



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

Case reference : **LON/00BA/LVI/2020/0004**

**HMCTS code
(paper, video,
audio)** : **P: PAPERREMOTE**

Property : **Aspen Lodge, 61-63 Wimbledon Hill
Road, Wimbledon, London SW19 7QP**

Applicant : **Aspen Lodge Management Company
Limited**

Representative : **Guillaumes LLP Ref AT/865-1**

Respondents : **The various leaseholders named in the
application**

Representative : **In person**

Type of application : **To vary two or more leases by a majority
under section 37 Landlord and tenant
Act 1987**

**Tribunal
member(s)** : **Judge Pittaway
Mr T Sennett MA FCIEH.**

Venue : **Remote**

Date of decision : **17 June 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers not objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing/on paper. The documents that the Tribunal were referred to are

in a bundle of 743 pages. In the interests of proportionality the Tribunal has reviewed one of the leases in details, that of Flat 4. It has not reviewed all 17.

Decisions of the Tribunal

1. The Tribunal grants the application for the variation of leases at the property under sections 35, 37 and 38 of the Landlord and Tenant Act 1987, (“**the Act**”).
2. The Tribunal makes an order varying each of the leases at Aspen Lodge, 61-63 Wimbledon Hill Road, Wimbledon, London SW19 7QP as follows;
 1. With effect from the date of this Decision each Respondent’s lease is varied in respect of the service charge percentages (as defined in each lease) in accordance with the table annexed hereto.
 2. The covenants conditions and remaining provisions contained in each Respondent’s lease shall continue in full force and effect except as varied by this order.
 3. The Applicant will within 28 days from the date of this Decision apply to the Chief Land Registrar to make the necessary entries in the registers of both the Applicant’s freehold title and each Respondent’s leasehold title to give effect to this order.
4. The Tribunal therefore does not award any compensation to any party to the application.
5. The reasons for the decision are set out below
6. Within 21 days of this decision the Applicant shall provide the Tribunal a schedule setting out all the e mail addresses it may have for the Respondents. Where it does not have an e mail address it shall provide the Tribunal with stamped addressed envelopes addressed to each leaseholder, to enable the Tribunal to serve a copy of this decision on them (as is required following the Upper Tribunal decision in *Hyslop v 38/41 CHG Residents Co Ltd* [2017] UKUT 0398 (LC)).
7. The relevant legislation is set out in an appendix to this decision.

8. Background

9. The applicants seek to vary **17** leases under section 37 of the Landlord and Tenant Act 1987 (“**the 1987 Act**”).
10. The variation sought relates to the percentage of service charge payable by the respondents. The application stated that the percentages within the sixth schedule of the lease total to 99.51% and those in the eighth schedule total to 99.5% and therefore there is a shortfall in the annual service

charge. The applicant seeks to vary the leases so that there is 100% recovery of service charge from the leaseholders.

11. The Tribunal issued Directions on 29 March 2021 in which it directed that the applicant send the Directions to every leaseholder by 16 April 2021 and confirm to the tribunal that it had done so. The applicant confirmed that it had done so to the tribunal on 15 April 2021.
12. The Directions provided that any respondent wishing to submit comments/representations to the tribunal should send these to the applicant and if they wished to take part in the proceedings they should request a copy of the bundle.
13. The Applicant was directed by 17 May 2021 to send to any respondent who had requested a bundle and to the tribunal a bundle.
14. The Directions stated that the application would be dealt with on the basis of written representations unless any party requested a hearing. No party did.

The Issues

15. In the Directions the tribunal identified the following issues to be determined:
 - What is the object to be achieved by the proposed variation? Can the object be achieved satisfactorily without all the leases being varied to the same effect?
 - Is the proposed variation within the contemplation of sections 37 and 38 of the 1987 Act?
 - Is there a sufficient majority for an application under section 37 of the 1987 Act?
 - If it does make an order varying the leases, should the tribunal order any person to pay compensation to any other person (see section 38(10) of the 1987 Act).

The Applicant's case

16. The Applicant provided an original statement of case and a Further Statement of Case in response to the Tribunal's Directions of 29 March 2021.
17. The Applicant is the freeholder of the property (registered title TGL138560) which is a block of 17 flats and associated common parts. The Respondents are the residential lessees of Aspen Lodge detailed in a schedule attached to the Application.
18. Each of the leases are for a term of 999 years from 24 June 1997 and are materially in the same form. Each lease provides for the lessee to

contribute a specified proportion towards the costs of the Applicant in complying with its obligations in Sixth and Eighth Schedules to each lease. 99.51% (stated to be 99.58% in the Applicant's Further Statement of Case) of the costs under the Sixth Schedule and 99.5% of the costs under the Eighth Schedule are recoverable from the lessees under the leases in their existing form.

19. The Applicant seeks to vary the terms of the leases as set out in the Variation Details attached to its application to enable 100% recovery of costs under the Sixth and Eighth Schedules. The variations sought are
 - That the reference to the figure in paragraph 19 of the Fourth Schedule in each lease be varied to reflect the 'New Percentage 6th Schedule' set out in the Variation Details.
 - That the reference to the first figure in paragraph 1 of the Seventh Schedule in each lease be varied to reflect the 'New Percentage 6th Schedule' set out in the Variation Details.
 - That the reference to the second figure in paragraph 1 of the Seventh Schedule in each lease be varied to reflect the 'New Percentage 6th Schedule' set out in the Variation Details.
20. Paragraph 19 of the Fourth Schedule of each lease contains a covenant by the lessee to keep the landlord indemnified from and against a specified percentage of all costs charges and expenses incurred in connection with the ownership or management of the Estate whether under the Sixth Schedule or otherwise. The Sixth Schedule sets out the landlord's covenants which include insuring the building.
21. By paragraph 1 of the Seventh Schedule each lessee covenanted to pay the Landlord a specified percentage of the cost incurred by the landlord in complying with its obligations in the Sixth Schedule and the Management Company a specified percentage of the cost incurred by it in performing its obligations under the Eighth Schedule. The Eighth Schedule sets out the Management Company's obligations which include maintenance and repair of the building and the provision of certain services for the benefit of the lessees.
22. The Applicant is now both the landlord and the Management Company.
23. The Applicant commented on the overlap between the sums recovered under paragraph 19 of the Fourth Schedule and the first part of paragraph 1 of the Seventh Schedule but stated that there was no suggestion of double recovery.
24. Of the seventeen flats, the lessees of sixteen have consented to the proposed variations. The lessee of flat 4 has not responded. It is because of this lack of response that the Applicant has made the application under section 37 of the 1987 Act.

25. In the Further Statement of Case the Applicant addressed the issues identified by the Tribunal, as follows.
26. The object achieved by the proposed variation is to prevent future shortfalls in recovery of costs by ensuring 100% recovery of the costs. It submits this this can only be done fairly by proportionately increasing the percentage payable as proposed in the 'Variation Details' schedule.
27. The proposed variation falls within the contemplation of section 37 of the 1987 Act because
- It varies more than two leases;
 - The leases are long leases of flats under which the landlord is the same person;
 - The object can only be satisfactorily achieved if all the leases are varied to the same effect;
 - The application is made by the landlord under the leases; and
 - A sufficient majority of the leaseholders consent to the variation.
28. No prejudice within the meaning of section 38(6) of the 1987 Act will be suffered by any respondent, nor any other person, as a result of the variation. It corrects a minor error in the leases with minor implications for each lessee.
29. There is a sufficient majority under section 37 of the 1987 Act. The application concerns 17 leases. By section 37(5)(b) the application must not be opposed by more than 10% of the total number of parties involved and at least 75% of those parties must consent. The applicant submits that there are a total of 18 persons, 17 lessees and the Applicant, on which basis 94% have consented. Flat 4 has not responded but has not objected to the application.
30. Section 38(10) provides a wide discretion to the Tribunal to award compensation to parties to an application. The Applicant submits that no Respondent will suffer a material loss or disadvantage, evidenced by the fact that no Respondent has made any representations in the proceedings claiming loss or disadvantage, nor provided any evidence of the same. The Applicant referred the Tribunal to the Upper Tribunal decision in *Frank Parkinson v Keeney Construction Limited* [2015]UKUT 607 (LC) in which HHJ Huskinson noted that an amendment to secure satisfactory service charge provisions (such as each lessee paying a fair share of relevant expenditure) does not necessarily bring loss or disadvantage to a lessee even though the lessee may pay a higher percentage of service costs than previously.

Reasons for the Tribunal's decision

31. The tribunal finds that the proposed variation falls within the contemplation of section 37 of the 1987 as submitted by the Applicant.

32. On the evidence before it the Tribunal finds that the proposed variation causes no prejudice to any Respondent or other person within the meaning of section 38(6) of the 1987 Act will be suffered by any respondent, nor any other person.
33. There is a sufficient majority under section 37 of the 1987 Act, whether the Applicant is treated as one person or 17.
34. On the evidence before it, and in light of HHJ Huskinson' comments in *Frank Parkinson v Keeney Construction Limited* the Tribunal accepts the Applicant's submission that no Respondent will suffer a material loss or disadvantage and the Tribunal therefore does not award any compensation to any party to the application.

Name: Judge Pittaway

Date: 17 June 2021

Rights of appeal

1. 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.
2. 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.
3. 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.
4. 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.
5. 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.
6. If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

APPENDIX

Sections 37 & 38 of the Landlord and Tenant Act 1987

37.— Application by majority of parties for variation of leases.

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

38.— Orders varying leases.

- (1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the tribunal, the tribunal may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.
- (2) If—
 - (a) an application under section 36 was made in connection with that application, and
 - (b) the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application under section 36,

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

(3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the 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) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.

(5) If the grounds referred to in subsection (2) or (3) (as the case may be) are established to the satisfaction of the tribunal with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.

(6) 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) A tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—

- (a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or
- (b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or
- (c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.

(8) 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.