

12386



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

Case Reference : **LON/00AH/LVT/2017/0003**

Property : **Various flats in Park Hill Court,
Addiscombe Road, CR0 5PJ**

Applicant : **John Peter Phelps and Mary
Patricia Phelps and 39 other
leaseholders**

Representative : **SLC Solicitors**

Respondent : **Binyan Finance S. A and the
leaseholders of flats 5, 15, 22, 23,
28, 32, 44 and 47**

Representative : **None**

Type of Application : **To vary two or more leases by a
majority**

Tribunal Members : **PMJ Casey MRICS**

**Date and venue of
Hearing** : **19 July 2017
10 Alfred Place, London WC1E 7LR**

Date of Decision : **21 August 2017**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that it is reasonable to vary the leases of numbers 1-48 Park Hill Court in the manner set out in the application. The Applicants are required to confirm to the tribunal within 14 days of the date they receive this decision whether they wish to effect the variations by way of a tribunal order under the provisions of section 38(3) or section 38(8) and will provide the tribunal with a draft of the order sought together with copies of the Schedules of Variations to be referred to in the order.
- (2) The tribunal makes the determinations as set out under the various headings in this decision

The application

1. The applicants seek to vary 48 leases pursuant to section 37 of the Landlord and Tenant Act 1987 (the Act), the application to the tribunal being dated 26 April 2017.
2. Directions were issued by the tribunal on 16 May 2017 which identified the matter as suitable for determination by written representations and none of the parties sought an oral hearing. The tribunal further identified the issues to be determined as: –

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 Act?

Is there a sufficient majority for an application under section 37 of the Act?

If it does make an order varying the leases, should the tribunal order any person to pay compensation to any other person?

Background

3. Park Hill Court is a purpose built block of 49 flats one of which is for a porter. The building is now managed by a tenant run “no fault” management company, Park Hill court (Croydon) RTM Company Limited, though it is not clear from the papers how many of the applicants are members of the RTM. There are apparently four different forms of lease on which the various flats are let and the lack of

uniformity makes management of the block more complex and difficult than it would be if the leases were all in the same form which is what the application to vary the existing leases seeks to achieve.

4. The variations sought concern:-
- (a) Reserve Fund – some leases make provision for this, others do not and the applicants want all the leases to provide for a reserve fund;
 - (b) Calculation of the Service Charge – some of the leases allow for payment in advance service charges to be estimated, the rest limited the in advance service charge to the amount paid in the previous year and what is sought is for all leases to allow for in advance sums to be based on an estimate;
 - (c) Windows and doors – some leases make window frames and doors a tenant’s liability, most make them repairable through the service charge and the variation sought is to make the repair of all service chargeable.
 - (d) Year end date – the date on which the service charge year ends varies between the leases with some specifying 25 December others 31 December and the latter is sought as a common date for all; and
 - (e) Interim payment dates – again these vary with some leases specifying 25 March and 29 September, the others 1 January and 1 July and this latter is sought for all.

The applicants’ case

- 5. In response to the Directions the applicants’ representative, SLC solicitors, provided a statement of case in which it sought to answer the questions posed by the tribunal and further explained the variations sought.
- 6. In the applicants’ submission the object sought which is uniformity across the block in respect of the five issues listed at 4. above can only be achieved by altering all of the leases so that common service charge provisions apply to all in the interests of fairness and good estate management practice.
- 7. The proposed variations are, they further submit, within the contemplation of sections 37 and 38 of the Act in that:-

- (a) The leases are all long leases of flats under which the landlord is the same person (Section 37(2));
 - (b) The object cannot be satisfactorily achieved without all the leases being varied to the same effect (section 37(3));
 - (c) The variations is not likely to substantially prejudice any respondent to the application or anyone who is not a party to the application (section 38(6));
 - (d) That any prejudice so caused is capable of being compensated (section 38(6)(a));
 - (e) That it is reasonable in the circumstances for the variation to be effected and there is no reason that would make the variation unreasonable (section 38(6)(b); and
 - (f) The application does not relate to provision for insurance (section 38(7).
8. So far as the majority required under sections 37(5) and (6) of the Act is concerned 40 out of 48 lessees in the block are parties to the application and no objections have been received from the other eight. The landlord has agreed in principle to the variation subject to the variations being identified on an individual basis (letter from Bude Storz solicitors at page 106 of the bundle). Thus more than 75% of the parties consent to the application and none are opposed.
9. No party to the variation will suffer any loss or disadvantage as a result of the variation sought and compensation it is submitted is not relevant. If the landlord is required to execute any deeds the applicants are prepared to pay its fees of no more than £50 plus VAT

Decision

10. The application is actively supported by 40 out of 48 lessees at the property and opposed by none of the parties. It seeks fairness and uniformity among all the lessees in relation to reserve funds, treatment of repairs to window frames and doors, a common basis for making advanced payment of service charges and common dates for such payments and for yearend accounting purposes. As well as fairness it will simplify and reduce the costs of management of the block. In the tribunal's opinion it is reasonable in all the circumstances for the variation sought to each lease to be effected and no reason can be seen that would make the variation unreasonable.

11. Attached to the statement of case was a draft deed of variation for flat 1, including a schedule of the variations proposed for that flat. Also enclosed were schedules of variations proposed only for each of the 48 flats. It is not entirely clear however whether the applicants wish to proceed by way of executing an individual deed of variation for each flat lease. It is a course of action which will involve costs and possible delays if the non-parties to the application do not co-operate.
12. Section 38(3) of the Act gives the tribunal power to make an order varying each lease in the manner specified in the order which would take effect immediately and not require the execution of a deed of variation for each flat. The tribunal had written to the applicants' solicitor on 26 June 2017. The letter said in its third and fourth paragraphs

“you should deal with the request for costs in your statement. This may well depend upon whether you are seeking an order varying the leases or a direction to the parties pursuant to section 38(8).

In any event the bundle must include either a draft of the order sought from the tribunal or a draft of a proposed deed of variation.”

The latter was included but not the former. If the applicants wish the tribunal to make an order under section 38(8) directing the parties to vary each lease by executing a deed of variation with schedule attached as in the draft attached to the statement of case they should make this clear within the next 14 days and the tribunal will make the order sought. If on the other hand the applicants would prefer the tribunal to make an order under section 38(3) they should, again within 14 days, provide a draft of the order which would need to enclose the schedules of variations and make provision for application to the Land Registry to ensure the variations are registered against each individual title.

13. Sections 37 and 38 of the Act are attached as an appendix.

Name: Patrick M J Casey

Date: 21 August 2017

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 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.

Rights of appeal

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

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case. The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

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

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

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