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LEASEHOLD VALUATION TRIBUNAL

In the matter of an application under Section 37 of the Landlord & Tenant Act 1987
(Variation of leases)

Case No: CHI/00ML/LVT/2012/0007

Property: **1 First Avenue, Hove, East Sussex BN3 2FG**

Between:

1 First Avenue Hove Management Company Ltd
(the Applicant/Landlord)

and

1. Julie Bunce (Flat 1)
2. Jeremy David Parr (Flat 2)
3. Ian Harold Holland (Flat 3)
4. Jane Adele Fear (Flat 4)
5. Adrian Tristan Downer (Flat 4)
6. Richard Moore (Flat 5)
7. Kate Baker (Flat 5)
8. Robert Henry Hickson (Flat 6)
9. Clarke Rees (Flat 7)
10. Katherine Anne Shrubb (Flat 8)
11. Brian Keith Roy Neal (Flat 9)
12. Darren John McCauley (Flat 10)
(the Respondents/Lessees)

Members of the Tribunal: Mr MA Loveday BA(Hons) MCIArb
Lady J Davies FRICS
Ms J Herrington

Date of the Decision: 2 December 2012

BACKGROUND

1. This is an application to vary the terms of leases of ten flats in a block in central Hove under s.37 Landlord and Tenant Act 1987.

2. The claim relates to 1 First Avenue, Hove BN3 2FG. The Applicant is the freehold owner of the building, and the Respondents are the lessees of the ten flats. However, the lessees of nine flats consent to the variation, and the only effective respondent is the lessee of Flat 9, Mr Brian Neal. A full list of the Respondents, the date of their lease and the date of consent to the application (where applicable) appears in the Schedule to this determination.

3. By an application dated 21 May 2012, the Applicant sought a variation of the provisions of the leases of each flat. Directions were given on 3 July 2012. In accordance with the directions, the Applicant served a Statement of Case dated 10 August 2012 which set out the proposed form of variation. In essence, the Applicant seeks to remove the specific obligations in the lease to provide a lift.

4. A hearing took place on 25 September 2012. The Applicant was represented by Mr Jamal Demachkie of counsel and the Mr Neal was represented by Mr Kevin Pain of counsel. The Applicant relied on evidence of Mr Clarke Rees (witness statement dated 11 August 2012) and expert evidence of Mr Stewart Gray FRICS (report dated 24 September 2012). Mr Neal also gave evidence (witness statement dated 5 September 2012) and relied on expert evidence from Mr Andrew Pridell FRICS (expert report dated 17 July 2012).

THE LEASES AND THE PROPOSED VARIATIONS

5. The Applicant is a lessee-owned company which acquired the freehold in 1993. The leases of each flat (set out in the Schedule to this determination) were granted by the Applicant to the lessees following the acquisition of the freehold. In each case they granted 999 year terms at a peppercorn ground rent. However, the leases gave effect to the re-grant of earlier terms of years which in each case they described as the 'existing leases'. The substantive provisions governing the obligations of the parties were in fact set out in the existing leases. The Tribunal has been provided with copies of the leases and the existing leases for each flat and the material terms of the existing leases (which are in similar form) appear below.

6. Clause 1(10) of the existing lease defines the common parts as follows:

> "(10) 'The Common Parts' means all main entrances passages landings staircases (internal and external) gardens gates access yards roads footpaths parking areas and garage spaces (if any) passenger lifts (if any) means of refuse disposal (if any) and other areas included in the Title above referred to provided by the Lessors for the common use of residents in the Building and their visitors and not subject to any lease or tenancy to which the Lessors are entitled to the reversion."

Clause 5(5)(a) of the existing lease imposed an obligation on the lessor to "maintain and keep in good and substantial repair condition ... (iii) the Common Parts." Clause 5(5)(c) imposed an obligation to insure "plant and machinery of the Lessors". These provisions, when taken together, therefore imposed an obligation on the Lessor to maintain, repair and insure any passenger lift.

7. In addition, clause 5(5)(l) of the existing lease includes a specific obligation in respect the lift, that required the Lessor:

> "(l) To maintain and where necessary renew or replace any existing lift and ancillary equipment relating to thereto and maintain insurance against risks of breakdown and third party claims in respect of the lift and lift equipment and mechanism in such amounts and on such terms as the Lessors shall from time to time think fit."

8. By clause 4 of the existing lease the lessees are required to pay an interim charge and a service charge defined by reference to the Fifth Schedule. The Fifth Schedule defines these contributions by reference to "Total Expenditure", which is in turn defined by reference to the costs incurred by the Lessors "In carrying out their obligations under Clause 5(5)" of the existing lease.

9. Clause 2 and paragraph 1 of the Second Schedule to the existing lease includes easements granted to the lessee as follows:

> "1. Full right and liberty for the Tenant and all persons authorised by him (in common with all other persons entitled to the like right) at all times and for all purposes in common with the permitted user of the Demised Premises to go pass and repass over and through and along the Common Parts including main entrances and the passages landings halls and staircases leading to the demised premises PROVIDED ALWAYS the Lessees shall have the right temporarily to close or divert any of the Common Parts ... subject to leaving available reasonable and sufficient means of access to and from the Demised Premises AND PROVIDED FURTHER THAT the Lessors shall have the right at any time and from time to time on giving in each case at least three months written notice to that effect to the Tenant to exclude from the easement right and liberty to granted by this paragraph the use of all or any part or parts of the garden or land forming part of the Common Parts but not so as to make access to the Demised Premises impracticable."

10. It should also be mentioned that both clauses 7(1) and paragraph 14 of the Fourth Schedule (regulations) to the existing lease include express references to "lifts" consequential on the above rights.

11. The Applicant's proposed variations appear in its Statement of Case and relate to the provisions of the existing lease. They are:

    (a) The excision of the words "passenger lifts (if any)" from the definition of "Common Parts" in clause 1(10).

(b) The addition of words to sub-clause 5(5)(a)(iii), so that it reads:

"(iii) the Common Parts, except that (if and to the extent that it would otherwise fall within the Common Parts) the Lessors shall not be liable under this sub-clause (5)(a) in respect of any lift in the Building."

(c) The addition of words in sub-clause 5(5)(c), so that it reads:

"(c) To insure and keep insured the Building ... against loss or damage by fire explosion storm tempest earthquake aircraft and such other risks (if any) as the Lessors think fit ... and to insure the fixtures and fittings plant and machinery of the Lessors except any lift (which expression shall be taken to include any associated shaft, lift equipment or mechanism, or other associated fixtures, fittings, plant and machinery) against such risks as are usually covered by a Flat Owner's Comprehensive Policy..."

(d) The addition of words in sub-clause 5(5)(i), so that it reads:

"(I) In the Lessors' absolute discretion to maintain and where necessary renew or replace any existing lift and ancillary equipment relating to thereto and maintain insurance against risks of breakdown and third party claims in respect of the lift and lift equipment and mechanism in such amounts and on such terms as the Lessors shall from time to time think fit. Nothing contained in this clause 5(5)(I) shall oblige the Lessors to maintain renew or replace any lift and lift and ancillary equipment relating thereto or maintain any insurance."

(e) The excision of paragraph 14 of the regulations in the Fourth Schedule.

INSPECTION

12. The Tribunal inspected the subject premises before the hearing. They comprise a substantial end-of-terrace house c.1900 close to the seafront in central Hove built on slightly sloping ground. The house is on five stories plus a lower ground floor/basement. The raised ground floor and first floors (where the 'principal' reception rooms of the original house would have been located) have higher ceilings than the remaining floors. The combination of the number of floors, ceiling height, end of terrace aspect, sloping ground and narrow road frontage gives the premises an impression that the building is tall and narrow. There is a separate stair access down to the two flats in the basement (Flats 1 and 2). Access to the remaining eight flats on the upper floors (nos. 3-10) is along a short gravel driveway and path to the side of the building and up a short flight of stairs to a communal doorway. Beyond the doorway is hallway, stairwell and landings on three upper floors. Flat 9 (Mr Neal) is located on the third floor. The Tribunal counted some 68 steps from the hallway to the third floor landing, although it was noted that Mr Pridell (see below) counted these as 69 steps. The Tribunal made a brief inspection of Flat 9, which comprised 3 rooms, a kitchen and bathroom/WC.

13. The lift shaft is located in the centre of the stairwell. On the ground and first to third floors are lift entrances with call buttons. The lift car was stationary on the first floor,

and evidently had not been used for some time. There was a metal lattice gate and timber door to the lift car which was lined with wood. The motor room for the lift was located in the basement down a narrow spiral staircase. This included OTIS lift machinery of some age and a service log giving the last service visit as 1984.

STATUTORY PROVISIONS

14. The jurisdiction to vary leases of residential flats was introduced by Part IV of the Landlord and Tenant Act 1987. Part IV includes three means of varying leases. Under s.35, a party to an individual lease of a flat may apply to vary that lease alone if it *"fails to make satisfactory provision"* for various matters. Section 36 allows a respondent to such an application to apply to vary other leases in the same building consequential upon a section 35 application. Section 37 permits a qualifying majority of parties to leases within a particular building to apply to vary the leases of all the flats in the building. The present application is made under s.37. Section 38 deals with the orders that a Tribunal may make under sections 35-37.

15. The material provisions of s.37 and s.38 are as follows:

> **"37 Application by majority of parties for variation of leases**
> (1) Subject to the following provisions of this section, an application may be made to the 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**
> ...

(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.

...

(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.

...

(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.

...

(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 court considers he is likely to suffer as a result of the variation."

THE APPLICANT'S EVIDENCE

16. The Applicant relied on the evidence of Mr Rees, who is the lessee of Flat 7 and Secretary of the Applicant company. He stated that the lift had not been operational for approximately 15 years and to the best of his knowledge, Mr Neal was the only lessee that had ever suggested it should be brought back into use. On various occasions, the Applicant had "considered the matter of making the lift operational again but because of the significant costs involved a decision on the matter [had] always been deferred." On 26 July 2010, the directors had discussed the lift at the Company AGM and the Applicant had then sought quotations. The quotations were based on advice from a lift consultant John Burchfield (provided by Mr Neal) that the lift should be replaced with a new electro/hydraulic lift system. The prices for

replacement of the lift from each contractor (excluding VAT, CDM costs and contingencies) can be summarised as follows:

(a) Southern Counties Lift Services Ltd £42,920

(b) Ascent Lifts Ltd £26,611

(c) Fenwick Lifts Ltd £68,300 (including building works)

These prices were considered in a tender appraisal from Mr Burchfield dated March 2011 where he concluded that only the third estimate included the necessary building works. The results of the appraisal were presented to the Annual Meeting of the Applicant on 31 October 2011 where Mr Burchfield advised that the lift was "beyond repair". The meeting voted against the proposal to replace the lift because the directors did not want to incur this cost. They wished to be able to make the lift operational at any point in future if the majority of lessees required it, but they wanted to remove the obligation in the leases to repair the lift. Mr Rees stated that after the October 2011 meeting, Mr Neal had gone back to Fenwick Lifts Ltd and sought a further estimate based on refurbishment of the existing lift, as opposed to replacement. Mr Rees referred to that further estimate dated 3 February 2012 which gave a price of £34,200. However, Mr Rees considered that the estimate for repairs (when taken together with the ongoing cost of annual lift maintenance and insurance) was still too high and the Directors did not want to incur those costs. In addition, it was clear that Mr Burchfield would not support the repairing option set out in the further estimate from Fenwick Lifts Ltd: see letter dated 16 February 2012. Mr Rees also stated that Mr Neal did not live at the property and, to the best of Mr Rees' knowledge, he had never lived there. When cross-examined by Mr Pain, Mr Rees accepted that the lift had been operational when Mr Neal bought his flat, that (of the present lessees) Mr Neal was probably the only person who had experience of a working lift at the premises and that this factor had influenced the views of the majority against continuing with the obligation to have a lift. Mr Rees also accepted that there had been a long history of discussions about repairs/replacement of the lift going back many years. Mr Rees stated that initially he had been generally supportive of lift replacement/repairs, subject to financing the cost, and that he had been one of three lessees who had voted to replace the lift at the October 2011 AGM. He also accepted that in practice, four out of ten lessees (i.e. the flats on the basement and ground floors) gained no real benefit from the lift. When questioned by the Tribunal, Mr Rees stated that if the variation was made, there were no proposals to put the lift into working order. This option would require new owners or shareholders of the freeholder. It was unlikely that for the foreseeable future there would be a lift in proper working order.

17. Mr Gray is an experienced chartered surveyor who has frequently given evidence on valuation matters to the LVT. He did not attend the hearing and was not cross-examined. Mr Gray's report states that he was asked to provide valuation advice in respect of compensation payable (if any) under s.38 of the 1987 Act (para 1.1). He further states that he was asked to assess the difference in capital value between Flat

9 "with the benefit of the existing passenger lift being in full operational order and to compare that with the value of the flat without the lift (Para 2.6)." His report assessed compensation by reference to:

(a) Capitalised rental values for the flat. Based on a difference in open market rents at £300 pa, he assessed the difference in value at £2,000.

(b) Leasehold sales of comparable flats with and without lifts in First Avenue. On this basis, he assessed the difference in value at £6,000.

Mr Gray preferred the latter measure, and derived a figure of £6,000 for any s.38 compensation.

THE RESPONDENT'S EVIDENCE

18. In his witness statement, Mr Neal stated that he had owned Flat 9 since 1983. It had been his home for 10 years until he had moved for work reasons. Since then, the flat had been sub-let. He contested the application because the Applicant had failed to maintain or repair the lift and it continued to refuse to do so. Mr Neal stated that now he was retired, he wished to spend "longer periods at the flat". He referred to a letter from his GP, Dr Simon Smith, dated 4 July 2012 which confirmed that he suffered from osteoarthritis that was aggravated by climbing stairs. Mr Neal stated that his purchase of the flat was in part influenced by the fact that there was a lift and he produced a copy of the particulars from the sales agent Fox & Sons which highlighted at the top that the flat was "served by [a] passenger lift". The lift became non-operational in 1988. Between 1988 and 1995, the lessees in the building concentrated on the acquisition of the freehold, sorting out a legacy of historic mismanagement, expensive fire precaution works etc. However, from time to time the issue of the lift had been raised by himself and others. In 1992, the lessee of Flat 10 had offered an interest-free loan to bring the lift back into use, but the Applicant had declined that offer. Estimates for repairing the lift were obtained in 1996 and the matter went before the Applicant's 1997 AGM. Although a number of lessees had supported the work being carried out at the time, the issue was deferred in favour of more pressing capital expenditure. Mr Neal referred to minutes of subsequent meetings where he had raised the issue on numerous occasions. At an EGM in 2009, the minutes of the meeting recorded that "it would be desirable for a functioning lift to be installed" but the meeting considered that the likely expenditure was too high for the project to "proceed in the foreseeable future". In 2010, Mr Neal contacted Mr Burchfield of Lift Consultancy Services and Mr Neal then sought estimates from nine contractors. The estimates were presented to the AGM on 31 October 2011 with Mr Burchfield's tender appraisal. The lessees voted against replacement of the lift, with 3 lessees in favour of replacement, 6 against and 1 absentee. He had subsequently sought the further estimate from Fenwicks referred to above based on repairing the lift rather than replacement. Mr Neal stated that he would suffer substantial prejudice if the lift was not made operational and he could not be adequately compensated for the same.

19. Mr Neal expanded on his statement in evidence to the Tribunal. He explained that if the lift was repaired, he hoped to stop letting out the flat and to return to his former home. His osteoarthritis had no cure. He had now issued a claim in the County Court seeking an order for specific performance of the obligations to repair the lift. As to the further estimate from Fenwick Lifts Ltd dated 3 February 2012, this had been authorised by Mr Neal. In cross-examination, Mr Neal stated that the County Court proceedings had been stayed. It was put to Mr Neal that the only purpose of that claim was to support his case in this Tribunal, but he did not agree: The court proceedings were the only way he could get the lift repaired. Mr Neal stated that he lived with his partner at a property called "High Winds" in Hyde near Fordingbridge. Mr Neal accepted that most flats in the building were let out. He also accepted there had never been a resolution to replace the lift or a "consensus" amongst the lessees to remove the lift. Mr Neal considered that each time the lift had been raised at a meeting, the issue had simply been deferred . Mr Neal was asked about the attitude of Mr Burchfield to the revised proposals from Fenwick Lifts Ltd set out in his letter of 16 February 2012. He stated that Mr Burchfield had now made further comments on the revised proposals by the contractor, but that he had not disclosed these to the Tribunal. Mr Burchfield now concluded that the lift could be repaired.

20. Mr Pridell is an experienced chartered surveyor, who has also frequently given evidence on valuation matters to Tribunals. Again, he did not attend the hearing for cross-examination. Mr Pridell's report stated that he had been asked to assess the diminution in the value of Flat 9, "both capital and rental, resulting from the lift being non-operational": para 2.2. As to the former, he analysed a number of comparables to produce a capital value of £255,000 with a lift, and a value of £248,625 without one. This suggests a difference in capital value of £6,375 on this basis. As to rental values, Mr Pridell considered that the monthly market rent was £1,200 "with an operating lift", and £1,000 "without the lift operating" (para 6.11). Mr Pridell then capitalised this to produce a loss of £20,000 as a result of a non-operational lift.

THE RESPONDENT'S CASE

21. It is convenient to take the submissions made by Mr Pain in response to the application first.

22. Mr Pain suggested that the essence of the application to vary was to (i) remove the obligation to repair the lift and (ii) to remove the right to use the lift. The basis of the application was that the majority of the lessees did not want to incur the costs of providing a lift. The question for the Tribunal was whether the avoidance of cost by the majority overrides the existing right of the dissenting voice to have a lift.

23. Mr Pain raised a preliminary jurisdictional point. He pointed to the variation proposed in the Application itself, which did not follow the wording of the variation sought in paragraph 15 of the Applicant's Statement of Case. The former specified variations in respect of clauses 1(10) and 5(5)(l), but did not deal with any variations to clauses 5(5)(a)(iii), 5(5)(c) or paragraph 14 of the Fourth Schedule. The requirement in s.37(1) was that the variation should be "specified in the application". The requirements in

both subparagraphs of s.37(5) are that a qualifying majority of lessees has consented "to it" and that a specified proportion of lessees are not opposed "to it". In each subparagraph, "it" meant "the application", not any Statement of Case. Given that s.37(5) states that "the application shall only be made" if the conditions are satisfied, it follows that the lessees must have consented to the precise wording of the variation "specified in the application". In this case, the consents to the application by the lessees had been given to the variations specified in the application, not the variations specified in the Statement of Case. Mr Pain accepted that s.38(3) allowed the Tribunal to impose a different wording to the words specified in the application, by making an order "in such manner as is specified in the order". However, it was inappropriate to use this to 'dig the Applicant out of its jurisdictional hole'. Mr Pain accepted that the main variations proposed by the Applicant could still be made, but that they would have to make a fresh application in respect of the remainder (for example, to vary the easement to use the lift).

24. As to the substantive issues, Mr Pain did not suggest that the requirements in s.37 were not met. However, he submitted that if the criterion set out in section 37(3) was met there were two separate considerations under s.38. Firstly, under s.38(3), the LVT "may" make an order varying the leases. This gave the Tribunal a discretion. Secondly, under s.38(6) an order for variation "shall not" be made if (1) the variation would be likely substantially to prejudice any party or person and an award of compensation would not afford him adequate compensation, or (2) for any other reason it would not be reasonable in the circumstances for the variation to be effected.

25. Mr Pain submitted as follows:

    (a) A variation under s.37 should not be granted if a lessor has failed to comply with its existing obligations to repair and maintain a facility provided to the tenants, and the variation is simply a means of absolving the landlord those obligations in future. In the present application, the purpose was to "let the landlord off the hook" of its repairing obligations.

    (b) Such an application should only be granted if the facility provided to the lessees is either no longer needed or has been superseded by an alternative facility. For example, see the LVT decision in ***Green v Kemplay-Amow and Amow*** (2007) LON/00AG/LVL/2007/2004.

    (c) The power should not be used to extinguish a property right currently enjoyed or capable of being enjoyed by some of the lessees. The application in this case extinguished a property right currently enjoyed or capable of being enjoyed by some of the lessees.

    (d) The fact that the requisite majority of lessees are in favour of a variation simply confers jurisdiction on the LVT and cannot of itself be sufficient to justify the removal of such a right; otherwise every lessee's contractual rights would be at the mercy of an application to vary by a sufficient number of other lessees.

(e) The power to compensate a tenant for loss suffered as a result of a variation cannot of itself be sufficient justification for granting an application. First, the order cannot be made if for any other reason it would be unreasonable to do so. Secondly, the discretion to grant the application for variation remains.

(f) Mr Neal bought Flat 9 with a right to use the lift, and the benefit of the landlord's covenant to maintain repair and renew the same. His decision to purchase the flat was affected by the same.

(g) The Applicant has failed to take steps to raise sufficient funds from leaseholders to pay for the necessary repairs or replacement of the Lift over time.

(h) Mr Neal has made persistent attempts to persuade the Applicant to agree to take steps to repair and/or renew the lift. He has supplied detailed quotations from prospective contractors, and engaged the services of a lift consultant.

(i) Repairs and/or replacement of the lift would be to the benefit of all leaseholders above the ground floor.

26. On the exercise of discretion, Mr Pain further submitted that s.38(6)(a)(i) made it clear that one could properly look at the individual circumstances of the lessees. He developed an argument that the Tribunal must exercise its discretion compatibly with Article 1 of the First Protocol to the European Convention on Human Rights ("the Convention"): ***Megarry & Wade, The Law of Real Property,*** 8th Edition, at 1-023. This article provides that no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law. Any deprivation must also be a reasonably necessary and proportionate means of achieving a legitimate objective: *ibid.,* at 1-028. In the current case, granting the Application would lead to the loss of Mr Neal's existing right of way over the lift and a contractual right to have the same maintained and repaired: *ibid.,* at 1-025. While the mechanism for deprivation is provided by the 1987 Act, Mr Pain submitted that the proposed variation is not in the public interest. The purpose of the same (i.e. avoiding the costs of repair) is not a legitimate objective, and the removal of the right of way and repair (and thus the use of the lift) is neither reasonably necessary nor a proportionate means of achieving the same.

27. Finally, Mr Pain submitted that the Tribunal must exercise its discretion with regard to the provisions of the Equality Act 2010. He developed an extensive argument as follows:

(a) Mr Neal was "disabled" within the meaning of the 2010 Act.

(b) The 2010 Act imposes a duty on the manager of premises not to discriminate (whether directly or indirectly) against a disabled person either (i) in the way in which that person is allowed or not allowed to use a benefit or facility, or (ii) by subjecting him to a detriment: section 35(1) of the 2010 Act. Indirect discrimination occurs if a person applies a provision, criteria or practice that is discriminatory in relation to another's disability (i.e. puts a disabled person

at a particular disadvantage) and it cannot be shown to be a proportionate means of achieving a legitimate end: section 19 of the 2010 Act.

(c) The 2010 Act also imposes a duty on the controller of let premises to take reasonable steps to avoid substantial disadvantage to a disabled person in relation to their enjoyment of the premises or their use of a benefit or facility arising out of the Lease: sections 20 to 21, and 36, and paragraph 2 of Schedule 4 to the 2010 Act.

(d) The Applicant's current failure to repair the Lift gives rise to a cause of action in favour of Mr Neal against the Applicant.

(e) Further, section 142 of the 2010 Act provides that a contractual provision is unenforceable as against a person in so far as it constitutes, promotes or provides for treatment that is prohibited by the 2010 Act. Section 143 of the 2010 Act gives the county court jurisdiction to remove or modify any such unenforceable term. As such, any term as varied may be unenforceable.

(f) Alternatively, it would be wrong for the LVT to exercise its discretion to allow the variation. The Equality Act 2010 is designed to provide disabled persons with remedies enabling them to make use of let property. The LVT should not grant a variation which would have the effect of making the flats unavailable to disabled tenants.

(g) In short, one should not shy away from the proposition that the 2010 Act applied to variations of leases. Either the variations proposed in the present Application are impermissible under the Act, or the Act should provide guidance to the exercise of discretion under s.38(3).

28. Mr Pain made only one specific submission in respect of s.38(6). He submitted that, on the evidence Mr Neal intends to make use of Flat 9 personally in his retirement. His ability to do so would be substantially affected by a failure to repair or renew the lift. Such a loss cannot be measured in purely financial terms: the diminution in the value of Flat 9, or the loss or rental income would not be sufficient to compensate him for the loss of amenity.

29. Finally, in the event that the LVT determined that the proposed variation should be made, Mr Pain sought an order for the Applicant to pay compensation to Mr Neal. He relied on the report of Mr Pridell and submitted that any variation would cause both a loss in value and a loss of amenity. Loss of rental value was closely related to loss of amenity, and both heads of compensation should be allowed. Some caution should also be exercised with Mr Gray's evidence since it had been provided very late indeed. Mr Neal should therefore be entitled to both heads of loss in Mr Pridell's report, namely £6,000 and £20,000.

THE APPLICANT'S SUBMISSIONS

30. On the jurisdiction point, Mr Demachkie submitted that the objection was a pointless one. The application dated 21 May 2012 specified variations that removed both the

principal obligations in issue, namely the obligations to maintain the lift and the easement to use the lift. Both were covered by the removal of the reference to the word "passenger lifts" from the definition of "the Common Parts" in clause 1(10). The variations set out in the Statement of Case simply "crossed the Ts and dotted the Is". If necessary, the Applicant would revert to the wording set out in the application itself. However, the Tribunal was not restricted to the wording of the proposed amendments set out in the application itself. Section 38(8) supported a more liberal approach to interpreting s.37(1). There was little point in permitting the Tribunal to order the parties to vary a lease in a particular "manner" if the LVT was restricted to the words set out in the application.

31. As far as the substantive issues are concerned, Mr Demachkie submitted that (contrary to ss.35 and 36 of the Act), s.37 provides a quasi-consensual method for the majority of parties to require a variation of their leases. In the instant case, the requirements of s.37 were clearly satisfied. More than eight leases were to be varied. Of the eleven parties to those leases (i.e. the lessees of ten flats and the freeholder), the application was opposed by only one. This was not more than 10%. Over 75% of the parties to those leases consented to the application. The basis on which the application is made is (a) to remove the lessees' right to use the lift and (b) to remove the Lessors' absolute obligation to maintain the lift. Plainly these objects can only be achieved if all the leases are similarly varied. Mr Demachkie submitted that each part of s.37 was satisfied and that the only potential issue was section 38 LTA 1987.

32. Mr Demachkie did not dissent from Mr Pain's analysis of s.38. However, turning to the grounds of opposition, he submitted as follows:
    (a) The lift has not been in use for over 24 years. Mr Neal has occupied the Property on occasion over this time without problem.
    (b) All of the other lessees (and the freeholder) desire the changes to be made.
    (c) It must also be relevant that the Applicant landlord is a lessee-owned management company. This is not an example of a landlord imposing its will on tenants; this is a lessee-owned company taking a democratic decision to act.
    (d) Mr Neal has been afforded every opportunity to obtain evidence as to the cost of repairing the lift and, following consideration of this evidence, the majority of the parties persist in their desire to vary the lease. This was a well informed and democratic decision based on professional advice.
    (e) There was a cost-benefit analysis to be made. The tender appraisal made by Mr Burchfield suggested that only the Fenwick Lifts Ltd estimate was reliable, and the total cost of this option for replacement (including VAT and other costs) would exceed £80,000. The revised quotation from Fenwick dated 3 February 2012 was not supported by Mr Burchfield in his letter of 16 February 2012. Apart from the capital cost of replacement, there were other distinct financial costs (namely the annual service fees, increased insurance premiums and the - not insignificant - cost of repairing faults in the lift as and when they arise). In return, the benefit of the ability to use the lift dealt with a problem which was of mere nuisance/inconvenience.
    (f) The motivation behind the application is irrelevant. The question is whether the

Applicant satisfies s.37 (which it does). The very purpose of s.37 is to allow tribunals to vary leases in circumstances where a minority object.

33. Mr Demachkie accepted that the Tribunal could take into account the effect on one individual respondent such as Mr Neal. Although Mr Neal has obtained evidence to show that he has osteoarthritis, the letter from the GP provides no detail as to the extent of this condition, or to what extent walking up stairs will advance the condition. Without this detail, it is impossible to ascertain whether the variation to the lease would cause substantial prejudice.

    a. In any event, it is apparent that Mr Neal does not currently reside at the premises and, therefore has a choice as to whether he occupies the flat or not. This is not a case in which an elderly resident is faced with an application to remove a lift on which they rely on a daily basis. This is an application relating to a lift which has not worked for a quarter of a century, and which nobody currently needs, or requires, to access their flat.

    b. In addition, in spite of Mr Neal's bold assertion that that he cannot be compensated for this loss of a lift, his own expert valuation evidence provides just such a figure. The reality is that, even if there is a substantial prejudice to Mr Neal, this loss is readily capable of quantification.

34. As to section 38(6), Mr Demachkie accepted that some prejudice was caused by the variation. However, it was not any "substantial" prejudice and in any event such prejudice was capable of being compensated for in monetary terms. In any event, the possibility still remains that the lift might be repaired in future - even if the variation was made.

35. Mr Demachkie referred to the Human Rights Act arguments (which had not been raised in any Statement of Case). This is a not a case of depriving anyone of their property, it was a case of competing property rights. In any event, s.38(7) provided a machinery for compensation to be paid for loss of their rights. Any interference with property rights was proportionate. The logic of Mr Neal's submission is that one could never vary a lease under s.37 of the Act which deprived a lessee of an existing right.

36. As to the Equality Act, the letter from the GP was not sufficient to satisfy the detailed definition of a "disability" in s.6(1). There had to be a "substantial and long term adverse effect on P's ability to carry out day-to-day activities". The definition is extended by para 8 of Sch 1 to the Act which deals with "progressive conditions". However, this did not cover the situation where a condition was likely to have a substantial adverse effect in future. It was also important that Mr Neal did not at present occupy the flat. Finally, the duty not to discriminate in the management of premises in s.35 referred to discrimination in the use of any "facility". There was no discrimination in the use of the lift. No-one, able or disabled, could use the lift. In any event, the remedies under the Act lay in the County Court, not the LVT.

37. As for compensation, Mr Demachkie submitted that assuming the Tribunal orders a

variation:

(a) Mr Pridell provided expert valuation evidence to support a claim for compensation. This evidence values the diminution in value to the flat on a capital and loss of rent basis.

(b) On the basis of the evidence from Mr Neal that he himself intends to occupy the flat as he has now retired, the loss of rent calculation is unhelpful. The more appropriate figure in the circumstances is the capital figure, indicating a 2.5% discount to the price of the flat without the benefit of a working lift.

(c) The difficulties in utilising a loss of rent assessment is further emphasised by the fact that the Applicant's expert, Mr Gray, has assessed a drastically different figure when considering the loss of rent assessment (namely £2,000 as opposed to £20,000).

(d) Although the method of calculating the loss of rent figure differs between the experts, the substantive reason for the large discrepancy is the assessment of the annual rent difference between Mr Neal's flat with and without a lift. Neither expert is able to point to comparables or anything other than hearsay evidence to support their assertions regarding rental figures, both of whom merely refer to 'discussions with local agents'.

(e) In the circumstances, if compensation is relevant, the appropriate assessment is the diminution to the capital value of the flat; both experts agree that this figure is in the region of £6,000-odd. From this figure, one would have to deduct Mr Neal's liability to reinstate or repair the lift and his ongoing contribution towards cost of maintenance.

38. Both experts were in any event "guesstimating" the loss incurred. They also answered the wrong question - the issue was not the difference in value of a Flat with no lift and one with a lift, but rather the difference in value between a Flat with a right to a working lift but where there had been no functioning lift for 20 years and a lease with no right to a lift but the possibility of there being a lift at some time in future. In any event, it would be necessary to deduct the cost of achieving any benefit from the lift - namely the obligation to pay a contribution to the cost of installing one. There was unlikely to be any loss in value at all.

THE TRIBUNAL'S DECISION

39. Jurisdiction. The Tribunal considers that Mr Pain's construction of s.37(1) is too narrow and that the Tribunal may properly order variations in a different form to those set out in the application. The main reason for this is that s.37(1) does not require the application itself to specify "the terms" of any proposed variation. Instead, s.37(1) simply requires the application to specify "the manner" in which the leases should be varied. The word "manner" in s.37(1) can be contrasted with the use of the word "terms" in the following subsection. Had the draftsman intended any requirement for the application to specify "terms" of the proposed variation, he would have used the word "terms" in s.37(1) rather than the general word "manner". This more liberal interpretation of s.37(1) is supported by the use of the same word "manner" in subsections 38(3) and 38(9). Both these subsections permit the Tribunal to depart

from the specific wording used in the application when it gives effect to a variation order.

40. If the Tribunal adopts the more liberal interpretation of s.37(1), the only question is whether the application in this instance did properly specify the manner in which the variations were to be made. The Tribunal accepts Mr Demachkie's submissions on the point. The application specifies the two main variations to the lease that are relied upon at the hearing, namely a removal of the obligation to maintain a lift, and a removal of Mr Neal's right to use such a lift. The precise wording used in the Statement of Case simply gives more detail of the precise wording of the proposed variations.

41. As to the remaining criteria in s.37, the Tribunal is satisfied that they are met in this matter. Indeed, there is no argument to the contrary.

42. The only issue is therefore whether an order should be made under s.38. Neither party relied on any guidance by the Upper Tribunal/Lands Tribunal or any court decisions as to the approach to be adopted in respect of s.38. Mr Pain suggested that there was a two stage test, namely (i) the exercise of a discretion under s.38(3) and (ii) consideration of the limitations in s.38(6). The Applicant did not dissent from this approach, although the submissions by both parties did not always clearly distinguish between the arguments under s.38(3) and s.38(6).

43. The Tribunal has considered the following factors when exercising its discretion under s.38(3):

    (a) The fact that all but one of the lessees support the application is a factor in favour of allowing the variation. This is not a case where there is significant number of lessees who are opposed. In addition, it is noticeable that the supporters of the variation includes lessees of other flats on the top two floors, who one might otherwise expect to support the provision of a working lift. However, the weight to be attached to this factor is not determinative of thw application. As Mr Pain points out, the fact that the requisite majority of lessees are in favour of a variation simply confers jurisdiction on the LVT under s.37(6) and the majority cannot of itself be sufficient to justify the variation. The discretion must require some other consideration to be involved. The weight to be attached to this factor is also slightly lessened by the evidence that other lessees (including Mr Rees) have supported replacement of the lift in the past.

    (b) The Tribunal attaches no weight to the fact that the Applicant landlord is a lessee-owned management company. In many situations where a Tribunal has to exercise a discretion, this might well be a material factor. However, in this case the majority of the lessees support the application (as they must under s.37(6)), so it is hardly surprising that the Applicant, which is controlled by the lessees, also supports the application. The Applicant's status as a lessee-owned management company therefore adds nothing in this case.

(c) The Tribunal attaches significant weight to the fact that the Applicant has been in clear breach of its obligations to repair and maintain a lift for a period of over 20 years. over very many years. Indeed, the Applicant did not advance any argument at the hearing that it had not been in breach of covenants in the lease. As Mr Pain stressed, the proposal is, in effect, to absolve the Applicant from liability for future breaches. Although this cannot be elevated to any broad principle (as Mr Pain suggested), this is a material factor which goes to the Tribunal's discretion. Against this, the Applicant suggests that it has considered the options to replace the lift carefully and fairly over a period of time. However, that is not the same as complying with the repairing covenants in the leases relating to the lift.

(d) Allied to this is the clear evidence that the Applicant has not prepared the ground for major expenditure to replace the lift. Clause 5(5)(o) of the lease permits a sinking fund to cover major works. The Applicant could have used this provision to enable it to comply with the repairing obligations and spread the contributions to this cost over the years. It has chosen not to do, and the need for a variation is to an extent also a result of this failure.

(e) One of the principal arguments in favour of the variation is that the lift has not been in use for at least 25 years, and it is said that the variation therefore seeks to alter the leases to reflect actual practice. However, the weight to be attached to this consideration is lessened by the evidence that Mr Neal and others had raised the issue of the lift over a period of very many years and that a decision had been deferred on grounds of cost. The evidence that the lift issue had been raised in 1992, 1996/7 and 2009 was not challenged.

(f) The right to a working lift, as set out in the leases, is an important property right currently enjoyed or capable of being enjoyed by some of the lessees. However, the Tribunal does not consider that Article 1 of Protocol 1 to the European Convention on Human Rights is engaged in this case. As Mr Demachkie submits, s.37 and s.38 of the 1987 Act involves "control [of] the use of property" rather than enjoyment of the Flat itself, and the Act provides for compensation to be paid for loss of any existing rights. This factor does not therefore affect the exercise of the Tribunal's discretion.

(g) The Tribunal attaches significant weight to the nature of the building. This is, by any analysis, a tall building that would (if built today) obviously be served by a lift. The property appears "tall and narrow" because of the high ceilings on lower floors. The third floor is accessed by 68 or 69 steps. This is plainly and obviously inconvenient to users - whether the elderly , the disabled and families with pushchairs. Indeed, access to the upper floors of such a building with stairs would be difficult for able-bodied users such as removal firms.

(h) The Tribunal is not satisfied that the Equalities Act 2010 strictly applies to the exercise of its discretion under s.38(1) for the reasons given by Mr Demachkie. This is not a separate argument in itself. However, the disability (or prospective

disability) of Mr Neal is typical of characteristics of the type of user who would be seriously affected by the suggested variation. The Tribunal therefore takes into account the obligations in the Act as providing some guidance on exercising its discretion. The variation proposes the removal of an existing right to have a working lift, and this clearly affects the ability of disabled persons as a class to use the upper floors of a building in a way which it does not affect the able-bodied.

(i) It is also a material consideration that the proposal is to remove an existing right, rather than to create a new one. The Tribunal does not accept that there is necessarily any general "principle" to this effect to be derived from previous LVT decisions such as ***Green v Amow*** as suggested by Mr Pain. However, in exercising its discretion, the Tribunal takes into account that Lessees have purchased their flats with a right to a working lift. As recently as 2011, each of the leases was re-granted with precisely the same right to a new lift. Those rights should not be readily extinguished.

(j) The other significant consideration is the cost-benefit analysis urged upon the Tribunal by the Applicant. The Tribunal considers that the potential benefits for the majority of lessees are purely monetary (the motivation for the proposed variation was not really disputed). That can be balanced against the fact that those lessees and their predecessors in title have incurred considerable savings over a 30 years period in not contributing towards the cost of repairing, maintaining and insuring the lifts. If the cost of not varying the leases will be a significant one, that can be set against the (probably much more significant saving) over the years of not replacing the lift at an earlier stage and paying for its ongoing costs. By contrast, the prejudice to the minority of lessees on the upper floors is not merely of nuisance value. It is real and significant for the reasons set out above. The cost benefit analysis approach favours the exercise of the Tribunal's discretion against making the variations.

(k) The Tribunal attaches no weight to the fact that the proposed variations do not strictly speaking rule out the possibility that the lift might be brought into service at some future date. Mr Rees quite properly accepted that if the variations were made, the prospect of the lift being brought into use again was remote.

44. Taking all these considerations into account, the Tribunal is satisfied that it should not exercise its discretion under s.38(3) to make the variations proposed by the Applicant.

45. In the light of the above, it is not strictly necessary for the Tribunal to deal with the remaining issues, namely the limitations in s.38(6) and whether compensation should be paid under s.38(10). However, in deference to the arguments advanced by the parties at the hearing, and in case the matter proceeds further, the Tribunal will briefly set out its conclusions on these separate issues.

46. The Tribunal is satisfied that the proposed variation would "substantially ... prejudice" certain respondents to the application under s.38(6)(a). The Respondents who are prejudiced are the lessees of flats whose entrances are accessed from the second and third floors of the building, and who include Mr Neal at Flat 9. The prejudice comprises a significant limitation of their convenient access to the flats. However, the Tribunal rejects Mr Pain's submission that such prejudice cannot be compensated for by an award under s.38(6) of the Act. Both experts in this case were able to quantify compensation "loss or disadvantage" under s.38(10) in their reports. It is noticeable that Mr Pridell does not suggest in his report that there was any loss he was unable to cover in his compensation calculations. In short, the limitation in s.38(6)(a) is not met.

47. As to s.38(6)(b), the Tribunal must consider whether there is a reason (other than prejudice to a respondent) that makes it unreasonable in the circumstances not to effect the variation. The Tribunal considers that the circumstances of the variation provide a good reason for not varying the leases. The application only arises because the Applicant has failed to comply with clear obligations under the leases of the flats to repair and maintain the lift, and it has failed to establish a sinking fund to pay for the lift replacement. The circumstances of this case are perhaps unusual, but the variation would, in the Tribunal's view simply condone a longstanding breach of covenant, and that is a good reason not to allow the variation.

48. Finally, there is the question of compensation. If the variation were allowed, the conditions of s.38(10) would be met in respect of any lessee who suffers loss or disadvantage as a result of the variation. Compensation would not necessarily be limited to Mr Neal, since other lessees of flats on the upper floors would suffer "loss or disadvantage" - although Mr Neal is of course the only party seeking compensation. The difficulty with the valuation evidence in this case is that neither expert has sought to value the "loss or disadvantage" which arises from the variation. Both experts have valued Flat 9 by considering the difference between Flat 9 with and without a lift. By contrast, the variation proposed in this matter would change Flat 9 from a flat with an old redundant lift (but with the contractual right to a working lift) to a flat with a redundant lift (with no right to a working lift, but with the remote possibility of having one in future). The *right* to a working lift may or may not equate to the *present enjoyment* of a working lift in valuation terms, but neither expert has addressed the point. Had the Tribunal made any award of compensation, it would have required further valuation evidence dealing covering this issue.

CONCLUSION

49. For the reasons given above, the Tribunal does not make the variations proposed in the Statement of Case.

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MA Loveday BA(Hons) MClArb

Chairman

2 December 2012

SCHEDULE: RESPONDENTS			
Flat	**Lessee**	**Lease**	**Date consent**
1	Julie Bunce	9 March 2011	26 June 2012
2	Jeremy David Parr	2 June 2011	5 July 2012
3	Ian Harold Holland	6 April 2011	29 May 2012
4	Jane Adele Fear	6 January 2011	10 June 2012
	Adrian Tristan Downer	10 January 2011	25 August 2012
5	Richard Moore	26 January 2011	29 May 2012
	Kate Baker	7 January 2011	29 May 2012
6	Robert Henry Hickson	26 January 2011	5 June 2012
7	Clarke Rees	7 January 2011	9 June 2012
8	Katherine Anne Shrubb	25 February 2011	30 May 2012
9	Brian Keith Roy Neal	2 February 2011	
10	Darren John McCauley	8 February 2011	13 June 2012