



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

Case Reference : **MAN/16UG/LVT/2022/0001
MAN/16UG/LMV/2022/0001**

Property : **16-38 Windward Way
Bowness-on-Windermere
Windermere
Cumbria
LA23 3BF**

Applicant : **Windward Phase 2 Limited**

Representative : **Naphens Solicitors LLP**

Respondents : **The leaseholders of the Property
(see Annex)**

Representative : **N/A**

Type of Application : **Landlord and Tenant Act 1987 – s37**

Tribunal Members : **Judge J Holbrook
Regional Surveyor N Walsh**

**Date and venue of
Hearing** : **Determined without a hearing**

Date of Decision : **11 November 2022**

DECISION

DECISION

The application is granted and the Tribunal makes the Order in Annex B hereto.

REASONS

Background

1. In April 2022, the Tribunal received an application under section 37(1) of the Landlord and Tenant Act 1987 (“the Act”). The application seeks an order varying each of the long leases (“the leases”) of the 23 residential apartments which comprise 16-38 Windward Way, Bowness-on Windermere, Windermere LA23 3BF (“the Property”). Those leases are currently held by the Respondents to the application, whose names are listed in Annex A hereto, together with their apartment numbers and the dates on which their respective leases were granted.
2. The application was made by Windward Phase 2 Limited, which is the landlord under each of the leases. It is responsible for the provision of services to the Property and for the administration of the service charge in accordance with the leases.
3. Each lease was granted in either 2006 or 2007 for a term of 250 years from 1 November 2006 and is in common form. There has been no previous variation of any of the leases.
4. The object of the application is explained in greater detail below. Essentially, however, the principal result which the Applicant wishes to achieve is to modify the provisions of the leases relating to insurance and repairs to better reflect the realities of the restricted availability of buildings insurance cover for the Property in light of the recent history of flooding in the area.
5. We have determined this application following a consideration of the written representations and supporting documentary evidence provided by the Applicant, but without holding a hearing. Rule 31 of the Tribunal’s rules¹ permits a case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed). In this case, the Applicant has consented and none of the Respondents have objected. Moreover, having reviewed the papers, we are satisfied that this matter is indeed suitable to be determined without a hearing: the issues to be decided have been clearly identified and the application is unopposed.
6. The Tribunal did not inspect the Property but we understand it to comprise three adjacent apartment blocks forming part of the Windermere Marina Village development.

¹ The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Law

7. A landlord or a tenant may apply to the Tribunal under section 37 of the Act for an order varying leases in such manner as is specified in the application. The application must relate to two or more leases, which must be long leases of flats under which the landlord is the same person. The leases need not be drafted in identical terms.
8. The grounds on which such an application may be made are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect (section 37(3)). However, where the application is in respect of more than eight leases (as in the present case), it must not be opposed for any reason by more than 10% of the total number of the parties concerned and at least 75% of that number must consent to it (section 37(5)(b)). The landlord counts as one of the parties for this purpose.
9. The Tribunal's powers on an application under section 37 are set out in section 38 of the Act. If the grounds for the application are established to the Tribunal's satisfaction, then it may make an order varying each of the leases concerned in such manner as is specified in the order (section 38(3)).
10. The Tribunal thus has a broad discretion to grant an application for variation. However, section 38(6) of the Act provides that the Tribunal must not do so if it appears:
 - (a) that the variation would be likely substantially to prejudice any respondent to the application (or a third party) and that an award under section 38(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.
11. Section 38(10) of the Act provides that, where the Tribunal makes an order varying a lease, it may, if it thinks fit, make an order 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.

Grounds of application

12. The Applicant explains the need for the application in the following way:

“The recent history of flooding in the Lake District National Park and at Windermere Marina (in particular in 2009 and 2015 when the Property flooded, and the high water events of February 2020 and October 2021), has resulted in buildings insurance cover for flood risk being exorbitantly expensive and cover unsatisfactory:

- (i) From 1st January 2020 for the cover year 2020 the annual premium was £55,941.46 (less loss of rentals cover charged separately to rental owners of £4,607 giving £51,334 for buildings cover) and the excess for damage caused by flooding at 20% of the cost of repairs or £75,000 per building (of which there are three), whichever the greater.
- (ii) In addition to this main policy from 1st August 2020 the Applicant has obtained a fixed pay-out policy for £250,000 with FloodFlash. This is for flood cover only and a sensor has been placed on one of the buildings, if the water level reaches 0.6m on the sensor, which is approximately equivalent to ground floor level, then the policy will pay-out automatically without excess. The annual premium from 1st August 2020 was £18,489 (including IPT, sensor fee (£120) and broker fee (£300)).
- (iii) For the cover year 2021, the Applicant's insurance brokers, Willis Towers Watson, were asked to go to the market for competitive quotes but were unable to obtain any offers of buildings cover for the Property other than from the existing insurer AXA. From 1st January 2021 the annual premium was £59,076.59. The policy had an excess for flood damage of £250,000 and a cap of £750,000 thereafter.
- (iv) In addition the FloodFlash policy was renewed on the same terms as the previous year from 1st August 2021 at a premium of £18,539 (including IPT, sensor fee (£120) and broker fee (£350)).
- (v) For the cover year 2022, the Applicant's insurance brokers, Willis Towers Watson, were asked to go to the market for competitive quotes but were unable to obtain an offers of buildings cover from the Property other than from the existing insurer AXA, and that only after an initial refusal. From 1st January 2022 the annual premium was £152,408.53. The policy has an excess for flood damage of £250,000 and a cap of £750,000 thereafter.

There is in reasonable prospect circumstances where insurance will be unavailable.

The Leases currently make inadequate provision in all these circumstances.

Clause 1.8 of the ground floor Leases (and Clause 1.12 of the upper floor Leases) defines "Insured Risks" as follows:

"include fire lightning explosion aircraft (including articles dropped from aircraft) riot civil commotion malicious persons earthquake storm tempest flood bursting and overflowing of water pipes tanks and other apparatus and impact by road vehicles and such other risks as the Landlord from time to time in its absolute discretion shall insure against"

Clause 6.1.1 of the Leases provides that the Applicant as Landlord is obliged to insure the Building (which includes apartments 16-38 Windward Way). Clause 6.1.3 provides that each Respondent as Tenant must pay their proportion of the insurance premium (this is defined as the relevant percentage in each lease, varying between 2.55% and 6.58%).

Clause 6.2 provides that in the event of damage or destruction to the Building (i.e. the three buildings comprising Apartments 16 to 38) due to an Insured Risk event, the Landlord must reinstate and use the insurance monies towards the cost.

Clause 3 of the Third Schedule to the Lease also provides that the Tenant will maintain the Property (i.e. the flat) in substantial repair and condition. It does not state that such obligation is excluded where damage is caused by an Insured Risk. There is accordingly an overlap of liability to repair for the Landlord and the Tenant in the event of damage being caused by an Insured Risk.

Part 2 of the Seventh Schedule sets out certain services (“Apartment Services”) which the Landlord must provide in relation to the Building including an obligation to repair and maintain. The costs which the Landlord incurs in carrying out those repairs are recoverable from the Tenants as “Apartment Service Charge”. The Lease does not provide that the uninsured cost of repairing the Building (i.e. the insurance excess) cannot form part of the Apartment Service Charge, but neither does it provide that it can form part of the Apartment Service Charge.

Consequently, the Leases fail to address in terms or adequately or clearly how the insurance excess, or any shortfall that is not insured, is to be treated either as a matter of insurance or as a matter of repair. A very large excess and shortfall is now to be anticipated, devaluing the interests of the parties to the Leases. Further, there is no provision in the Leases were insurance to be obtainable only at exorbitant cost or to be unobtainable by the Landlord.”

13. The Applicant has proposed a package of variations to the leases to address these difficulties. In addition, it proposes that the leases be varied in two further respects, namely: (i) to provide that the Landlord may serve amended estimates throughout the Apartment Service Charge Year should it consider it reasonably necessary; and (ii) to remove the provision for exponential ground rent increases.

Views of the Respondents

14. The Applicant has previously prepared and circulated to the Respondents “deeds of rectification” for the purpose of giving effect to the relevant lease variations without the need for an order of the Tribunal. None of those deeds have been completed, but they have been executed by all but the respondent lessees of apartments 25, 31 and 34. We therefore assume that the 20 lessees who have executed those deeds consent to this application. As far as the lessees of apartments 25 and 34 are concerned, we understand that, whilst they have not executed deeds of rectification, neither have they intimated any objection to the outcome

which the Applicant is seeking to achieve by this application. It appears that the respondent lessee of apartment 31 may oppose the proposed variation (and thus the tribunal application also), but the reasons for any such opposition are unknown (and the Respondent in question has not made any representations to the Tribunal in the course of these proceedings).

Conclusions

15. We are satisfied that the object to be achieved by the proposed lease variations cannot be satisfactorily achieved unless all the leases are varied to the same effect. In this regard we note that, under clause 5 of the leases, the Applicant covenants to “observe and perform” the covenants in the Fourth Schedule. Paragraph 4 of the Fourth Schedule is a covenant: “Not to enter into a lease of an apartment within the Building unless such lease is substantially similar to this lease”. It follows that the Applicant cannot proceed with the deeds of rectification referred to above in the absence of unanimity.
16. We are also satisfied that the requirements of section 37(5)(b) of the Act are met: it follows from the facts stated at paragraph 14 above that more than 75% of the parties consent to the application and less than 10% oppose it.
17. We do not consider that the proposed variation would be likely substantially to prejudice any respondent to the application (or any third party), or that for any other reason it would not be reasonable in the circumstances for the variation to be effected. Nor do we consider it appropriate to order any party to pay compensation to any other person as a condition of granting the application.
18. Accordingly, we are satisfied that it is appropriate to grant the application and thereby to vary each of the leases in the manner provided for in the Order set out at Annex B hereto. The terms of that Order have been settled by counsel for the Applicant, the operative provisions of which being to the same effect as the deeds of rectification referred to above.

ANNEX A – RESPONDENTS AND LEASES

Name	Apartment No.	Date of lease
AJP Property Development Ltd	16	03/08/2007
Rebecca Dearden	17	03/08/2007
Kevin & Elizabeth McAuliffe	18	26/06/2007
Peter & Susan Rowbottom	19	10/10/2007
Nicolette Byrne	20	26/06/2007
Christopher Davies	21	29/06/2007
Mr A Carey & Mr D Newman as trustees of the Robert Harry Ford Will Trust	22	25/05/2007
John Tanner & Alison Ryall	23	15/06/2007
Gabman Limited	24	10/04/2007
Hasan & Shenaz Isaji	25	30/03/2007
Nick & Karen Isherwood	26	26/07/2007
Kathryn Greenleaf	27	30/03/2007
Linda Lea	28	30/03/2007
Ian Aspden	29	25/05/2007
Anita Banks	30	15/12/2006
Mr & Mrs OA Wilkes	31	15/12/2006
Lake Escape Properties Ltd	32	01/12/2006
Colin Lannen	33	20/11/2006
Mr & Mrs JJ Cameron	34	20/11/2006
Peter & Lesley Bluckert	35	20/11/2006
Timothy Haworth	36	28/03/2007
Angela Jennings & Brian Royle	37	20/11/2006
Kevin & Elizabeth McAuliffe	38	30/11/2006

ANNEX B – ORDER

UPON the Tribunal issuing directions on 25th August 2022 for service of this Application and its accompanying bundle, with a copy of the directions, on each of the Respondents and none of the Respondents opposing the Application within the time directed or at all

And UPON the Tribunal having directed on 25th August 2022 that this application will be determined on the papers provided by the parties without holding a hearing unless a party requests one, and no party having made such a request

And UPON the Tribunal considering the Application and its accompanying bundle, including, for all but three of the Respondents' leases at the Property, the executed Deeds of Rectification in common form with the terms of the Application

And UPON the Tribunal being satisfied that the object to be achieved by the variations as set out in the Application cannot be satisfactorily achieved unless all the Leases are varied to the same effect

It is ORDERED that pursuant to section 38(3) of the Landlord and Tenant Act 1987 all the residential long leases at the Property are varied from the date of this Order, as follows (any clause not indicated remaining as per the original lease):

(a) Various², **Clause 1.8** or **Clause 1.12**, **“Insured Risks”** is deleted and replaced by the following:

“Insured Risks”

fire, explosion, lightning, earthquake, storm, flood, bursting and overflowing of water tanks, apparatus or pipes, escape of water or oil, impact by aircraft and articles dropped from them, impact by vehicles, riot, civil commotion, malicious damage, theft or attempted theft, falling trees and branches and aerials, subsidence, heave, landslip, collision, accidental damage to underground services, public liability to anyone else and any other risks which the Landlord decides to

² The position of this definition varies between leases and is either Clause 1.8 or Clause 1.12

insure against from time to time and Insured Risk means any one of the Insured Risks (Provided the same are available at commercial rates and any exclusions and exceptions are reasonably acceptable to the Landlord).

(b) **Clause 3.2** shall have the words before the brackets deleted and the following inserted

(i) in leases which refer to “Common Parts Service Charge” as well as “Service Charge” and “Apartment Service Charge” the words “the Service Charge Apartment Service Charge and Common Parts Service Charge as estimated pursuant to Seventh Schedule Part 1 clause 3, Seventh Schedule Part 2 clause 3 and Seventh Schedule Part 3 clause 4 respectively within 28 days of written demand”

and

(ii) in all other leases “the Service Charge and Apartment Service Charge as estimated pursuant to Seventh Schedule Part 1 clause 3 and Seventh Schedule Part 2 clause 3 respectively within 28 days of written demand”

(c) **Clause 6 “Mutual Covenants”** is deleted and replaced by the following clause:-

6 MUTUAL COVENANTS

The Landlord and Tenant mutually covenant and agree with each other that:

6.1 The Landlords shall

6.1.1 at all time during the Term (unless such insurance is vitiated by an act or default of the Tenant) insure the Building against loss or damage by the Insured Risks and keep the Building so insured in the name of the Landlord with an insurance company of its choice for such sum as the Landlord shall consider adequate to cover the cost of rebuilding works including demolition architects’ surveyor’s fees (and any other reasonably expected other fees) together with third party owner’s liability and third party public liability risks (subject to any exclusions and limitations conditions

or excesses that maybe imposed by the Landlords insurer and further subject to the same being available on reasonable terms in the London insurance market)

6.1.2 if requested by the Tenant produce but at their own cost a copy summary or extract of the insurance policy and current schedule

6.2 The Tenant shall pay on demand to the Landlord:-

6.2.1 The Relevant Percentage of the insurance premium(s) (and insurance tax) and shall not by act or omission on the part of the Tenant and any other occupiers of the Property cause the Landlord's insurance to be rendered void or voidable or effect any further insurance policies other than in accordance with their obligations under this lease plus any additional premium as determined by the insurance company providing the insurance on the Building arising as a result of the use of the Property

6.2.2 the Relevant Percentage of any excess payable or an amount that is deducted or disallowed by the Landlord's insurer pursuant to any excess provision in the insurance policy of the Building following the occurrence of an Insured Risk and

6.2.3 an amount equal to any insurance money that the insurers of the Building refuse to pay by reason of any act or omission of the Tenant or undertenant their workers contractors or agents or any person at the Building with the express or implied authority of any of them

6.3 If the Building or any part of it is damaged or destroyed by an Insured Risk, the Landlord shall:

(a) promptly make a claim under the insurance policy(ies) for the Building;

(b) notify the Tenant (as soon as reasonably practical) if the Landlord's insurer indicates that the reinstatement cost will not be recoverable

in full under the insurance policy, and, where appropriate, pursue (subject to the costs of the same being recoverable from the tenants if not fully recovered otherwise) any of the tenants in the Building in respect of any monies that the insurers of the Building refuse to pay by reason of any act or omission of the tenants in the Building or any undertenant, their workers, contractors or agents or any person at the Building with the express or implied authority of any of them;

- (c) promptly take such steps as may be necessary and proper to obtain all planning and other consents to repair (or as the case may be) rebuild the Building;
- (d) subject to obtaining such consents, use any insurance money received (other than for loss of Rent and Service Charge and/or Apartment Service Charge) and any money received from the Tenant under paragraph 6.2.2 and/or 6.2.3 above) to repair the damage in respect of which the money was received or (as the case may be) to rebuild the Building (Provided always that the Landlord is under no obligation to make up any shortfall) and
- (e) subject to obtaining such consents, provide premises or facilities equivalent in size, quality and layout to those previously at the Building but if the relevant consents cannot be obtained for premises or facilities equivalent in size, quality and layout to those previously at the Building to provide premises and facilities that are reasonably equivalent to those previously at the Building.

6.4 The Tenant shall not insure the Building (or any part thereof) against any of the Insured Risks in such a manner as would permit the Landlord's insurer to cancel the Landlord's insurance or to reduce the amount of any money payable to the Landlord in respect of any insurance claim.

6.5 The Landlord shall not require the Tenant to contribute to the costs of maintenance repair and insurance of any apartment in the Building in

respect of which a lease containing similar terms to this lease has not been granted

(d) The Sixth Schedule “Provisions for Review of Rent” Clause 2.1

In the definition of “B” the words “last published at the Commencement Date” are deleted

And are replaced by

“for the first day of the Immediately Previous Rent Period”.

(e) The Seventh Schedule Part 1 clause 3 shall have the words added after "Year" on line 4 "provided always that the Landlord may serve amended estimates throughout the Service Charge Year should it consider it reasonably necessary.”

(f) The Seventh Schedule Part 2 clause 3 shall have the words added after “Service Charge Year” on line 4 "provided always that the Landlord may serve amended estimates throughout the Apartment Service Charge Year should it consider it reasonably necessary."

(g) The Seventh Schedule Part 3 clause 4 shall have the words added after “Service Charge Year on line 4 “provided always that the Landlord may serve amended estimates throughout the Common Parts Service Charge Year should it consider it reasonably necessary.”

Signed: J W Holbrook
Judge of the First-tier Tribunal
Date: 11 November 2022