

11973



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

**Case References** : **LON/00BD/LVT/2016/0010**

**Property** : **6 Kew Gardens Road, TW9 3HL**

**Applicants** : **Ms Irene Mulkeen  
Mr Gordon David Innes**

**Respondent** : **Ms Jane Harrison**

**Parties present** : **All**

**Type of Application** : **Variation of leases**

**Tribunal** : **Mr M Martyński (Tribunal Judge)  
Mr P Roberts DipArch RIBA  
Mr A Ring**

**Date of Hearing** : **21 November 2016**

**Date of Decision** : **8 February 2017**

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**DECISION ON THE APPLICATION TO VARY LEASES**

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## **DECISION SUMMARY**

1. The leases at 6 Kew Gardens Road ('the Building') are varied only to provide for the employment and payment of a Managing Agent and other professionals/trades. The other applications for variations are refused. The variation order is attached and will need to be registered with the Land Registry.

## **BACKGROUND**

2. The Building is a three-storey Victorian house containing three flats.
3. The freehold of the Building is held jointly by the parties to these applications.
4. Mr Innes (Applicant) holds the leasehold interest in the ground floor flat number 1. That lease is dated 2 June 1975 and is for a period of 150 years from 25 March 1974. There is a variation to this lease dated 1 March 2010 affecting the description of the demise but that is not relevant to this decision.
5. Ms Harrison (the Respondent) holds the leasehold interest in the first floor flat number 2. That lease is dated November 1975 (so far as we can tell – this part of our copy of the lease is not clear) and is for a period of 150 years from 25 March 1974.
6. Ms Mulkeen (Applicant) holds the leasehold interest in the top floor flat number 3. That lease is dated 6 September 1974 and is for a period of 150 years from 25 March 1974.
7. Ms Harrison has lived in the Building since 1979. Ms Mulkeen and Mr Innes bought their flats more recently.
8. There has been an unfortunate and considerable history of animosity between, on the one part, the applicants, Ms Mulkeen and Mr Innes, and on the other part, Ms Harrison. It is not necessary to deal with that history in any great detail but we note that there has been considerable litigation between the parties. Mr Innes has successfully taken proceedings against Ms Harrison in respect of his alteration of his flat (he built a kitchen extension). We were told by Ms Harrison that those proceedings extended to bankruptcy proceedings brought by Mr Innes by way of enforcement of a costs order that he obtained in the litigation against her. Ms Harrison has taken proceedings against Mr Innes in the County Court seeking damages in respect of alleged harassment (as far as we are aware those proceedings were discontinued). Ms Harrison has been arrested and charged in connection with alleged harassment of Ms Mulkeen and her partner. Those proceedings were discontinued.
9. Ms Harrison has been upset by building works carried out by Mr Innes and Ms Mulkeen. Works of repair and decoration have been carried out

to the Building by Mr Innes and Ms Mulkeen without the active consent of Ms Harrison.

10. We set out the above disputes (and we do not assert that these are a complete list of the disputes) in order only to give a flavour of relations at the Building and not in any attempt to document those disputes nor to form any view as to them.
11. At the final hearing on 21 November 2016, there were three issues before the tribunal. The first was a transfer from the County Court which was dealing with a claim made by Ms Mulkeen against Ms Harrison in respect of Service Charges. The second was an application made by Ms Mulkeen and Mr Innes for dispensation in respect of the statutory consultation regulations regarding some works in respect of which Service Charges were disputed. We dealt with these issues in a decision dated 7 December 2016.
12. The third issue was an application made by Ms Mulkeen and Mr Innes for a variation of the leases in the Building. We were unable to deal with that issue in our decision of 7 December as we did not have complete copies of the leases. We have since been supplied with those copies.

#### **THE APPLICATION**

13. The application is dated 5 October 2016 and is made pursuant to section 35 Landlord and Tenant Act 1987. The variations sought were as follows:-
  - a) Vary clause 3(d) to add "(i)" after "(d)" and add subparagraph (ii)  
'3.(d)(ii) To be responsible for and to keep indemnified against all damage damages losses costs expenses actions demands proceedings claims and liabilities made against or suffered or incurred by the Lessors arising directly or indirectly out of any breach of non-observance by the Lessees of the covenants conditions or other provisions of the lease or any of the matters to which demise is subject'
  - b) Add the following paragraphs to Part I of the Fifth Schedule to the leases:  
'7. The costs of employing Managing Agents to manage the Building and discharging all proper fees salaries charges and expenses payable to all such agents or such other person who may be managing the Building including the costs of computing and collecting the Charge and in all respects of the Building or any parts thereof provided always that if the Lessors so desire they can carry out the duties of the Managing Agents and in this event charge such proper fees salaried charge and expenses as foresaid.'  
  
'8. The costs of employing all such surveyors builders architects engineers tradesmen accountants or other professional persons

as may be necessary or desirable for the proper maintenance safety and administration of the Building.’

‘9. The costs, charges and expenses (including but not limited to Solicitors’ costs and Counsels’ fees) incurred by the Lessors arising directly or indirectly out of any breach of [sic] non-observance by the Lessees of the covenants conditions of [sic] provisions of the lease or any of the matters to which the demise is subject.’

#### **THE APPLICANTS’ CASE**

14. In their Statement of Case, the Applicants made the following comments in relation to the application to vary the leases.

...for several years, the respondent has refused to participate in decisions relating to the maintenance of the building, or to contribute to any of the maintenance costs which have been incurred by the applicants with the exception of approximately £125 for the repair of a leak in the roof.

In an attempt to resolve this impasse, the applicants are now looking to appoint a managing agent who can maintain the building on behalf of all the lessors.

However, the leases do not include, within the definition of the charge for building maintenance costs, the cost of employing managing agents and other professionals.

The applicants are, therefore, applying to the tribunal to vary the leases to allow for these costs, as well as legal costs in relation to enforcing lessee covenants in the lease, to be included within the definition the charge of which the lessees are required to contribute

15. In the hearing the Applicants stated that Mr Innes was due to be based in New York in the future and so he would not be around to deal with the maintenance of the building. Further, there was currently an urgent problem with a leak into a kitchen at the Building and matters such as this were not getting dealt with in a timely fashion due to the disputes between the parties.

#### **THE RESPONDENT’S CASE**

16. The Respondent’s view was that there was no need for a managing agent. She said that there had previously been a managing agent for the Building and that this had proved to be unnecessary and expensive. The Building could be managed by the parties themselves, the Building had been well maintained before and there was no pressing need for an agent now.

#### **OUR DECISION**

17. Section 35 Landlord and Tenant Act 1987 gives the tribunal the power to vary leases in certain circumstances. The relevant parts of that section state as follows:-

### 35 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.

18. It is clear that the parties to this application, due to the dysfunctional relationships between them, are not capable of managing the Building effectively and that a third, independent, party needs to manage the Building. Whether that independent management can be effectively achieved by way of the simple appointment of a managing agent is questionable. We are concerned that the parties may not be able to agree on the identity of the managing agent or to agree the terms of appointment of such agent. Further, we are concerned that the parties will not be able to agree on the instructions to be given to the agent and that the agent will be put in an impossible position as a result. The only solution may be for a further application to be made to the tribunal for the

appointment of a Manager by the tribunal. That Manager would have the power to manage the Building independently of the parties and would only be answerable to the tribunal.

19. Regardless of these reservations, the leases clearly do not make proper provision for the appointment and payment of an agent to manage the Building and we are of the view therefore that the leases should be varied to make proper provision for this and provision for the proper payment of professionals and trades in order for the Building to be properly maintained.
20. However, we are not prepared for the variation to go so far as to allow the Lessors themselves to charge fees if they undertake the management of the Building without using an agent. That would simply open the door to further dispute in this Building. None of the current Lessors are professional managers and, as far as we are aware, none are qualified to manage the Building.
21. As to the proposed variations to allow the Lessor to claim against individual leaseholders in respect of breaches or non-observance of covenants and to oblige leaseholders to indemnify the Lessor in respect of loss arising out of breach or non-observance of covenants in the lease; we are not prepared to vary the leases in this way. Again, we are of the view that this would simply open the door to further dispute in this Building. If the Building is managed properly and independently, there should be no need for such clauses. These clauses, it seems to us, in the context of a Building owned by the leaseholders, will simply be used as weapons for further, possibly pointless litigation given that the "Lessor" is only the sum total of the leaseholders. Any action therefore taken by the "Lessor" may well only succeed if it is taken on behalf of all the individuals comprising the Lessor. Given that those individuals are also the leaseholders, the action would be pointless.

**Mark Martyński, Tribunal Judge**  
**8 February 2017**

#### **ANNEX - RIGHTS OF APPEAL**

1. 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.

2. 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.
3. 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.
4. 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.



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**Respondent** : **Ms Jane Harrison**

**Parties present** : **All**

**Type of Application** : **Variation of leases**

**Tribunal** : **Mr M Martyński (Tribunal Judge)  
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**ORDER VARYING LEASES**

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## **THE LEASES**

Property: Flat 1, 6 Kew Gardens Road, TW93HL  
Date: 2 June 1975  
Parties: Landway Estates (London) Limited and Albert Joseph Spring-Steel and Joan Arlene Spring-Steel  
Title Number: TGL329746

Property: Flat 2, 6 Kew Gardens Road, TW93HL  
Date: 20 November 1974  
Parties: Landway Estates (London) Limited and Nigel Honorius Hurt Sitwell and Elizabeth Sandra Sitwell  
Title Number: SGL191638

Property: Flat 3, 6 Kew Gardens Road, TW93HL  
Date: 6 September 1974  
Parties: Landway Estates (London) Limited and Peter Hotston  
Title Number: SGL194073

## **THE VARIATIONS**

Add the following paragraphs to Part I of the Fifth Schedule to the leases:

'7. The costs of employing Managing Agents to manage the Building and discharging all proper fees salaries charges and expenses payable to all such agents including the costs of computing and collecting the Charge and in all respects of the Building or any parts thereof.'

8. The costs of employing all such surveyors builders architects engineers tradesmen accountants or other professional persons as may be necessary or desirable for the proper maintenance safety and administration of the Building.'

These variations take effect on the date of this order and should be registered with the Land Registry.

**Mark Martyński, Tribunal Judge**  
**8 February 2017**