the agreement of 75% of tenants cannot be obtained, we will be obliged to disband the [informal] sinking fund"*. We conclude that lessees were adequately consulted about the proposed variations; that they should have been aware that their consent was being sought for the purposes of a section 37 application to the tribunal; and that they were notified that to succeed, at least 75% of lessees needed to consent to the variations, with no more than 10% objecting.

(52) We turn now to the position regarding Mr Becker. On 21 November 2019, the tribunal received an email from Mr Becker, the lessee of Flat 15, in which he said that he had only found out the previous day, following a conversation with neighbours, that this tribunal application had been made.

(53) Corker Clifford replied to that email on 26 November 2019, and sent a copy to the tribunal. In the email it acknowledges that it did not serve the application on Mr Becker. Nor does it appear Mr Becker was sent a copy of the tribunal's directions of 22 July 2019. It therefore seems credible that Mr Becker did not know about these proceedings until shortly before the hearing.

(54) Corker Clifford's reason for not doing so is said to be because, at the relevant time, the Applicant was pursuing forfeiture of Mr Becker's lease and did not wish to do anything that could potentially risk recognising the continued existence of a landlord and tenant relationship with Mr Becker.

(55) The Applicant had previously pursued an application in this tribunal against Mr Becker seeking a determination that he had breached covenants in his lease (LON/00AG/LBC/2019/0010). Its application was successful, the tribunal determining, in a decision dated 21 May 2019, that he had let his Flat on AirBnB, on short-term lets, contrary to a sub clause in his lease that required him to use to use Flat as a private residence only. The tribunal also found that the letting of the Flat via AirBnB had adversely affected the insurance premium for the Building and that the lettings breached a covenant in Mr Becker's lease not to do anything that may increase the rate of such premium.

(56) From documents accompanying Corker Clifford's email of 22 November 2019, it appears that initial steps were taken to pursue forfeiture but this ceased to be pursued. In an email dated 15 April 2019, Hockfield & Co said to Mr Corker *"Nonetheless, solely for the purposes of drawing a line under this matter, if the application is now withdrawn my client will agree to the following:"*. The full text of the

agreement is redacted from documents provided, however point 2 is unredacted and reads:

> *"2. Consent to the proposed lease variations (albeit the typo mentioned previously does still require correction)".*

(57) Corker Clifford stated in its email of 26 November 2019 that both Mr Becker, and his solicitor, stated *"on multiple occasions that you agree to the lease variations".*

(58) In Mr Becker's email to the tribunal of 21 November 2019, he states that he was aware of the Applicant's intention to seek to amend the terms of the lessee's leases in relation to "the sinking fund", and in respect of "insurance claims". He also says that he had been *"compelled by Mr Corker to agree to the lease changes and threatened with costly legal action……".* However, he goes on to say that he opposes the variations and, in a subsequent email to Mr Corker, copied to the tribunal, dated 26 November 2019, he states "*Under no circumstances did I or my solicitor consented [sic] to the proposed change of the lease, it was part of a settlement offer that you and BHNC refused"* He then goes on to say *"I also want to withdraw my consent to the sinking fund charge, I no longer believe that it is the best interest of residence and owners [sic]".*

(59) On 8 January 2020 Judge Vance issued directions, recording that the tribunal required evidence from both Mr Corker and from Mr Becker as to the terms of the asserted agreement reached between the Applicant and Mr Becker. The directions provided for the provision of witness statements from both Mr Becker and the Applicant, and Mr Becker was invited to submit any further written representations concerning the application before it was determined.

(60) No witness statement from Mr Becker, or any further representations, were received in response to the directions of 8 January 2020. Corker Clifford responded, by letter, on 16 January 2020 in which it stated:

(a) the Applicant *was not* asserting that Mr Becker had agreed to the proposed lease variations, and that when the application was submitted, it was recorded in the schedules accompanying the application that his position was treated as 'unknown', in other words, neither as consenting, or objecting.

(b) Mr Becker had signed a consent form on 21 May 2018 stating that he agreed, in principal to a variation, and application to the tribunal, to make express provision in his lease for a sinking fund. A copy of that document was attached to Corker Clifford's letter;

(c) although Mr Becker's solicitor had, on three separate occasions, stated that he was content to agree both lease variations on behalf of Mr Becker, as part of a settlement of the intended forfeiture proceedings, no final agreement was ever reached;

(d) Mr Becker was aware of both proposed variations, even though he was not served with the application, but at no time did he object to the variations until his email to the tribunal of 21 November 2020.

(61) Corker Clifford's assertion, in its letter of 16 January 2020, that the Applicant has always treated Mr Becker as an 'unknown' for the purpose of this application is at odds with the schedules accompanying the Applicants' application. Although the schedules included in the hearing bundle **[17 and 18]** code him as being an 'unknown', the colour-coded schedules accompanying the application, as held on the tribunal's file, record him as consenting to the application.

(62) Therefore, although there is nothing in the documentation before us to indicate that Mr Becker objected to either variation before 18 July 2019, there is some confusion as whether the Applicant treated Mr Becker as consenting to the variations on the relevant date of 18 July 2019, or as being neutral. The Applicant appears to have treated him as consenting when the application was submitted, subsequently deciding that he should be treated as an 'unknown'.

(63) We must determine whether, on the evidence, Mr Becker was aware of the proposed variations and, and looking at the matter objectively, whether he had consented or objected to them, or expressed no conclusive opinion. It is clear from the documentation provided by Corker Clifford, under cover of its letter of 16 January 2020, that he received its letter of 2 May 2018 seeking consent in principal to the sinking fund variation, as Corker Clifford has provided a signed copy of that consent form he returned dated 21 May 2018.

(64) It is also apparent that he was aware of the insurance excess variation sought because his solicitor, in a without prejudice letter dated 10 April 2019, stated *"Our client has no objection to the introduction of a sinking fund (6.26(c) & d), albeit not clear as to the reference to "after the end of the relevant obligations"' nor to the principle of an insurance…"* The document supplied does not show the remainder of the sentence, but presumably it referred to the insurance excess variation. In addition, in emails dated 15 and 16 April 2019 from his solicitor to Mr Corker, the solicitor indicated that Mr Becker would consent to the variations (in the plural) if the forfeiture application was withdrawn.

(65) Whilst there is doubt that Mr Becker consented to the variations, and the Applicant is not now arguing that he did, importantly there is no evidence at all, in his emails to the tribunal, or elsewhere, that he had objected to them on the relevant date of 18 July 2019. His objections were only received after the tribunal application was made, very shortly before the hearing of the application. Mr Becker has not availed himself of the opportunity accorded to him in the tribunal's directions of 8 January 2020 to explain what appeared to be his agreement to the variations, and to submit any further written representations concerning this application. On balance, and looking at the position

objectively, we consider that the evidence indicates that he had neither consented to the proposed variations, nor objected to them as at 18 July 2019, and it is therefore correct to treat his position as being 'neutral'.

(66) We therefore conclude that there was only one lessee who objected to the application as at 18 July 2019, and that at least 75% consented, meaning that the requirements for a valid application have been met.

Are the requirements of sections 37(3) met?

(67) It is self-evident that the objects of the proposed variations, namely setting up a sinking fund to defray the costs of major works, and making provision for handling of insurance excess, cannot be satisfactorily be achieved unless all leases are varied in the same manner. For a reserve fund to work, all lessees will need to be obliged, under their lease, to contribute towards the sums to be paid into the fund in the proportions set out in their respective leases. Similarly, the obligation to pay an insurance excess can only operate fairly and satisfactorily if it is provided for in all the leases.

Our exercise of Discretion

<u>The Sinking Fund Variation</u>

(68) In our determination, the grounds advanced by the Applicant, warrant us making the variation requested. We consider formalising the previously informal arrangement to be eminently sensible. We agree with Ms Gourlay's submission that setting up a sinking fund enables a landlord to plan for future expenditure on major works to the Building in a meaningful way. We do not consider the variation will prejudice any lessee, rather, it should benefit all concerned, as it enables the costs of major works to be spread across several service charge years, rather than lessees receiving a single service charge demand in a large amount. As she stated, the operation of a reserve or sinking fund is considered good practice by the Royal Institution of Chartered Surveyors (see RICS Service Charge Residential Management Code 3rd edition, para 7.5).

(69) There is no evidence to support Ms Barden's suggestion that the Applicant seeks this variation so that it can operate both the informal reserve fund, in place since 2016, as well as a formal sinking fund. Her evident confusion on this point seems to have originated from Corker Clifford's attempt to explain of the difference between a reserve and sinking fund in its letter if 2 May 2018. Ms Gourlay agreed that the distinction drawn was not particularly helpful and she was correct to point out during the hearing that for all practical purposes the two terms are commonly used interchangeably.

(70) It is certainly good practice for a landlord to have reference to a costed, long-term maintenance plan when setting its annual service charge budget and deciding what level of contributions are required towards a sinking/reserve fund. However, the suggestion from Ms Barden and Dr

Bahn that contributions towards such a fund should only be demanded in respect of an identified set of major works is not a reason to refrain from establishing the fund in the first place. Rather, they go to the question of whether sums demanded towards a reserve are payable by lessees. Although there is no statutory provision for consultation with lessees before a budget is set, lessees have the right to pursue a challenge to this tribunal as to whether such sums are reasonable and payable by them under the provisions of section 27A Landlord and Tenant Act 1985. If, therefore, a lessee considers that an amount demanded from lessees towards a reserve fund contribution is not payable because no programme of proposed maintenance works had been identified, they can pursue such a challenge.

(71) As to the complaint that no explanation had been provided as to how a reserve fund would be calculated, or how much would be demanded, lessees' contributions towards the reserve fund will be calculated according to their apportioned contributions as provided for in the service charge provisions of their lease. The amount payable will vary according to the budget set each year.

Backdating of the sinking fund variation

(72) In Corker Clifford's letter to lessees of 2 May 2018 it was stated that counsel's advice was that the establishment of a formal sinking fund could have retrospective effect so that any lessees who had not paid into the informal sinking fund could be compelled to bring their service charge accounts up to date. In Corker Clifford's letter of 4 June 2018 to lessees it responded to a query that had been raised about the retrospective nature of the variation, in its answer to Question 12, in which it explained that it would only be retrospective to ensure fairness between lessees by compelling those lessees that have not paid [into the voluntary sinking fund] to do so. It was also explained that the extent to which it would be retrospective would be determined by the tribunal. The date on which retrospective effect was to be commence, 29 February 2016, was then specified in the Applicants statement of case dated 11 July 2019, sent to lessees under over of a letter dated 29 July 2019.

(73) Many of the lessees who objected to this application have, in fact, paid significant contributions to the informal sinking fund. Ms Barden has made contributions for the 2016 and 2017 service charge years for both of her flats. Both Mr McAleer and Mr Cawthorne have paid for all three of the 2016, 2017 and 2018 service charge years, and Dr Bahn has paid for 2016. Ms Gourlay argued that back-dating implementation would therefore not prejudice the objecting lessees.

(74) However, we are not persuaded that backdating is appropriate. This is for two reasons. Firstly, although lessees were aware, prior to this application being made, that the Applicant was seeking that the variation of the sinking fund variation should be backdated, they were not made aware, prior to the application being made, as to the date on

which it wanted backdating to take effect. Fair process would have been to inform them of this prior to asking them to confirm agreement to the variation.

(75) Secondly, and importantly, we are not persuaded that backdating is required. It seems to us that all the Applicant need do once the formal sinking/reserve fund is established is to issue a demand for reserve fund contributions, giving a credit to those lessees who have already paid under the informal scheme. Enforcement action under the lease could then be taken against those lessees who do not pay following service of that demand. This, in our view, is preferable to backdating the operation of the fund as it will enable the Applicant to provide lessees with details of how the sums demanded are arrived at, in the context of its annual service charge budget, and having regard to its long-term maintenance plan for the Building. There is no evidence before us from the Applicant as to any such plan, nor evidence from the Applicant that works required to the Building have been frustrated because of the lack of monies in a reserve fund, and backdating does not, therefore, appear to be warranted for that reason.

The Insurance Excess Variation

(76) We do not consider anything turns on the fact that Applicant only decided to consult lessees about the insurance excess variation in Corker Clifford's letter of 4 June 2018. As stated above, we consider the contents of the subsequent letter of 5 November 2018 adequate to enable those lessees who were opposed to the variation to indicate their opposition.

(77) The insurance excess payable for water damage is clearly a major issue facing lessees. A £50,000 excess is very high and Ms Barden's evidence that it led to a prospective purchaser pulling out from a purchase of one of her flats is entirely credible.

(78) We accept, as advanced by Ms Gourlay, that Bevan House has a poor insurance claims history concerning escapes of water. Eight claims in the last three years is significant. Despite this history, we find the amount of the current excess concerning. In Corker Clifford's letters of 4 June 2018 and 5 November 2018, reference is made to the excess being £2,500 per claim. There is no evidence before us explaining the apparent subsequent increase to £50,000 per claim.

(79) However, we do not consider the amount of the excess to be relevant to the question of whether the lease should be varied to stipulate who pays the excess in the event of a claim. We are aware, as an expert tribunal, of a recent trend, particularly in larger blocks to agree to a higher insurance excess as a way of reducing the total cost of the premium. There is reference to the possibility of a trade-off between cost of premiums and the level of excess applied to some claims at paragraph 12.8 of the RICS Code. There is no evidence that this has happened in this case, but if a lessee considers that it was unreasonable for the

Applicant to take out the current insurance, with such a high excess, then the lessee has a statutory right to challenge the insurance costs, before this tribunal, under section 27A of the 1985 Act. Given the impact on saleability and ability to secure a mortgage described by Ms Barden, lessees may wish to consider making such an application, although they might first wish to explore with the Applicant the possibility of paying a higher premium in return for a lower excess.

(80) On balance, we are persuaded that a variation of the lease to include provision whereby, in the event of a successful claim on the Building's insurance policy, and where the need for the claim was caused by a breach of covenant by a lessee, that the lessee in question is liable to pay to the landlord the excess it has had to pay to the insurer. We consider that the inclusion of such a covenant will assist in delineating lessees' obligations, and may avoid subsequent argument, and potential litigation, between neighbours over liability in the event of an insurance claim caused by breach of covenant, such as escape of water from one flat into another.

(81) In the absence of provision in the lease, or other contractual agreement between the landlord and lessees, litigation regarding liability is likely to focus on issues of negligence or nuisance, that may be more difficult to establish than if there were contractual provision in the lease. An alternative, of course, is for the cost of such an excess to be spread across all lessees by recovering it as a service charge cost, but that is not the lease variation that the majority of lessees have agreed to in this application.

(82) We accept that the variation does not cause prejudice to lessees as the variation will only be engaged in the event of a claim on the buildings insurance, and where a defaulting lessee is in breach of covenant. Under the current lease provisions, if there was a successful insurance claim resulting from a breach of covenant by a lessee, the landlord would have to pay that excess and then seek to recover the cost, through litigation if necessary, from the defaulting lessee. Under the new proposed variation, the only difference would be that there would be no need for argument concerning liability. So long as the landlord can establish breach of covenant, the defaulting lessee is liable to pay the excess. This clarity over liability does not, in our view, constitute prejudice for the purposes of section 38(6)(a) of the Act.

Order

(83) Pursuant to section 38(3) of the Act we make an order in the terms set out in the order accompanying this decision, varying all the leases in the Building, with effect from the date of this order, as follows:

(a) Paragraph 26(c) of the Sixth Schedule is varied to add the following words after "(which shall commence on the Thirty-First day of March in each year)"

"*and the Lessor may from time to time establish a reserve for anticipated future, periodic, or exceptional expenditure which may be incurred after the end of the relevant obligations in the Seventh Schedule hereto ("the sinking fund")*".

and after the words "and the Lessee shall pay the estimated contribution":

"and any such sum as the Lessor may reasonably consider appropriate as a contribution towards the sinking fund"

(b) Paragraph 26(d) of the Sixth Schedule is varied to add the following words at the end of the clause:

"and in the event that there is a surplus, such sum may be held by the Lessor in any sinking fund or alternatively, at the Lessor's or the Managing Agent's discretion, credited towards the Lessee's next advance contribution payable in accordance with paragraph (c) hereof

(c) A new paragraph 27 is added to the Sixth Schedule as follows:

"The Lessee shall pay to the Lessor any excess paid by the Lessor or any other lessee of any of the Flats following a successful claim made on the insurance policy obtained by the Lessor pursuant to paragraph 2 of the Seventh Schedule that has been caused by a breach of covenant by the Lessee".

(84) The Applicant also proposes adding a new paragraph 12 to the Seventh Schedule, which contains covenants on the part of the Lessor. We do not consider the draft wording proposed to be clear and instead order the following variation which we understand to be the intention behind the proposed variation:

"in the event that the Lessee has paid an excess following a successful claim made on the insurance policy obtained by the Lessor, and the Lessor receives payment towards that excess from a lessee of any of the Flats, the Lessor shall pay the sum received to the Lessee, on the provision of a receipt confirming that the Lessee has paid the said excess".

(85) Pursuant to section 38(9) of the Act we direct that a memorandum of these variations to the Leases shall be endorsed on the Leases at the Land Registry.

Name: Amran Vance **Date: 20 February 2020**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/LVT/2019/0008**
Property	**:**	**Bevan House, Boswell Street, London, WC1N 3BT**
Applicant	**:**	**Bevan House Management Company Ltd**
Representative	**:**	**Corker Clifford LLP**
Respondents	**:**	**Leaseholders at Bevan Court**
Representative	**:**	**N/A**
Type of application	**:**	**Variation of leases at Bevan House by a majority**
Tribunal members	**:**	**(3) Judge Amran Vance** **(4) Mr W R Shaw FRICS**
Date and venue of hearing	**:**	**27 November 2019 at 10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**20 February 2020**

ORDER

UPON the application dated 11 July 2018 and the tribunal's decision dated 20 February 2020

IT IS ORDERED THAT:

(86) Pursuant to section 38(3) of the Landlord and Tenant Act 1987 Act all the residential long leases at Bevan House, Boswell Street, London, WC1N 3BT ("the Leases") are varied, with effect from the date of this Order, as follows:

(d) Paragraph 26(c) of the Sixth Schedule is varied to add the following words after "(which shall commence on the Thirty-First day of March in each year)"

"*and the Lessor may from time to time establish a reserve for anticipated future, periodic, or exceptional expenditure which may be incurred after the end of the relevant obligations in the Seventh Schedule hereto ("the sinking fund")*".

and after the words "and the Lessee shall pay the estimated contribution":

"and any such sum as the Lessor may reasonably consider appropriate as a contribution towards the sinking fund"

(e) Paragraph 26(d) of the Sixth Schedule is varied to add the following words at the end of the clause:

"and in the event that there is a surplus, such sum may be held by the Lessor in any sinking fund or alternatively, at the Lessor's or the Managing Agent's discretion, credited towards the Lessee's next advance contribution payable in accordance with paragraph (c) hereof

(f) A new paragraph 27 is added to the Sixth Schedule as follows:

"The Lessee shall pay to the Lessor any excess paid by the Lessor or any other lessee of any of the Flats following a successful claim made on the insurance policy obtained by the Lessor pursuant to paragraph 2 of the Seventh Schedule that has been caused by a breach of covenant by the Lessee".

(g) a new paragraph 12 is added to the Seventh Schedule as follows:

"in the event that the Lessee has paid an excess following a successful claim made on the insurance policy obtained by the Lessor, and the Lessor receives payment towards that excess from a lessee of any of the Flats, the Lessor shall pay the sum received to the Lessee, on the provision of a receipt confirming that the Lessee has paid the said excess".

(87) Pursuant to section 38(9) of the Act we direct that a memorandum of these variations to the Leases shall be endorsed on the Leases at the Land Registry.

Name: Amran Vance **Date: 20 February 2020**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).