

12543



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

Case reference : **LON/00AP/LVT/2017/0009**

Property : **Marc Court, 56-58 West Green
Road, Tottenham, London N15 5NR**

Applicant : **Rubycroft Limited (the landlord)**

Representative : **Bude Nathan Iwanier LLP**

Respondent : **The lessees listed in the schedule to
the application**

Representative : **Not known**

Type of application : **Variation of a lease by a party to the
lease**
S35 Landlord and Tenant Act 1987

Tribunal member(s) : **Judge J Pittaway**

Venue of determination : **10 Alfred Place, London WC1E 7LR**

Date of decision : **5 December 2017**

DECISION

Decisions of the tribunal

(1) The tribunal grants the variations sought as set out in the Schedule attached to the Applicant's application, save for

- a. the deletion of Clause 6 which should remain in the Lease, but in the following varied form;

"The Association HEREBY COVENANTS with the Lessee to perform and observe the covenants set out in the Fourth Schedule hereto. In the event that the Association no longer exists the Lessor HEREBY COVENANTS with the Lessee to perform and observe the covenants set out in the Fourth Schedule hereto. ; and

- b. in paragraph 4 of the Firth Schedule the reference to "Association" should be changed to "Lessor".

A copy of the "draft amendments to lease" as amended in manuscript by the tribunal is attached to this decision.

(2) There were no applications for costs before the tribunal.

The application

1. The applicant seeks to vary six leases of flats in Marc Court 56-58 West Green Road, Tottenham, London N15 5NR (the "Property") under section 35 of the Landlord and Tenant Act 1987 (the "1987 Act").
2. The leases were each entered into by the Landlord, the respective tenant and Marc Court Management Company Limited (the "Association"). The Association covenanted (in clause 6 of the Lease) to perform the obligations set out in the Fourth Schedule, namely to repair and maintain the Reserved Property, to employ necessary staff, to pay communal charges and to insure the individual flats. By paragraph (t) of the Second Schedule of the leases the tenants covenanted to pay the Association a maintenance charge, being a proportion of the Association's costs in complying with its obligations under the Fourth Schedule. By clause 5(4) provision was made for the Landlord to assume the rights and obligations of the Association if the Association failed to do so, but only if requested by the Association following a resolution passed at general meeting.
3. The Association was dissolved on 22 September 2009. At present the landlord is not under an obligation to provide the services set out in the Fourth Schedule; nor able to recover the cost of provision of such

services from the tenants. The landlord has therefore applied to the tribunal for an order to vary the leases under section 35 of the Act.

4. Directions dated 27 September 2017 provided for various steps to be taken. They provided that the application was to be considered by way of a paper determination unless a party requested an oral hearing. As no oral hearing was requested the application was considered on the basis of the papers on 5 December 2017.

The applicant's case

5. The applicant relied on its original application (which included copies of all the relevant leases and a draft of the variations sought). The application listed all persons (including mortgagees) likely to be affected and stated that each of those persons had been served with a copy of the application.
6. By a letter dated 1 November 2017 to the tribunal Bude Nathan Iwanier confirmed on behalf of the applicant that they had not received any response from any person on whom they had served a copy of the notice. The tribunal note that the bundle before it includes a letter from the mortgagee of Flat 1, Capital Homes Loans Limited dated 10 November 2017 confirming its agreement to the proposed variations.

The tribunal's decision

7. The tribunal is satisfied that the grounds upon which the application has been made fall within the grounds set out in section 35(2) of the Act, which section is set out in the schedule to this decision.
8. Following the dissolution of the Association the leases do not make satisfactory provision for the repair of the Reserved Property, or the insurance of the flats, being the grounds specified in Section 35 (2) (a) and (b) of the Act on which an application may be made. The tribunal agree that clause 6 should not refer to the Association, but clause 6 must remain in the leases to make provision for the landlord to be responsible for such repair and insurance. It is not sufficient to vary clause 5(4) without retaining clause 6 under which the Association covenanted to comply with the Fourth Schedule. By clause 38(4) the variation specified in the order under section 38(1) may be the variation requested in the application, "or such other variation as the [Tribunal] thinks fit".
9. Subject to this variation being made the tribunal agree that the amendments requested by the Applicant to the Fifth Schedule should be made in order to permit the Applicant landlord to recover the cost to it of the costs of complying with the obligation in clause 6 and the Fourth Schedule.

10. The tribunal also orders the other variations requested by the Applicant which are consequential on the above variations.
11. Accordingly the tribunal grants the variations sought as set out the draft Deed of Variation attached as a Schedule to this decision, as varied in respect of clause 6 of the leases as set out above. The tribunal directs that a memorandum of the variations to the leases be endorsed on the leases.
12. The tribunal is also satisfied that it is not appropriate to 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 as we do not consider any is likely to be suffered as a result of the variation.
13. The tribunal notes that there are no applications for costs before it.

Name: Judge Pittaway

Date: 5 December 2017

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this 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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Sections 35 and 38 of the Landlord and Tenant Act 1987

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 the appropriate 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.

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—

- (a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and
- (b) other factors relating to the condition of any such common parts.

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

- (a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and
- (b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and
- (c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than $\frac{2}{3}$ the whole of any such expenditure.

(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 and Tribunal Procedure Rules shall make provision—

- (a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and
- (b) for enabling persons served with any such notice to be joined as parties to the proceedings.

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

- (a) the demised premises consist of or include three or more flats contained in the same building; or
- (b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) In this section “service charge” has the meaning given by section 18(1) of the 1985 Act.

(9) For the purposes of this section and sections 36 to 39, “appropriate tribunal” means—

- (a) if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
- (b) if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.

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.

FOUNTAYNE MANAGING LIMITED

DRAFT AMENDMENTS TO LEASE

FLAT A, FIRST FLOOR, 56-58 WEST GREEN ROAD, LONDON N15

Clause 5(4)

If at any time the Association shall fail to observe and perform any of the covenants on its behalf in this Lease contained or the Association shall no longer exist then henceforth this Lease shall be read as if for the future the Lessor has assumed the rights and obligations of the Association hereunder. and such default shall continue for two months then the Lessor shall at the written request of the Association following a resolution passed at general meeting determine the further rights of the Association hereunder henceforth this Lease shall be read as if for the future the Lessor has assumed the rights and obligations of the Association hereunder but without prejudice to all rights of action of any party against the Association in respect of any antecedent breach of its covenant

Clause 6

STET
AS
amended
THE Association HEREBY COVENANTS with the Lessee to perform and observe the covenants on the part of the Association set out in the Fourth Schedule hereto In the event that

The First Schedule - Clause 4 COVENANTS WITH THE LESSEE TO PERFORM AND OBSERVE THE COVENANTS SET OUT IN THE FOURTH SCHEDULE HERETO

The right (in common with the Association and the Lessor and all persons deriving title under the Lessor and the lessees for the time being of all the other Flats) for the lessee his servants agents licensees and invitees to use at all times and in accordance with such reasonable regulations as the Association or the Lessor may from time to time impose the passageway and communal areas of the Block coloured green on the plan

"Excepting and Reserving" - Clause 4 - page 10/11

The right for the Association or the Lessor to decorate or redecorate (to the exclusion of the Lessee whose obligation shall not extend thereto) the outside faces of the external walls and the entrance doors of the demised premises

The Second Schedule - Clause (g)

To permit the Lessor and the Association and the lessee or occupier of any other of the Flats and their respective agents or workmen at any time or times during the said term at reasonable hours in the daytime upon giving reasonable notice (except in the case of emergency) to enter upon the demised premises for the purpose of inspecting cleansing and for executing repairs or alterations upon or to the Reserved Premises or any other of the Flats without unreasonable delay and making good to the Lessee all damage thereby occasioned but without compensation for any temporary damage or inconvenience.

The Second Schedule – Clause (j)

To comply with and observe the Management regulations set forth in the Third Schedule hereto and such amendments or additional regulations as the Lessor Association may (consistently with the provisions of this Lease) make to govern the use of the Block in the general interest of the residents

The Second Schedule – Clause (n)

To permit the Lessor and the Association or either of them or its agents with or without workmen and others at all reasonable times upon giving reasonable notice (except in the case of emergency) during the said term at convenient hours in the daytime to enter the demised premises to view and examine the state and condition of the demised premises and of all decays defects and wants of repair as shall be then and there found for which the Lessee may be liable hereunder to give to the Lessor notice in writing and that the Lessee will remedy repair and amend the same within two calendar months then next following the service of such notice

The Second Schedule – Clause (o)

That if the Lessee shall make default in any of the covenants hereinbefore contained for or relating to the repair or repainting of the demised premises it shall be lawful for the Lessor (but without prejudice to the right of re-entry under the clause hereinbefore contained) or the Association to enter upon the demised premises and repair the same at the expense of the Lessee in accordance with the covenants and provisions of these presents and the expense of such repairs shall be repaid by the Lessee to the Lessor or (as the case may be) the Association on demand with interest at four pounds per centum above Barclays Bank Plc base rate for the time being

The Second Schedule – Clause (2)(ii)

Upon any transaction or disposition to which the Lessee is a party or over which he has any control involving a change in the ownership of the flat to procure that person becoming or to become as a result of such transaction or disposition the owner of the flat (which expression shall be deemed to include any assignee of this lease and any person holding as sub-tenant for substantially the whole of the unexpired part of the term hereby granted but excluding any mortgagee) becomes (in the case of any assignee of this lease) a member of the Association

The Second Schedule – Clause (t)

To pay to the Lessor Association at the times and in the manner set out in the Fifth Schedule hereto such sum as shall under them provisions of that Schedule be determined to be the maintenance charge payable in respect of the demised premises

The Third Schedule – Clause 2

No musical instrument wireless set television set loudspeaker or other mechanical instrument of any kind shall be played or used to household machine used or noise made between the hours of twelve midnight and eight o'clock in the morning or between such other times as the Lessor Association shall decide nor at any time so as to cause annoyance or disturbance to the occupier of any other Flat

The Third Schedule – Clause 5

No name writing drawing signboard notice placard or advertisement of any kind shall be put on or in any windows or the exterior of the demised premises (other than a notice to be approved by the Lessor Association indicating that a particular Flat is to be sold or let)

The Third Schedule – Clause 10

No bird dog or other animal shall be kept on the demised premises without the previous written consent of the Lessor Association and should such permission be given then dogs shall be kept on lead in all communal parts and in the curtilage PROVIDED nevertheless that such consent may be revoked at any time if in the opinion of the Lessor Association the bird dog or animal shall become a nuisance to the owner or occupier of any other Flat

The Third Schedule – Clause 13

Each lessee shall observe such other rules and regulations (either in addition to or by way of substitution of these Regulations) as the Association or the Lessor may think desirable for securing the safety comfort or convenience of the occupiers of the Block

The Fifth Schedule – Clause 1

The maintenance charge in respect of each year of the said term shall be a sum equal to such proportion of the expenses incurred in that year by the Lessor Association in complying with the Lessor Association's covenants in this lease and the Lessor Association's lease and of transferring to a reserve fund for future anticipated maintenance such as the Lessor Association shall think necessary as the rateable value of the flat bears to the aggregate rateable value of the flat and other flats within the building

The Fifth Schedule – Clause 2

The cost to the Lessor Association of complying with its covenants shall be deemed (without prejudice to the generality of the foregoing words) to include:

- (a) The cost of and incidental to compliance by the Lessor Association with every notice regulation or order of any competent local or other authority;

- (e) All administration accountancy legal and other costs of the Lessor Association in carrying on its business

The Fifth Schedule – Clause 3

The Lessee shall pay to the Lessor Association in advance on the Twenty fifth day of December and the Twenty fourth day of June in each year the sum of ONE HUNDRED POUNDS (£100) (or such other sum as the Lessor Association shall from time to time fix) on account of the maintenance charge the first of such payments or a due proportion thereof to be made on the signing hereof

The Fifth Schedule - Clause 4

As soon as practicable after the expiration of each year ending on the Twenty fourth day of June the ^{Lessor}~~Association~~ shall ascertain and certify the amount of the actual maintenance charge for the preceding twelve months and the amount standing to the credit of the reserve fund and serve on the Lessee a copy of such certificate (which shall be binding and conclusive on the Lessor Association and the Lessee) any any balance remaining to be paid by the Lessee after giving credit for the interim payments made by the Lessee in respect of such year shall be paid by the Lessee within fourteen days of the service of such certificate of (if there is a balance repayable to the Lessee) such balance shall be repaid by the Lessor Association within the like time