

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL &
LEASEHOLD VALUATION TRIBUNAL**

Case No: CHI/43UB/LVL/2010/0004

Between:

Wellington Close (Walton on Thames)
Management Company Limited (Applicant)

and

The Lessees (Respondents)

**In the Matter of an application under Part IV (Section 37) of the Landlord
and Tenant Act 1987**

Premises: Wellington Close, Hepworth Way, Walton on Thames, Surrey
KT12 4XN ("the Premises")

Date of Hearing: 22 September 2010

Tribunal: Mr D Agnew BA LLB LLM Chairman
Miss C D Barton BSc MRICS

DETERMINATION AND REASONS

The Application

1. By an application dated 12 March 2010 the Applicant applied to the Tribunal for an order under Section 37 of the Landlord and Tenant Act 1987 Part IV (hereafter referred to as "the Act") for a variation of the leases of the Premises. The main changes sought were to the repair and maintenance obligations with regard to the windows and doors in the walls bounding the flats excluding the internal surfaces thereof. A change was also sought to alter the provision for window cleaning at the Premises to make it a duty on the part of the landlord to effect the cleaning of windows including those on the balconies of the flats. Thirdly, the Applicant sought to alter the amount that the landlord could charge for approving assignments. At the time of the application it was stated that more than 75% of the Lessees had consented to the application and less than 10% opposed the application.
2. A copy of the application and a schedule setting out the proposed new lease terms were sent by the Applicant's solicitors to each of the

Lessees together with a document for each Lessee to indicate as to whether or not they agreed with the proposed variations and to return that document to the Tribunal. These returns showed that there were more Lessees opposed to the variations than seemed to be the case when the Applicant made its application. The first question for the Tribunal to determine, therefore, was whether there was sufficient support for the variations as laid down in the Act.

The Premises

3. The Premises comprise 132 flats which were constructed in the 1960s. They are contained in three separate buildings each consisting of a rectangular tower block ten storeys high and a two storey annexe. The main tower blocks are of reinforced concrete construction exteriors of which are clad with an aluminium curtain walling system. There are brickwork flank walls and mosaic tile skirts and parapets. The annexes have mostly brick elevations but the windows form a continuous band at ground and first floor levels. There are painted glass panels below the windows in the tower blocks. The windows have aluminium frames, are single glazed and slide horizontally. The flats in the tower blocks have balconies which are accessed through glazed doors and there is an adjacent window which looks out onto the balcony.
4. It was evident from the Tribunal's inspection of the Premises that significant sections of cladding were missing and in need of repair.

The Leases

5. The Tribunal was advised that all the leases were in similar form although there were different service charge contributions depending on the location of each flat.
6. Part 1 of the first schedule of the lease states: "the flat shall include the internal plastered coverings and the plaster work of the walls bounding the flat and the doors and door frames and window frames fitted in such walls (other than the external surfaces of such doors frames and window frames) and the glass fitted in such window frames ... but not including:-
 - (i) any parts of the building (other than any conduits expressly included in this demise) lying above the said surfaces of the ceilings or below the said floor surfaces
 - (ii) any of the main timbers and joists of the building or any of the walls or partitions therein (whether internal or external) except such of the plaster surfaces floors and joists thereof and the doors and door frames fitted therein as are expressly included in this demise ..."
7. The Lessor's repairing covenant is set out in clause 5(2) of the lease as follows: "... subject to the payment by the lessee of the contributions hereinbefore provided to maintain repair redecorate and renew
 - (a) the structure and in particular the main walls drains roofs

foundations chimney stacks gutters and rainwater pipes of the building

...

(c) the entrances car park driveway communal gardens lifts passages landings and staircases and other parts of the building so enjoyed or used by the lessee or the lessees of the other flats in common as aforesaid and the boundary walls and fences of the said building ...”

8. The Lessees' covenant to repair states that: “from time to time and at all times well and substantially to repair cleanse maintain and keep the flat (other than the parts comprised in and referred to in paragraph (2) of clause 5 hereof) and the fixtures thereon and the walls pipes cables wires and appurtenances thereof with all necessary reparations cleansings and amendments whatsoever ...”
9. By clause 2(iii) of the lease the lessee covenants to contribute to “... the cost of maintaining repairing decorating and renewing
(a) the structure of the building including the main walls drains roofs foundations chimney stacks gutters and rainwater pipes and any boundary walls and fences.
(b) the gas and water pipes electric cables and wires in under or upon the building.
(c) the entrance drive pathways driveways carpark entrance hall staircases and landings of the building including the cleaning and lighting thereof and of the carpeting or other covering of the entrance hall staircases and landing (if any) ...”

The Applicant's case

10. The Applicant stated that it was evident from the inspection of the building that it was necessary to effect repairs of the cladding to the tower blocks at the Premises. A report by Mr Stuart Radley MRICS confirmed this and explained the construction of the tower blocks. The windows were an integral part of the curtain walling and as the particular curtain walling system that was used in the construction of the tower blocks is no longer available it is not possible to replace the cladding without replacing the windows.
11. It was the Applicant's case that the leases in their current form demised the windows apart from the external surfaces to the lessees and that in order to carry out the work to all the flats in a uniform manner it is necessary for the leases to be amended to give the landlord the responsibility for repairing and maintaining the whole of the external windows and to recover the cost of this work through the service charge and this therefore required an amendment to the leases.
12. There were certain ancillary but more minor matters which the Applicant wished to include at the same time in the lease variation. The first of these issues concerned the windows looking out onto the balconies and the doors giving access thereto. At present, the leases give the option to the landlord as to whether or not to clean these

surfaces. If it did clean them then it can recover the costs thereof through the service charges. There is, however, no duty upon the landlord to clean the windows. It was likely to be a condition of the guarantee when the windows are replaced that they are kept clean and the Applicant therefore sought to vary the leases by making it a duty upon the landlord to clean these surfaces. If a lessee then refused to allow the cleaning to take place then Mr Newey, the Applicant's solicitor, considered that he would be in a stronger position to apply to the court for an order that the lessee permit the cleaning to take place than the leases currently provide.

13. The next minor issue was that the Applicant sought to change the amount the lessee was required to pay for approval of an assignment of the lease from the current Four pounds as stipulated in the leases to "at least Fifty".

The Respondents' case

14. The following lessees attended the hearing: Mr Marshall Dixon, who is the lessee of flats 23, 53, 92, 113, and 128; Mr Martin Lincberg, lessee of flat 116; and Mr Paul Courtel, the leaseholder of flat 124.
15. Mr Courtel challenged the fact that the Applicant had satisfied the required percentages as laid down in the Act for a variation under Section 37. He pointed out that in the Applicant's documentation on submitting the application ten lessees were shown to have opposed the application. Since that time a further four lessees had registered their objection to the Tribunal and therefore a total of 14 lessees would appear to oppose the application. This exceeds 10% of the total number of parties required to consent, which is 133.
16. At this point the Tribunal went through the documents of objection that they had received and it appeared that the lessee of one flat had not confirmed his or her objection to the application making the total number of objections 13. The objectors present contended that if that was the case then 13 was sufficient to defeat the application under Section 37. They argued that 10% of the total number of objections would be 13.3. This should be rounded down to the nearest whole number so that 13 objectors would be sufficient to defeat the application.
17. It was evident, however, from the objectors present that they did not object in principle to the variations sought in so far as those variations related only to the clauses desirable to effect efficiently the external cladding work. What was objected to was the manner in which the consent to the variations had been obtained by the Applicant in giving an incentive to those who agreed the proposals by offering to extend their leases to 999 year leases at no premium whereas those who raised objections to the terms of the variation would be penalised by not receiving such an offer. The objectors felt that they were being

unfairly prejudiced by this tactic when all they were doing was exercising their rights under the Act.

18. As far as the more minor matters were concerned the objectors agreed that it would be acceptable to amend the sum to be paid to the landlord for approval of assignments to a more realistic level. They thought that Fifty pounds was an unreasonable amount but they would agree to a variation to read "to at least Thirty five pounds". At this point Mr Newey, on behalf of the Applicant agreed with this suggestion.
19. With regard to the proposed variation to make the doors and door frames in the walls bounding the flats to be excluded from the demise Mr Courtel's concern was that taken to its logical conclusion the landlord could remove the door and leave the lessee in a flat without a front door. When it was pointed out to Mr Courtel that under the proposed variation the internal surface of the door would remain within the demise and that any removal of the door would constitute a trespass to that part of the demise which the lessee could prevent Mr Courtel withdrew his objection to that variation.
20. The objection to the proposed variation to make it a duty of the landlord to undertake the cleaning of the external windows and glazed doors of the building was that with regard to the windows and doors of the balconies this was impractical. Some of the balconies have netting to prevent birds from entering onto them and other balconies have tables chairs and other items on them making it difficult for cleaners to gain access. There was also a concern about security as sometimes balcony doors are left open. It was pointed out by the Tribunal that under the existing leases the landlord was given a discretion as to whether or not to clean the windows and doors including those on the balconies and if it did so then it could recover the cost from the lessees. If it was impractical for the landlord to clean any particular window then that was a problem for the landlord. In the circumstances, Mr Newey on instructions decided to withdraw the application in respect of this particular variation as it was considered by the landlord more important to proceed with the variation with regard to the repairing obligations in respect of the windows and external doors so that the repairs to the cladding could be put in hand.
21. The final point the objectors wished to make was to claim compensation under Section 38(10) of the 1987 Act. The Landlord has apparently obtained a valuation that a premium for a new lease of each flat was likely to be of the order of £12,000. By having objected to the variations proposed it was said that the landlord company had unfairly discriminated against the objectors by stating its intention not to offer them new leases at a nil premium and they therefore claimed the sum of £12,000 per flat by way of compensation under the 1987 Act. Mr Newey's response to this was that the company at a meeting of shareholders, who are all the tenants of the Premises, had decided by a majority that it would not offer new leases to the objectors on the

same terms as those who had consented to the proposed variation. It was not within the Tribunal's jurisdiction to interfere with that decision which was a matter of company law and not landlord and tenant law, that if the lessees feel aggrieved by that decision there may be steps they can take under company law but that is not a matter for the Tribunal. In any event, Section 38(10) of the 1987 Act refers to the Tribunal being able to make an order for compensation "in respect of any loss or disadvantage that the Tribunal considers (a lessee) is likely to suffer as a result of the variation". Mr Newey contended that any loss or disadvantage as claimed by the objectors was not "as a result of the variation" but as a result of their having objected to the application. Compensation was not therefore payable in those circumstances.

The Law

22. Section 37 of the Landlord and Tenant Act 1987 provides that:
- (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 this 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 ten percent of the total number of the parties concerned and at least seventy-five percent of that number consent to it.
 - (6) for the purposes of sub-section (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 the 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."
23. By Section 38 of the 1987 Act it is provided that:-
- (3) if, on an application under Section 37, the grounds set out in sub-section (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 sub-sections (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 sub-section (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.

(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.”

The Determination

24. The Tribunal first considered whether the Applicant had established that it had achieved the necessary percentages to comply with Section 37(5) (b) of the 1987 Act. There was no dispute that more than 75% of the lessees consented to the variation. The objectors however did query whether they had established that more than 10% of the lessees objected to the variation. There are 132 flats therefore the total number of “parties concerned”, including the landlord, is 133. 10% of 133 is 13.3. The Tribunal determines that it is necessary for 14 “parties concerned” to oppose the application for it to be defeated. The Tribunal did not accept that the percentage should be rounded down to 13. The Act requires that the application be not opposed by more than 10% of the parties concerned. 13 would be less than 10% and therefore the requisite number is 14. The Tribunal also determined that the relevant proportion had to be determined as at the date of the hearing. The evidence was that at that date 13 of the lessees objected to the application as made and therefore the Tribunal determines that there were insufficient objectors to form 10% of the parties concerned and it therefore had jurisdiction to go on to consider the application under Section 37 of the 1987 Act.
25. In any event, some of the objections to the application were met as follows:-
- a. It was agreed that the fee stipulated in the lease for consenting to assignments should be varied to read “to at least Thirty-five pounds.”;
 - b. That the landlord would withdraw its application in respect of cleaning of the windows and would rely on the existing clauses in the lease in respect thereof; and
 - c. The objection to varying the leases to provide that the demises would not include the doors to the flats save for the internal surfaces would be withdrawn.

25. This left the proposed variation with regard to the extent of the demise with regard to the windows of the flats save for the internal surfaces and the repair and maintenance thereof. These variations were not objected to in principle but the objectors concerns were as to the process by which the application had come about and in particular the fact that those who raised questions and any opposition to the proposed variations were being penalised by not being offered new extended leases for a nil premium whereas those who had consented to the variations were being given such offers by the landlord company.
26. The Tribunal can understand the objectors' concern in this respect but did not consider that this was a matter for the Tribunal. The Tribunal had to be satisfied that the objects to be achieved by the variation could not satisfactorily be achieved unless all the leases are varied to the same effect. The Tribunal is satisfied that the satisfactory and efficient repair to the cladding of the premises can best be achieved by the variation of the leases and can only be achieved if all the leases are varied to the same effect.
27. The Tribunal does not consider that it has any jurisdiction to award compensation under Section 38(10) of the Act due to the discrimination that the objectors feel in the way that they are being treated as far as the offer of new leases is concerned. The Tribunal has power to award compensation under that Section only where there has been loss or disadvantage suffered "as a result of the variation". The Tribunal agrees with Mr Newey that any loss or disadvantage that the objectors will suffer is not "as a result of the variation" but as a result of something else namely their objection to the proposed variation which the landlord will say has led to delay and expense in having to make an application to the Tribunal. The decision not to offer the objectors new leases on the same terms as those who have consented to the variations was taken at a meeting of the landlord company of which all the lessees are shareholders. It may be that the objectors can consider taking proceedings alleging that the interests of minority are being unfairly prejudiced by the actions of a majority of shareholders. This is, however, a matter of company law and will be a matter for the courts to decide and not this Tribunal.
28. The Tribunal therefore approves the following variations to the leases of the flats at the Premises and those variations will henceforth take effect. The variations are as follows:-
Page 3. Clause 2(2)(a) (iii) Line 13ff: Insert new clause (e) to read: "the doors door frames windows and window frames (including the glass fitted in such door frames and window frames) in any walls bounding the Flat excluding the internal surfaces thereof."
Page 5. Clause 2(11) Line 3: Remove the word "glazed".
Page 5. Clause 2(12) Line 7: Insert the words: "doors door frames windows window frames and glazing in any walls bounding the Flat" after the words "watercourses gutters wires" at line 6-7.
Page 6. Clause 2(15)(v) Line 5: Remove the words "Four".

Page 6. Clause 2(15)(v) Line 5: Insert the words: "at least Thirty-five" before the words "Pounds for the registration".

Page 9. Clause 5(2) Line 12: Insert new clause (d) to read: "the doors door frames windows and window frames (including the glass fitted in such door frames and window frames) in any walls bounding the Flat excluding the internal surfaces thereof."

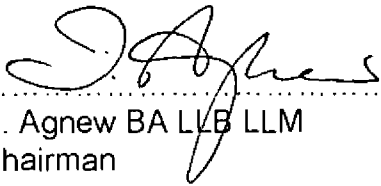
Page 12. First Schedule First Part, Para (a) Line 2-5: Delete: "(other than the external surfaces of such doors frames and window frames) and the glass fitted in such window frames".

Page 12. First Schedule First Part, Para (a) Line 2: Insert the words: "internal surfaces of the" before the words "doors and door frames".

Page 12. First Schedule First Part, Para (ii) Line 4-5: Delete: "and the doors and door frames fitted therein as are expressly included in this demise."

Page 12. First Schedule First Part, Para (iii) Line 2: Insert new clause (iv) to read: "any doors door frames windows and window frames (including any glass fitted in such door frames and window frames) in any walls bounding the Flat save for the internal surfaces thereof."

Dated this 19th day of October 2010



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D. Agnew BA LLB LLM
Chairman