FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/00HN/LVT/2019/0007
Property	:	Leonard Hackett Court, St Winifreds Road, Bournemouth, BH2 6PR
Applicants	:	Anchor Hanover Group
Representative	:	Not represented
Respondent	:	The Lessees
Representative	:	Not represented
Type of Application	:	Variation of Lease (Section 37 Landlord and Tenant Act 1987)
Tribunal Members	:	Judge N P Jutton
Date of Decision	:	12 March 2020

DECISION

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1 **Introduction**

2 The Applicant is the lessor of Leonard Hackett Court, St Winifred's Road, Bournemouth, BH2 6PR (the Property). The Property comprises some 36 residential flats each held on long leases. By an application dated 10 December 2019 made pursuant to Section 37 of the Landlord and Tenant Act 1987 (the Act) the Applicant seeks to vary each lease at the Property.

3. Directions were made by the Tribunal on 30 December 2019. The Directions required the Applicant to give notice of the application together with the Directions to each of the lessees. The Directions further provided that the Applicant's application form and accompanying documents would stand as the Applicant's Statement of Case. That the Respondent lessees could serve on the Applicant a Statement in reply together with any claim for compensation under Section 38(10) of the Act and any other documentation upon which the Respondents wished to rely.

4. In accordance with the Directions the Application has prepared and filed a bundle of documents. The bundle includes the Application, HM Land Registry Official Copy Entries of the Applicant's title, the Directions, details of the parties to each lease, copies of various leases and deeds of variation, a proposed draft deed of variation, correspondence from the Applicants to the lessees and a letter from Electoral Reform Services Limited dated 2 July 2019. References in this Decision to page numbers are references to page numbers in that bundle.

5. On 2 March 2020, the Applicant sent to the Tribunal a further bundle of documents. Within that bundle were 7 types of proposed deeds of variation together with, in each case, a copy of the lease to which each deed applied. There was also a copy of a letter dated 3 June 2019 (pages 189-192 of the additional bundle) addressed to lessees outlining as it was put in the letter *"in simple terms"* the proposed amendments to the lease, and with that letter was a ballot form to be completed and returned by the lessees by Monday 1 July 2019.

6. The Directions provided that the Application would be determined on the papers without a hearing in accordance with Rule 31 of the Tribunal Procedural Rules 2013 unless a party objected in writing to the Tribunal within 28 days of receipt of the Directions. The Tribunal has received no objections and therefore proceeds to determine the Application on the papers without a hearing.

7. **Background**

8. Various leases of flats at the Property were granted between 1990 and 2015. They are essentially in the same form and contain like clauses. Some have been subject to deeds of variation, some have not. They have in the additional bundle been divided into 9 different types. There is a proposed deed of variation in relation to each type of lease. There is a very helpful spreadsheet at pages 195-196 of the additional bundle which by reference to each flat at the Property sets out the parties to the lease, the

date of the lease, any applicable historic deed of variation and the lease type as identified above.

9. All leases (where applicable as varied) provide that the Applicant will "*keep in good and substantial repair the interior of the flats at the property including the repair of Landlord's fixtures and fittings therein and the central heating system and all sewers drains pipes cables and wires but not to undertake internal decorative repair of the flats*". The reasonable cost incurred in complying with that provision can be recovered from the individual lessees by way of service charges.

10. That provision the Applicant says has over the years raised concerns amongst the Respondents in particular regarding the impact on service charge contributions. The Applicant says that assessments have been carried out in respect of anticipated future costs should the Applicant remain responsible for undertaking repairs and renewals within the flats and in respect of anticipated costs in the event that the leases were varied to make the individual lessees responsible.

11. The Applicant proposes that the leases be varied to provide that the lessees be responsible for keeping the interior of their demised premises in good and substantial repair and condition (but to exclude repairing and maintaining the central heating system and associated pipework, external windows and external doors and any warden call system within the premises) so as to relive the Applicant of that burden and thus reduce the service charges payable by the lessees.

12. The relevant provisions of the Act are set out in a Schedule to this Decision. Section 37 of the Act provides that a landlord or any of the tenants (lessees) can make an application to this Tribunal for an Order varying each of the leases at a property on the grounds that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.

13. Section 37(5)(b) provides that such an application can only be made if in respect of an application to vary more than 8 leases (as in this cases) the application is not opposed for any reason by more than 10% of the total number of the parties concerned and at least 75% of that number consent to it.

14. Section 38(3) of the Act provides that if on an application under Section 37 the Tribunal is satisfied that the object to be achieved by the proposed variation cannot be achieved unless all the leases are varied to the same effect then the Tribunal may make an Order varying each of the leases in such manner as it specifies. However the Tribunal will not make an Order effecting any variation of a lease if it appears to the Tribunal that the variation would be likely to substantially prejudice the Respondent to the Application (in this case the lessees) or any person who is not a party to the Application, and that an award under Section 38(10) of the Act will not afford adequate compensation or that for any other reason it would not be reasonable in the circumstances for the variation to be effected (Section 38(6)).

15. On 3 June 2019, the Applicant wrote to each of the lessees at the Property (there are examples of those letters at pages 189-192 of the additional bundle). The letter referred to a meeting with residents on 27 March 2019. The letter went on to say *"This letter sets out the proposal in simple terms of varying the lease and the necessary legal obligations"*. The letter encloses a ballot paper in which the recipient is asked to tick a box of their choice. The choice is as follows:

    "Yes (for the motion)
    I am in favour of the proposal to amend the lease through a deed of variation.
    This will make residents (leaseholders) responsible for all repairs and replacements within their own flat.

    No (against the motion)
    I am not in favour of the proposal to amend the lease through a deed of variation.
    I wish for the lease to stay the same with the landlord carrying out all repairs and renewals in both the communal areas and within each property, using the service charge to pay the costs".

    There is then a provision for the form to be signed, to complete the appropriate flat number and date.

16. There is at page 87 a letter from a company called Electoral Reform Services Limited dated 2 July 2019 which is a report of the result of the ballot. The report provides that there were a total of 36 eligible voters (one vote per flat). That 30 votes were cast. That equated to a turnout of 83.3%. That 28 lessees voted in favour of proposals to vary the lease (equivalent to 93.3% of the turnout) and 2 voted against (6.7% of the turnout).

17. Following a meeting with lessees on 11 July 2019 the Applicant produced a draft deed of variation of the proposed variations to the various leases. It subsequently sent a copy to those proposed variations to each of the lessees (undated copy letter at 85). The letter explained that the effect of the variations would be that each lessee would be responsible for the maintenance and repair of the interior of their properties with the exception of the central heating installation and associated pipework.

18. The Applicant further wrote to each of the lessees pursuant to the Directions made by the Tribunal (copy undated letter at 86) notifying the lessees of this Application, enclosing a copy of the Directions dated 30 December 2019, providing the Tribunal's details and notifying each lessee that they were entitled to be joined as a party either as an Applicant (if they were in favour of the Application) or a Respondent (if they opposed the Application).

19. The Tribunal has received no requests from any of the lessees of the Property to be joined as a party to the Application.

20. **Decision**

21. As stated above an Application made pursuant to Section 37 in relation to more than 8 leases can only be made if it is not opposed for any reason by more than 10% of the total number of parties concerned and at least 75% consent to it. The relevant point in time to determine whether or not an Application is opposed or consented to for those purposes is the time at which the paper Application is made (**Marshall Dixon v Wellington Close Management Limited** [2012]UK UT95 (LC)). In this case the date of the Application is 10 December 2019. The Applicant relies upon the report from Electoral Reform Services Limited of 2 July 2019 which pre-dates the application by over 5 months.

22. The report itself does not say what the proposed amendments to the lease are. However, it seems clear that they are as outlined in the letter sent to lessees dated 3 June 2019. That letter outlines the proposed amendments but does not set out the actual proposed wording.

23. The letter to lessees at page 85 is undated but it would appear to have been written after the Electoral Reform Services report of 2 July 2019. That is because it refers to a meeting which it is said took place with the residents on 11 July 2019. The letter states "*I am pleased to confirm that the draft deed of variation has* <u>*now*</u> (emphasis added) *been prepared. The proposed Deed of Variation (a copy of which is enclosed) changes the clauses within the lease so that residents will be responsible for the interior of their property, with the exception of the central heating installation and associated pipework, for which Anchor Hanover will continue to retain responsibility*".

24. It would appear from the papers before the Tribunal that the wording of the proposed variations was not produced to the lessees until after the meeting which took place on 11 July 2019 which in turn is sometime after the ballot of lessees the report of which is dated 2 July 2019. The report of 2 July 2019 provides that as at that date 93.3% of those who voted were in favour of a proposal to amend the lease through a deed of variation and only 6.7% opposed that proposal but it would appear that the lessees at the time of voting did not have before them the wording of the proposed variation. All the lessees appear to have had before them was the letter dated 3 June 2019 which (not unhelpfully) set out the proposed variation *"in simple terms"*.

25. The Tribunal needs to be satisfied upon the evidence before it that for the purposes of Section 37(5)(b) that the proposed variations were as at the date the Application sufficiently supported or were insufficiently opposed by the lessees. The Tribunal is concerned that without having the benefit of the proposed wording to be contained in the deed of variation before them the lessees did not at the time that the ballot was conducted have sufficient information in order to make an informed decision. As it was put by HHJ Gerald in **John Peter Simon v St Mildred's Court Residents' Association Limited** [2015] UKUT 0508 (LC) at paragraph 31 "*further, even in apparently straightforward cases (not that variations to leases are ever straightforward – vide the First*

Application), lessees should be given an opportunity of considering and if so consenting to the proposed wording".

26. The Tribunal has some sympathy with the Applicant's position. It has endeavoured to explain to lessees in clear and understandable terms what is proposed. However, the wording on the ballot form (page 193 of the additional bundle) is in broad terms. It does not set out, nor does the letter that accompanied it, the proposed wording of the variation. It is clear to the Tribunal that at the time that they cast their votes, the lessees were not aware of the wording of the proposed variations. In the view of the Tribunal, they should have been. They could not properly make an informed decision to support or oppose the proposed variation without seeing the draft wording. In all the circumstances, the Tribunal cannot be satisfied upon the basis of the evidence before it that for the purposes of Section 37(5)(b), that at least 75% of the Lessees consent to the proposed variations and that they are not opposed by more than 10%. Had the letter of 3 June 2019 or more particularly the enclosed ballet paper contained or set out on a separate document the wording to be contained in the proposed deed of variation, the Tribunal may have taken a different view.

27. For those reasons the Tribunal dismisses the Application.

Dated this 12th day of March 2020

Judge N P Jutton

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

SCHEDULE

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 subsection (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 subsection (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.