



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

**Case References** : **MAN/00CE/LVL/2015/0005**

**Property** : **Murton Gardens 29-55 (odd) Beckett Drive,  
Osballdwick, York YO19 5RX**

**Applicant** : **(1) Murton Gardens at Osballdwick  
Management Company Limited.  
(2) Premier Property Management and  
Maintenance Limited**

**Applicants  
Representative** : **Brethertons LLP**

**Respondents** : **Various Leaseholder**

**Type of Application** : **Landlord & Tenant Act 1987 – Section 35**

**Tribunal Members** : **Laurence Bennett (Tribunal Judge)  
Jonathan Holbrook (Tribunal Judge)**

**Date of determination** :

**Date of Decision** : **24<sup>th</sup> June 2015**

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DECISION

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## **Application**

1. Murton Gardens at Osbaldwick Management Company Limited and Premier Property Management and Maintenance Limited apply for an order under Section 35 of the Landlord & Tenant Act 1987 (the Act) for an order for varying the Leases of the Apartments at the Property. The Respondents are the owners of the Leasehold interest / Leases.
2. The application was received by the Tribunal on 25<sup>th</sup> March 2015. By directions dated 28<sup>th</sup> April 2015 a Tribunal Judge directed that in the absence of a request by either party the application would be determined on the papers. The Tribunal has not received a request for a hearing and the application has been determined on the papers.

## **The Property**

3. The Property is purpose built blocks of flats let on Residential Leases for a term of 150 years commencing 1<sup>st</sup> January 2006. The Applicant is the owner of the Leasehold interest.

## **Evidence and Submissions**

4. The Leases of the apartments are in common form. A sample Lease has been provided.
5. The Applicant's submissions refer to the Third Schedule of the Leases containing the Tenant's Covenant to pay a maintenance charge. The Lease contains a definition of the maintenance charge and provides that the sum payable is a proportion applicable to the individual property. Part 3 of the Sixth Schedule should contain the percentage proportion, however, figures have not been included.
6. The Applicant submits that the stated proportion should be an equal part of the total maintenance charge payable by all Leaseholders as has been collected in practice. This has not been challenged.
7. The Applicants apply for a variation of the Lease under Section 35 of the Act to include the proportions.

## **The Law**

8. **Section 35 Landlord and Tenant Act 1987. Application by party to Lease for variation of Lease**

(1) Any party to a long Lease of a flat may make an application to the court for an order varying the Lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the Lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

(a) the repair or maintenance of—

(i) the flat in question, or

(ii) the building containing the flat, or

(iii) any land or building which is let to the tenant under the Lease or in respect of which rights are conferred on him under it;

- (b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);
- (c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;
- (d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);
- (e) the recovery by one party to the Lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;
- (f) the computation of a service charge payable under the Lease.
- (g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—

- (a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and
- (b) other factors relating to the condition of any such common parts.

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a Lease, whether the Lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(4) For the purposes of subsection (2)(f) a Lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

- (a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and
- (b) other tenants of the landlord are also liable under their Leases to pay by way of service charges proportions of any such expenditure; and
- (c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

(5) Rules of court shall make provision—

- (a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and
- (b) for enabling persons served with any such notice to be joined as parties to the proceedings.

(6) For the purposes of this Part a long Lease shall not be regarded as a long Lease of a flat if—

- (a) the demised premises consist of or include three or more flats contained in the same building; or
- (b) the Lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) In this section “service charge” has the meaning given by section 18(1) of the 1985 Act.

9. **Section 36 Landlord and Tenant Act 1987. Application by respondent for variation of other Leases**

Where an application ("the original application") is made under section 35 by any party to a Lease, any other party to the Lease may make an application to the court asking it, in the event of its deciding to make an order effecting any variation of the Lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other Leases as are specified in the application.

Any Lease so specified—

(a) must be a long Lease of a flat under which the landlord is the same person as the landlord under the Lease specified in the original application; but

(b) need not be a Lease of a flat which is in the same building as the flat let under that Lease, nor a Lease drafted in terms identical to those of that Lease.

(3) The grounds on which an application may be made under this section are—

(a) that each of the Leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application; and

(b) that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons who are parties to the Leases specified in that application, to have all of the Leases in question (that is to say, the ones specified in that application together with the one specified in the original application) varied to the same effect.

10. **Section 37 Landlord and Tenant Act 1987. Application by majority of parties for variation of Leases**

(1) Subject to the following provisions of this section, an application may be made to the court in respect of two or more Leases for an order varying each of those Leases in such manner as is specified in the application.

(2) Those Leases must be long Leases of flats under which the landlord is the same person, but they need not be Leases of flats which are in the same building, nor Leases which are drafted in identical terms.

(3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the Leases are varied to the same effect.

(4) An application under this section in respect of any Leases may be made by the landlord or any of the tenants under the Leases.

(5) Any such application shall only be made if—

(a) in a case where the application is in respect of less than nine Leases, all, or all but one, of the parties concerned consent to it; or

(b) in a case where the application is in respect of more than eight Leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.

(6) For the purposes of subsection (5)—

(a) in the case of each Lease in respect of which the application is made, the tenant under the Lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such Leases shall be regarded as constituting a corresponding number of the parties concerned); and

(b) the landlord shall also constitute one of the parties concerned.

11. **Section 38 Landlord and Tenant Act 1987. Orders by the court varying Leases**

(1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the court, the court may (subject to subsections (6) and (7)) make an order varying the Lease specified in the application in such manner as is specified in the order.

(2) If—(a)

an application under section 36 was made in connection with that application, and (b) the grounds set out in subsection (3) of that section are established to the satisfaction of the court with respect to the Leases specified in the application under section 36,

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

(3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the court with respect to the Leases specified in the application, the court may (subject to subsections (6) and (7)) make an order varying each of those Leases in such manner as is specified in the order.

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the court thinks fit.

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

(6) The court shall not make an order under this section effecting any variation of a Lease if it appears to the court—

(a) that the variation would be likely substantially to prejudice—

(i) any respondent to the application, or

(ii) any person who is not a party to the application,

and that an award under subsection (10) would not afford him adequate compensation, or

(b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

(7) The court shall not, on an application relating to the provision to be made by a Lease with respect to insurance, make an order under this section effecting any variation of the Lease—

(a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or

(b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or

(c) which, in a case where the Lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.

(8) The court may, instead of making an order varying a Lease in such manner as is specified in the order, make an order directing the parties to the Lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a Lease or to any variation effected by an order shall include a reference to an order which directs the parties to a Lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.

(9)The court may by order direct that a memorandum of any variation of a Lease effected by an order under this section shall be endorsed on such documents as are specified in the order.

(10)Where the court makes an order under this section varying a Lease the court may, if it thinks fit, make an order providing for any party to the Lease to pay, to any other party to the Lease or to any other person, compensation in respect of any loss or disadvantage that the court considers he is likely to suffer as a result of the variation.

12. **Section 39 Landlord and Tenant Act 1987. Effect of orders varying Leases: applications by third parties**

(1)Any variation effected by an order under section 38 shall be binding not only on the parties to the Lease for the time being but also on other persons (including any predecessors in title of those parties), whether or not they were parties to the proceedings in which the order was made or were served with a notice by virtue of section 35(5).

(2)Without prejudice to the generality of subsection (1), any variation effected by any such order shall be binding on any surety who has guaranteed the performance of any obligation varied by the order; and the surety shall accordingly be taken to have guaranteed the performance of that obligation as so varied.

(3)Where any such order has been made and a person was, by virtue of section 35(5), required to be served with a notice relating to the proceedings in which it was made, but he was not so served, he may—

(a)bring an action for damages for breach of statutory duty against the person by whom any such notice was so required to be served in respect of that person's failure to serve it;

(b)apply to the court for the cancellation or modification of the variation in question.

(4)The court may, on an application under subsection (3)(b) with respect to any variation of a Lease—

(a)by order cancel that variation or modify it in such manner as is specified in the order, or

(b)make such an order as is mentioned in section 38(10) in favour of the person making the application, as it thinks fit.

(5)Where a variation is cancelled or modified under paragraph (a) of subsection (4)—

(a)the cancellation or modification shall take effect as from the date of the making of the order under that paragraph or as from such later date as may be specified in the order, and

(b)the court may by order direct that a memorandum of the cancellation or modification shall be endorsed on such documents as are specified in the order; and, in a case where a variation is so modified, subsections (1) and (2) above shall, as from the date when the modification takes effect, apply to the variation as modified.

## **Further Submissions**

13. The Applicant submits that the absence of maintenance charge percentages constitutes a failure to make satisfactory provision under Section 35(2)(e) for recovery of expenditure. The Applicant also refers to Upper Tribunal decision *Brickfield Properties Limited v Botten* [2013] UKUT 133 (LC) which supports the view that the variation should take place retrospectively and that no substantial prejudice would occur within the meaning of Section 38(6) of the Act.
14. The Applicant has provided a draft of the order sought

## **Tribunal's Conclusions**

15. We have considered the grounds set out in the application form and the written submissions and documents provided by the Applicant. We note the absence of a response or disagreement by a Respondent.
16. In the light of the documents and submissions we accept that the Residential Leases have failed to make satisfactory provision for recovery by the Lessor from the Lessees in respect of expenditure incurred under the maintenance obligations.
17. Although not specifically pleaded we accept that the object of the variation requested cannot be achieved unless all the Leases are varied; that is equal payment proportions cannot be achieved unless all relevant Leases at the Property are varied to that effect.
18. Following our findings we conclude that the order proposed by the Applicant should be made in the form submitted save that we consider the Tribunal does not have authority to order the Chief Land Registrar to make entries in the Register. We have substituted a requirement that the parties apply to the Chief Land Registrar to that intent.

## **Order**

19. The Tribunal orders that Leases of the apartments at the Property shall be varied in the terms of the order set out in the Schedule to this decision.