



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

Case Reference : **BIR/00CN/LVT/2016/0001**

Property : **25 to 35 (odd numbers) Park Avenue,
Hockley, Birmingham B18 5ND**

Applicant : **Talmont Properties Limited**

Representative : **Adcocks Solicitors Limited**

Respondents : **The persons listed in the Schedule to
this Decision**

Representative : **None**

Type of Application : **Application under section 35 and
section 37 of the Landlord and Tenant
Act 1987 for a variation of the leases
held by the Respondents**

Tribunal Members : **Judge M K Gandham
Mr I Humphries B.Sc. FRICS
Mr P W Hawksworth**

**Date and venue of
Hearing** : **27th September 2016
Centre City Tower, 5 – 7 Hill Street,
Birmingham B5 4UU**

Date of Decision : **5 April 2019**

DECISION

Decision

1. The Tribunal is satisfied that the grounds under section 35 of the Landlord and Tenant Act 1967 are established. Accordingly, the Decision of the Tribunal is that it will order a variation of the leases to the properties known as 25, 27, 29, 31, 33 and 35 Park Avenue, Handsworth, Birmingham B18 5ND (the 'Properties') in accordance with the revised drafts annexed hereto.
2. The Tribunal considered, for the purposes of section 38(6) and (10) of the Act, whether the variation effected by the Order substantially prejudices any of the Respondents or any person not a party to the Application and concluded that, as the variation is for the benefit of all of the Respondents - by correcting existing terms which do not make satisfactory provision for the insurance, administration of the repair and the provision of services to the Properties - there can be no prejudice arising from the Order. The Tribunal, therefore, makes no order for compensation under subsection (10).
3. The Tribunal's variation Order is contained in the Appendix to this decision.
4. In reaching its decision, the Tribunal took account of its inspection of the subject property, the evidence adduced and the Tribunal's own general knowledge and experience.

Reasons for Decision

Introduction

5. On 21st April 2016, the Tribunal received an application from Talmont Properties Limited (the 'Applicant') for an order under section 35 and, in the alternative, under section 37 of the Act, for an order varying the terms of the leases of the Properties. The Respondents are the current leaseholders of the Properties and are listed in the Schedule to this Decision (along with details of the leases of each of the Properties).
6. The Applicant stated that the leases to the Properties, which were originally granted in the early 1970s and 1980s, were imperfect in that the provisions regarding the maintenance of the structure of the building and responsibility for carrying out the repairs were inadequate and there was duplication of provisions regarding the maintenance of the roof. There was also no provision for the payment of a service charge in advance and, as a result of these defects, the Properties had fallen in to disrepair and were, as the Applicant stated, 'in urgent need of significant improvement works'.

7. In addition, the Applicant wished to alter the insurance provisions so the liability fell on the lessor, as under the terms of the current leases of the Properties the obligation for insurance fell on the leaseholders.
8. Directions were issued by the Tribunal on 2nd June 2016, requesting the Applicant to prepare and forward to the Tribunal (and to each of the leaseholders of the Properties at the time) a copy of the proposed amendments to the leases of the Properties, with provision for any comments on those amendments to be received from the leaseholders by 29th July 2016.
9. A draft lease was received by the Tribunal on 30th June 2016. The only leaseholder to make a comment regarding the proposed amendments was Mr. Patel, the lessee of Flat 27, who requested an amendment to the term and ground rent.

The Law

10. The relevant law in relation to the application is set out in sections 35 to and 38 of the Landlord and Tenant Act 1987:

Landlord and Tenant Act 1987

Section 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 a leasehold valuation tribunal 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.*

Section 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 a leasehold valuation 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.*

Section 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.*

(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.*

...

(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.

Inspection

11. The Tribunal inspected the Properties on 27th September 2016 in the presence of Mr Hind, the director of the Applicant company.
12. The Properties are located in a three storey building located in Handsworth, Birmingham, on the corner of Park Avenue and South Road. There is a shared parking area, fronting Park Avenue, with six garages located beneath the flats and common garden areas to the side and rear of the building.
13. The building has an unusual layout, in that, four of the flats are accessed from the front of the Property (flats 29, 31, 33 and 35), with the accommodation for these flats being located on the first and second floors of the building. The access to the remaining flats (25 and 27) are located

at the rear of the building, with the accommodation for these two flats encompassing the ground floor. Flats 29, 31, 33 and 35 are accessed via concrete steps to the left hand side of the building, which lead to a balcony over the garages. The flats to the rear have their own individual staircases from the rear common parts.

14. The interiors of the Properties were not inspected.
15. The Tribunal noted various items of disrepair: the lintels required repointing; the asphalt to the front balconies were in a very poor condition and the balconies required redecorating; various tiles were loose or missing; the front wall to the side garden had been knocked down and required rebuilding; the front drive required resurfacing and the side and rear gardens were completely overgrown (with waste having been dumped in the side garden).

Hearing

16. Following the inspection, a public hearing was held at the Tribunal's offices in Birmingham. The Hearing was attended by Mr. Hind, with Mr. Adcock and Miss McMahon from Adcocks Solicitors Limited (the Applicant's Representative). None of the leaseholders attended.

Applicant's Case

17. The Applicant's Representative provided to the Tribunal a case summary which outlined the Applicant's case and also stated that the section 35 application was only made as a precautionary measure. As the Applicant held the consent of the majority of the leaseholders, the application under section 35 was unlikely to be relevant.
18. Mr. Adcock confirmed that the leases of the Properties did not adequately provide for the management of the building and the obligations on the parties were difficult to understand. He also confirmed that, unlike modern leases, no single party was responsible for the maintenance of the building and the provisions in the leases were confusing and, in part, contradictory; which meant that the building was now in require of repair, creating problems for the Applicant and leaseholders alike.
19. He went on to confirm that an overhaul of the leases was required to make the respective parties' obligations clear, and to include a scheme of management in line with modern leases.
20. Mr. Adcock referred the Tribunal to section 37, and confirmed that the object to be achieved by the variation would only be effective if all the leases were similarly varied.
21. He stated that, as the application was made in respect of less than nine leases, all but one of the parties must consent to the variation - the lessor constituting one of the parties. He confirmed that the Applicant had the

consent to the proposed changes from the leaseholders, with only one amendment suggested by the lessee of Flat 27.

22. On questioning by the Tribunal, Mr. Adcock confirmed that it did not appear that any interested third parties – in particular any Lender – had been contacted regarding the variation. In addition, the Tribunal noted various errors in the draft leases supplied by the Applicant.

Leaseholders' Submissions

23. The leaseholders did not attend the Hearing and the only amendment proposed was received from Mr. Patel, the lessee of flat 27, requesting the current wording of clause 1.1 of the leases:

“for the term of 99 years from the 1st day of January 1970 YIELDING AND PAYING therefor during the said term the yearly rent of £25.00”

to be varied to:

“for a term of 171 years from the 1st day of January 1970 YIELDING AND PAYING therefor during the said term the yearly rent of £250.00”.

24. Mr. Adcock objected to the amendment proposed as he stated that the leaseholder was simply trying to amend the term of the lease, not dealing with the problematic issues regarding management, to which the application related.

Second Directions Order

25. Owing to the issues relating to notices to third parties and the drafting errors, a second Directions Order was issued by the Tribunal on 27th September 2016, requiring notice of the application to be served on any interested third parties and amended draft leases to be supplied to the Tribunal and leaseholders.
26. On 21 October 2016, the Tribunal received a letter from Adcock's solicitors, in compliance with the Directions, forwarding the draft leases and confirming that each of the drafts had been sent to the leaseholders and that notices had been forwarded to any relevant third parties.
27. The draft leases supplied set out the amendments proposed by the Applicant which - in addition to generally updating and correcting the terminology in the leases - made the following amendments:
 - the definition of the demise was updated to specify those items included in the definition of the individual premises;
 - a new clause 1.2 was added, setting out the various definitions in the varied leases;
 - the existing clauses in relation to the maintenance of the common parts and shared facilities were deleted;

- the existing clauses relating to the leaseholders' obligations to insure their individual properties were deleted;
 - the existing clauses relating to the lessor's obligations for maintenance of the common areas were deleted;
 - new clauses were included requiring the lessor to provide the services, subject to payment of a service charge;
 - the existing clauses in the Second Schedule to the leases were deleted, being replaced by detailed provisions regarding the calculation and payment of the service charge and the services to be provided by the lessor; and
 - a Fourth Schedule was added to the leases detailing the provisions regarding the insurance of the Properties.
28. Despite the Tribunal extending the deadline for receipt, the Applicant confirmed, on 29 March 2017, that - although they had not received any objections - the leaseholders had failed to provide their consents to the amended drafts (as required to proceed under section 37 the Act). The Applicant further stated that they did not believe that the consents would be forthcoming. As such, the Applicant requested that their application proceed instead under section 35 of the Act.

Third Directions Order and Reconvened Hearing

29. On 18 April 2017, the Tribunal issued a further Directions Order confirming that the Applicant was to notify the leaseholders of the decision to proceed with the application for variation under section 35 and giving the leaseholders an opportunity to forward any proposed amendments or comments.
30. On 27 April 2017, the Applicant confirmed to the Tribunal that they had written to all of the leaseholders to confirm that they were proceeding under section 35 of the Act and, on 12 June 2017, the Applicant confirmed to the Tribunal that no comments or representations had been received by the leaseholders.
31. Owing to various errors on the drafts leases provided by the Applicant's solicitors, the Tribunal wrote to the Applicant's solicitors expressing their concerns. Further draft leases were received by the Tribunal on 10th August 2017; however, the revised drafts still contained various errors so a reconvened hearing was arranged for 15th November 2017. Unfortunately, neither party attended the reconvened hearing.

Fourth Directions Order and Case Management Conference

32. In order to progress matters, and to avoid the need for a further hearing, the Tribunal issued a Fourth Directions Order on 13th December 2017, outlining the Tribunal's concerns on the various drafts.
33. The Applicant's solicitors, by way of a letter received by the Tribunal on 10th January 2018, agreed with all of the Tribunal's comments and further

copies of each of the proposed leases (with copies of each lease detailing the variations made) were provided with their letter. The Tribunal noted that these did not comply with the Directions Order so a case management conference was arranged for 21st June 2018, at which the Tribunal indicated the matters that were still in need of clarification.

34. After further correspondence, a draft lease, which finally dealt with all of the issues raised by the Tribunal at the case management conference, was received on 5th October 2018 and copies of draft leases for the remaining flats, for the Tribunal's consideration, were received on 30th November 2018.
35. On 5th March 2019, the Tribunal asked the Applicant to provide final copies of each of the drafts in duplicate, one copy to detail any of the proposed amendments to the original leases in italics (copies of which are included in Part 1 of the Appendix hereto) and one copy to be in plain type, and these were received by the Tribunal on 21st March 2019.

The Tribunal's Deliberations

36. The Tribunal considered all the written and oral evidence submitted and summarised above.
37. The Tribunal notes that the application under section 35 of the Act relates to all section 35(2)(a), section 35(2)(d) and section 35 (2)(e), concerning maintenance of the building and the provision of services, and section 35 (2) (b) in relation to the insurance of the building.
38. In relation to the services, the Tribunal notes that the building is in a state of disrepair - in particular the common parts; and that the current leases fail to establish a service charge regime, as in modern leases, for the payment in advance of services. Instead there is a covenant in the leases for the leaseholders to contribute and pay on demand a fair proportion of the costs, expenses, outgoings and other matters mentioned in the Second Schedule of the leases - the Second Schedule detailing expenses relating to the foundations, structure, roofs, guttering etc... of the building, in addition to the boundary fences, right of way, amenity areas, forecourt, footpaths and gardens.
39. In addition, the current leases require the leaseholders to insure the individual properties, which the Applicant submits is not satisfactory and proposes a variation under section 35(2)(b) of the Act, to stipulate that the insurance is instead provided by the lessor, with each of the leaseholders contributing towards the cost of the same.
40. The Tribunal is satisfied that the leases fail to make satisfactory provision in relation to the repair and maintenance and provision of services to the Properties, and for the recovery of the costs for the services. In addition, the Tribunal is satisfied that the existing leases fail to make satisfactory

provision in relation to the insurance of the Properties. As such, the grounds under section 35 of the Act are satisfied.

41. The Tribunal is also satisfied that the final revised draft leases provided by the Applicant provide a satisfactory basis for the repair and maintenance and provision of services and insurance to the Properties.
42. In relation to the amendment previously proposed by Mr Patel, the Tribunal notes that it does not relate to any of the grounds set out in section 35 of the Act, and, as such, is not accepted by the Tribunal.

Appeal Provisions

43. If either party is dissatisfied with this decision they may apply to this Tribunal for permission to appeal to the Upper tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to the parties (Rule 52 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013).

M. K. GANDHAM

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Judge M. K. Gandham

Schedule

Flat	Details of Lease	Title Number	Respondents
25	Lease dated 1 st June 1973 and made between (1) Midland Land Developments Limited and (2) Peter John Jennings and Marian Ellen Theresa Regan	WK215086	Ilyas Ehrari
27	Lease dated 28 th March 1984 and made between (1) Ronald Whitehouse and (2) Jeanette Bushell	WM315420	Jayshree Pravin Garara
29	Lease dated 23 rd March 1973 and made between (1) Midland Land Developments Limited and (2) David Gittings and Susan Letitia Gittings	WK210542	Abimbola Mopelola Ibidun
31	Lease dated 13 th March 1974 and made between (1) Midland Land Developments Limited and (2) John Patrick Greenan	WK230215	Matthew Taylor
33	Lease dated 30 th January 1981 and made between (1) Ronald Frederick Whitehouse and (2) Patricia Barbara Banks	WM216939	Kevin John Ahern
35	Lease dated 7 th October 1977 and made between (1) Midland Land Developments Limited and (2) Robert Brian George Taylor	WM106599	Sukhvinder Singh

Appendix



FIRST - TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

ORDER FOR THE VARIATION OF LEASES

Talmont Properties Limited (Applicant)

and

The Persons listed in the Schedule to this Order (Respondents)

DATE OF ORDER: 5 April 2019

UPON the application of the Applicant under section 35 of the Landlord and Tenant Act 1987 ('the Act') for the variation of the leases listed in the Schedule hereto ('the Leases')

AND UPON considering representations on behalf of the parties

- 1. IT IS ORDERED THAT**, pursuant to the power conferred upon the Tribunal by section 38 (1) of the Act, the Leases shall be and by virtue of this Order are varied as per the drafts detailed in Part 1 of the Schedule annexed hereto. For ease of reference the Leases, as amended, are shown in plain text in Part 2 of the Schedule annexed hereto.
- 2.** The Tribunal directs that H.M. Land Registry takes due note of the variations hereby ordered and requests that the registers of the respective freehold and leasehold titles be amended accordingly.

Schedule to the Order of the Tribunal

The Leases

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