



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

Case reference	:	LON/00BG/LVT/2018/0018
Property	:	Flats 6, 8, 15, and 23 Steam Mills, 12 Fairclough Street, London E1 1PT
Applicant	:	Steam Mills Management Company Limited
Representative	:	Bolt Burdon (Solicitors)
Respondents	:	1. Michael Scott Eyles (Flat 6); 2. Alan Fenwick and Marion Iris Fenwick (Flats 8 & 15); 3. Nicholas Zuchet and Delphine Jacqueline Guibert (Flat 23)
Representative	:	Bower & Bailey Solicitors on behalf of Michael Scott Eyles
Type of application	:	To vary two or more leases by a majority
Tribunal member	:	Judge Robert Latham Mr Peter Roberts Dip Arch RIBA
Date and venue of paper determination	:	26 March 2019 at 10 Alfred Place, London WC1E 7LR
Date of decision	:	26 March 2019

DECISION

The Tribunal makes an Order pursuant to section 37 of the Landlord and Tenant Act 1987 varying the leases. The terms of the variation are annexed to this decision.

The Application

1. On 11 December 2018, the Applicant landlord applied to vary four leases under section 37 of the Landlord and Tenant Act 1987 ("the 1987 Act"). A Bundle extending to 151 pages has been served in support of this application. This does not include all the documents which were served with the application form, but the Tribunal has had sight of these from the tribunal file.
2. Steam Mills is a purpose-built block of 24 flats. It seems that there were originally 23 flats, but Flat 1 has subsequently been divided to create two flats (1A and 1B). The original leases were granted in about 1998 and 1999. The tenants have now acquired the freehold and own the Respondent company. The Applicant's case is that as a result of the enfranchisement process, it became apparent that there were errors in the drafting of four of the leases as a result of which the service charge contributions for the service charge expenditure only secure 94.92% of the expenditure.
3. The error has arisen in this way:
 - (i) When the flats were originally marketed, the sizes (in square feet) of each flat was computed.
 - (ii) The service charge contribution of 20 of the original 23 flats was computed on the basis of the size of the flats and the service charge contribution appears as a percentage.
 - (iii) The service charge contribution of three of the flats (Flats 6, 8, and 15) was rather specified as 1/23, albeit that the flats vary in size. As these flats are larger than average, their contribution is smaller than it would have been had a percentage been specified.
 - (iv) Had the service charge contribution of all the flats been computed as a percentage based on size, the contributions would have totalled 100%.
 - (v) The lease for Flat 23 originally specified a service charge of 2.74% (see p.106). On 13 January 2006, there was a deed of rectification (at p.129) increasing the contribution to 2.89120%. The Applicant now seeks to substitute the original figure of 2.74%.
4. No explanation has been provided as to why it took 20 years for this error to become apparent or how the landlord managed to fund the service charge expenditure given the shortfall of 5.08%.
5. On 4 October 2018 (at p.185-188), the Applicant served notice of this application on all 23 tenants. However, it is recognised that the variation only has a direct impact on four tenants:
 - (i) Flat 6: Mr Eyles. He opposes the application. His flat is 1,616 sq ft. His 1/23 contribution (4.35%) would increase to 5.87%. This is an increase of some 35%.

(ii) Flat 8: Mr and Mrs Fenwick. Their flat is 1,730 sq ft. Their 1/23 contribution (4.35%) would increase to 6.29%. This is an increase of some 44.6%. On about 8 October 2018 (see p.18), the tenants agreed to the application on the assurance that the variation would not be retrospective but would take effect from the date of the Order of the Tribunal.

(iii) Flat 15: Mr and Mrs Fenwick. Their second flat is 1,681 sq ft. Their 1/23 contribution (4.35%) would increase to 6.12%. This is an increase of some 40.7%. On about 8 October 2018, the tenants agreed to the application in respect of this flat.

(iv) Flat 23: Mr Zucchet and Ms Guibert. Their flat is 753 sq ft. Their lease originally specified the correct proportion of 2.74%. For some unexplained reason, this was increased to 2.89120%. It is now proposed to revert to the original proportion of 2.74%. On 10 November 2018, the tenants agreed to the application (see p.151 annexed to the application notice; the document at p.19 of the Bundle is undated).

6. On 23 January 2019, the Tribunal gave Directions. Any tenant who wished to submit any comments or representations to the Tribunal was directed to send them to the Applicant by 5 March. On 6 March, Bower and Bailey filed representations on behalf of Mr Eyles (at p.142-143). No other tenant has made any representations.

Our Determination

7. Mr Eyles asks the Tribunal to consider the following issues:

(i) He suggests that the three other tenants affected by the change have not given consent in the manner required by section 37(5)(a) of the Act. He states that the consent given by Mr and Mrs Fenwick was conditional. We disagree. Mr and Mrs Fenwick sought an assurance that the variation would not be retrospective. When given this assurance, they confirmed their consent.

(ii) He suggests that he was not validly served with the application. We disagree. He gave his landlord his address as "C/O Michael Charles Lettings, 78 Parkway, London, NW1 7AH". On 20 December 2018, the Applicant sent the application and the notice of the CMH to this address (p.194). On 1 February 2019, the Applicant sent a copy of the Directions and the application to his solicitor. The Applicant's solicitor, Sarah Goodall addresses this in her witness statement (at p.179). In any event, Mr Eyles has now had adequate opportunity to make his position clear and his solicitor has made written representations on his behalf.

(iii) He complains that he has not been provided with all the information that he has requested. We do not consider that notes of the AGM or other meetings are relevant to the issue which we are required to address.

(iv) He states that it would be fundamentally unreasonable to backdate any amendment. We are not asked to do so.

8. The substantive issue is that the leases currently only generate 94.92% of the expenditure required to fund the service charge expenditure. The reason for this is that the grantor adopted two methods for apportioning this expenditure: (i) a standard $1/23$ for 20 of the original flats; and (ii) a percentage for the remaining 3 flats. The flats differ in size and it is more equitable to apportion the service charge according to the size of each flat. Had this course not been adopted, flats 1A and 1B would now each only pay $1/46$ (i.e. 50% of $1/23$). Mr Eyles has suggested that all lessees should pay a 5.35% increase to make up the shortfall of 5.08%. However, the Tribunal is satisfied that the error has arisen because the lessees of Flats 6, 8 and 15 were not required to pay the appropriate percentage based on the size of their flats when their lease were granted. They have benefited from paying less than their fair share over the past 20 years. It would be wrong to aggravate the situation by requiring all lessees to pay more to meet the shortfall attributable to these three flats.
9. The proposed variation rather seeks to put all lessees in the same position, paying their fair proportion having regard to the size of their flats. We are satisfied that it is appropriate to approve the proposed variation.

Judge Robert Latham
26 March 2019

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).

Annexe: Sections 37 & 38 of the 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 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.

IN THE FIRST TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

BETWEEN:

STEAM MILLS MANAGEMENT COMPANY LIMITED

Applicant

and

(1) MICHAEL SCOTT EYLES
(2) ALAN FENWICK AND MARION FENWICK
(3) NICOLAS ZUCCHET AND DELPHINE GUIBERT

Respondents

~~DATE~~ ORDER

Upon the tribunal determining the application without a hearing:

IT IS ORDERED THAT

1. The leases to which this application affect be varied to change the service charge proportion payable to reflect the square foot measurements of each property in the following terms:
 - a. Apartment 6 Steam Mills, 12 Fairclough Street, London and Parking Space 6 E1 EPT registered at HM Land Registry under Title Number EGL384352

Clause 1.1.10 of the Lease dated 20 November 1998 be varied to replace the words "one twenty-third" with "5.87%"

- b. Apartment 8 Steam Mills, 12 Fairclough Street, London and Parking Space, E1 1PT registered at HM Land Registry under Title Number EGL384355 (AGL458229 - new title number pending registration)

Clause 1.1.10 of the Lease dated 20th November 1998 (made applicable to the current demise by virtue of the Lease dated 15th October 2018) be varied to replace the words "one twenty-third" with "6.29%"

- c. Apartment 15 Steam Mills, 12 Fairclough Street, London and Parking Space, E1 1PT registered at HM Land Registry under Title Number AGL458227

Clause 1.1.10 of the Lease dated 20th November 1998 (made applicable to the current demise by virtue of the Lease dated 15th October 2018) be varied to replace the words "one twenty-third" with "6.12%"

- d. Apartment 23 Steam Mills, 12 Fairclough Street, London and Parking Space, E1 1PT registered at HM Land Registry under Title Number EGL396235 (AGL464592 - new title number pending registration)

Clause 1.1 of the Deed of Rectification dated 13th January 2006 be varied to replace "2.89120%" with "2.74%" (and thus reinstating the original provision in Clause 1.1.10 of the Lease dated 30th September 1999, made applicable to the current demise by virtue of the Lease dated 3rd January 2019).

2. The variations set out above shall apply from the date of this order and shall have no retrospective effect.
3. The Applicant shall apply to HM Land Registry to register this order against the Freehold title and affected Leasehold titles within 28 days.
4. Within 14 days of completion of registration by HM Land Registry the Applicant shall serve each Respondent with the copy of their title showing the registration of the variation.



Judge Robert Latham
26 March 2019