



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

**Case Reference** : **BIR/00CT/LVT/2020/0005**

**HMCTS** : **Paper**

**Property** : **Malvern Court 915/917 Warwick Road,  
Solihull, West Midlands B91 3EP**

**Applicant  
Representative** : **Stonewater (2) Limited  
Shakespeare Martineau LLP**

**Respondents** : **The Leaseholders of Malvern Court**

**Date of Application** : **22<sup>nd</sup> July 2020**

**Type of Application** : **To vary a lease or leases pursuant to  
s37 Landlord and Tenant Act 1987**

**Tribunal** : **Judge J R Morris  
Mr R Bryant-Pearson FRICS**

**Date of Decision** : **8<sup>th</sup> December 2020**

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**DECISION**

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## **Covid-19 Pandemic**

This determination on the papers has been consented to by the parties. A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has directed that the case is to be determined wholly on the papers because it is not reasonably practicable for a hearing, or to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

## **Decision**

1. The Tribunal orders that pursuant to section 38 of the 1987 Act all the residential long leases at the Property are varied as set out in the Order annexed hereto with effect from the date of the Order.

## **Reasons**

### **The Application**

2. The Applicant seeks a variation of the Leases of 30 flats at Malvern Court (“the Property”), which is retirement housing, under section 37 of the Landlord and Tenant Act 1987 (“the 1987 Act”). The Variation is to allow the replacement of a residential scheme manager with a non-residential scheme manager. 29 out of the 30 Leaseholders consent to the Application which is in excess of the 75% required under section 37 of the 1987 Act. There is only one Leaseholder who opposes the Application which is less than the figure of 10% prescribed in section 37.
3. Directions were issued on 28<sup>th</sup> July 2020 which required the Applicant to send a copy of the Application and Schedule of the Proposed Variations and the Direction to all 30 Leaseholders and to any persons it knows or believes are likely to be affected by the proposed variation of the Lease informing such persons that they may apply to the Tribunal to be joined as a party. On 10<sup>th</sup> August 2020 the Applicant confirmed that the Directions had been complied with.
4. The Tribunal received a Statement of Case and Schedule of the Proposed Variations in compliance with the Directions from the Applicant. No statement of case or representations were received from the Respondents.
5. The Application was set down for determination on or after 30<sup>th</sup> October 2020. On 2<sup>nd</sup> October 2020 the Tribunal asked for some further information which was provided on 13<sup>th</sup> October 2020 as requested.

## The Leases

6. A copy of a Lease was provided. It was stated that all the Leases were for a term of 99 years from 29<sup>th</sup> September 1985 and are in like form although have different commencement dates. The Lease provided was dated 7<sup>th</sup> July 1986 and was between (1) Jephson Homes Housing Association Limited (the Landlord) (2) a purchaser (name redacted) (the Tenant) for a Flat (number redacted) let for a term of 99 years from 29<sup>th</sup> September 1985. The Lease was subsequently assigned to the Applicant as Landlord.
7. The relevant terms of the Lease are as follows (the words to be varied are underlined)
8. Clause 1:4  
Specified Percentage 2.86% (for one-bedroom flats)  
Or  
“Specified Percentage 3.43% (for two-bedroom flats)
9. Clause 1:13  
“Warden’s Residence” that part (the position and extent whereof is shown edged brown on Plan 1 being on the ground floor) of the Buildings on and over the development
10. Clause 1:14  
“Common Parts” all parts of the Development (other than those comprised in the Leases and excluding the Warden’s Residence)
11. Paragraph 1 of Part II of the Fourth Schedule (Covenants by the Association as to the provisions of services)  
  
SUBJECT to the provision of paragraph 8 of the Sixth Schedule: -
  1. To use its best endeavours to maintain the services of a resident warden for the performance within the Development of the following duties:
    - (a) responding to the Warden call system link between the Property and the warden’s Residence during normal hours
12. Paragraph 2 of Part II of the Fourth Schedule (Covenants by the Association as to the provisions of services)  
  
To keep in a good state of repair and condition and when necessary replace rebuild and reinstate the warden’s Residence
13. Paragraph 3 of Part II of the Fourth Schedule (Covenants by the Association as to the provisions of services)

To keep the roof foundations and external parts(including external walls and loadbearing walls and external door and windows (save the glass in any Flat doors and windows) of the Property in good and substantial repair and to paint or otherwise treat (as may be appropriate) as often as may be reasonably necessary in a proper an workmanlike manner and with a suitable materials of good quality such external parts of the Property and all other Buildings comprised in the Development and all internal and external parts of the Warden’s Residence as are usually painted or otherwise treated

14. Paragraph 9:1 of Part II of the Fourth Schedule (Covenants by the Association as to the provisions of services)

To keep the Development (including the Warden’s Residence) and the property insured at all times from loss or damage by dire flood and such other risks and perils as the Association shall from time to time determine in sum equal to the full rebuilding costs (including the removal of debris) for the time being together with an adequate sum I respect of architect’s and surveyor’s fees and in the event that the Property shall be destroyed or damaged as aforesaid to lay out such moneys towards the reinstatement and rebuilding of the same subject nevertheless to the proviso contained in paragraph 6 of the Third Schedule

15. Paragraph 6 of Part II of the Fifth Schedule (Expenditure to be recovered by means of the Maintenance Charge)

All sums paid by the Association in and about the repair maintenance decoration cleaning lighting and running of the buildings the Common Parts and the Warden’s Residence and the Development whether or not the Association was liable to incur the same under its covenants herein contained

### **The Proposed Variation**

16. The proposed variation applicable to all the long leases is as follows (“the Proposed Variation”)

17. Clause 1:4

Specified Percentage 2.77% (for one-bedroom flats)

Or

Specified Percentage 3.32% (for two-bedroom flats)

18. Clause 1:13

To be deleted from the Lease

19. Clause 1:14

“Common Parts” all parts of the Development (other than those comprised in the Leases)

20. Paragraph 1 of Part II of the Fourth Schedule (Covenants by the Association as to the provisions of services)

SUBJECT to the provision of paragraph 8 of the Sixth Schedule: -

1. To use its best endeavours to maintain the services of a warden for the performance within the Development of the following duties:

(a) responding to calls from the helpline service during normal working hours

21. Paragraph 2 of Part II of the Fourth Schedule (Covenants by the Association as to the provisions of services)

To be deleted from the Lease

22. Paragraph 3 of Part II of the Fourth Schedule (Covenants by the Association as to the provision of services)

To keep the roof foundations and external parts (including external walls and loadbearing walls and external door and windows (save the glass in any Flat doors and windows) of the Property in good and substantial repair and to paint or otherwise treat (as may be appropriate) as often as may be reasonably necessary in a proper and workmanlike manner and with suitable materials of good quality such external parts of the Property and all other Buildings comprised in the Development

23. Paragraph 9:1 of Part II of the Fourth Schedule (Covenants by the Association as to the provisions of services)

To keep the Development and the property insured at all times from loss or damage by fire flood and such other risks and perils as the Association shall from time to time determine in sum equal to the full rebuilding costs (including the removal of debris) for the time being together with an adequate sum in respect of architect's and surveyor's fees and in the event that the Property shall be destroyed or damaged as aforesaid to lay out such moneys towards the reinstatement and rebuilding of the same subject nevertheless to the proviso contained in paragraph 6 of the Third Schedule

24. Paragraph 6 of Part II of the Fifth Schedule (Expenditure to be recovered by means of the Maintenance Charge)

All sums paid by the Association in and about the repair maintenance decoration cleaning lighting and running of the buildings the Common Parts and the Development whether or not the Association was liable to incur the same under its covenants herein contained

### **Submissions**

25. The Applicant provided grounds for the claim on the Application Form and Statement of Case which is précised and paraphrased as follows.

26. The Applicant had consulted with its Leaseholders at Malvern Court in relation to replacing the residential scheme manager with a non-residential scheme manager with a view to saving costs which are ultimately recovered from the Leaseholders by way of their service charge. The Leaseholders voted in favour of a non-residential scheme manager.
27. The Applicant said that it was satisfied that there is a sufficient majority for an Application under section 37 of the 1987 Act. All 30 Leaseholders had been consulted in relation to the proposed variation and 30 responses had been received. Of the responses 29 Leaseholders voted that they have a preference for a non-residential scheme manager. The Applicant, as landlord, also has a vote and has a preference for a non-residential scheme manager. There are 96.77% in favour of the Proposed Variation which is over and beyond the required 75% of the Leaseholders' consent needed to make an Application under section 37 of the 1987 Act.
28. A copy of the Application and Directions, dated 28<sup>th</sup> July 2020, was sent to all Leaseholders on 7<sup>th</sup> August 2020. The Application contains a draft of the Proposed Variations to effect the change from residential scheme manager to a non-residential scheme manager. The Applicant confirmed that no response had been received in opposition to the Application.
29. In response to the Tribunal's questions the Applicant was able to confirm the following information.
  1. There are 5 one-bedroom flats and 25 two-bedroom flats (not including the Warden's Residence).
  2. The pre-variation Service Charge apportionment referred to in the Lease as the Specified Percentage is:  
2.86% for one-bedroom flats; and  
3.43% for two-bedroom flats.  
The post-variation Service Charge apportionment or Specified Percentage is:  
2.77% for one-bedroom flats; and  
3.32% for two-bedroom flats.
  3. The Applicant confirmed that the Warden's Residence will be let as a two bedroom flat in like manner as the other flats, thus increasing the number of flats and thereby reducing the service charge apportionment percentage post variation.
  4. The premium paid for the long lease of the Warden's Residence will not be paid into the reserve fund, but leaseholders will benefit from the reduced service charge and the cost of the non-residential scheme manager will be less than a residential scheme manager so in turn this will further reduce the Service Charge costs. These benefits were discussed with residents when the ballot was undertaken.

## **Decision**

30. The Tribunal considered all the evidence adduced.
31. In making its determination the Tribunal took into account the reasons for effecting the change from residential scheme manager to a non-residential scheme manager. It found that the letting of the Warden's Residence would result in a modest reduction in the Specified Percentage paid by the Leaseholders towards the Service Charge. It also found that the employment of a non-residential scheme manager would reduce the Service Charge costs incurred. It further found that the Leaseholders had received all the relevant information regarding the variation and these proceedings and that no objections had been received.
32. The Tribunal is satisfied that the conditions as set out in Section 37(5) of the 1987 Act for varying the Leases are met. It is also satisfied that pursuant to section 37(3) the application to effect the change from residential scheme manager to a non-residential scheme manager cannot be satisfactorily achieved unless all the leases are varied to the same effect.
33. The Tribunal found that the reduction in the Service Charge in terms of both the Specified Percentage and the costs incurred would benefit all the Leaseholders in equal measure. The Tribunal had regard to section 38(6) and was satisfied that the variation would not be likely to substantially prejudice (i) any respondent to the application, or (ii) any person who is not a party to the application. The Tribunal also had regard to section 38(10) and determined that no loss or disadvantage had been suffered by a party as a result of the variation to justify an order for compensation.
34. Therefore, the Tribunal orders that pursuant to section 38 of the 1987 Act all the residential long leases at the Property are varied in accordance with the Proposed Variation as set out in the Order annexed hereto with effect from the date of the Order.

**Judge JR Morris**

## **APPENDIX 1 - RIGHTS OF APPEAL**

1. If a party wishes to appeal the 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.



## APPENDIX 2 – THE LAW

### **The Law**

The relevant law is contained in the Landlord and Tenant Act 1987 sections 37 and 38.

#### **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 subsections (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 subsections (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.