

**RESIDENTIAL PROPERTY TRIBUNAL SERVICE  
SOUTHERN RENT ASSESSMENT PANEL  
LEASEHOLD VALUATION TRIBUNAL**

**S.35 Landlord & Tenant Act 1987 as amended**

**DECISION AND REASONS**

Case Number: CH1/29UG/LVT/2008/0007

In the matter of:

**Birch House, 60 Burch Road, Northfleet, Gravesend, Kent DA11 9NE**

Applicants (Freeholders): Three Keys Properties Limited

Respondent (Lessees):   Ms. D Chidgey [Flat1]  
                                  Mr. J Richardson [Flat 2]  
                                  Mr. N. Gibbs [Flat 3]  
                                  Mr. A Sellars [Flat 4]  
                                  West Frazier Ltd [Flat 5]  
                                  Mr. and Mrs, Rann [Flat 6]  
                                  Ms. A. Duff [Flat 7]  
                                  Ms. S. Williams [Flat 8]

Date of Application: 13<sup>th</sup> November 2008

Date of Hearing: 4<sup>th</sup> February 2009

**Tribunal Members:** Mr. S Lal LI.M, Barrister (Legal Chairman)  
                                  Mr. R.Athow FRICS

**Representation**

Applicant: None Present

Respondents: Ms. D. Chidgey [Flat1]

                  Mr. N. Gibbs [Flat 3]

                  Ms. S. Williams [Flat 8]

### **The Application**

1. The Applicant in this matter applied to the LVT on 13<sup>th</sup> November 2008 under s. 35 of the Landlord and Tenant Act 1987 (the "Act") for a variation of each of the Leases held by the Respondents.
2. The background to the application is as follows. The Applicant was the Respondent party to a LVT application under s.27A of the Landlord and Tenant Act 1985. That Tribunal decided following inspection and hearing that the lease of each of the flats in the subject property did not provide for the recovery of expenditure in respect of fire safety works and annual maintenance of the fire alarm and fire extinguishers. Therefore the Lessees were not liable to the present Applicant for the cost of these works.
3. The Tribunal were provided with a signed Statement of Case dated 17<sup>th</sup> December 2008 prepared by Caroline Bagley for and on behalf of the Applicants where she points out that the Applicant does not intend to profit from the carrying out of such works but they feel that each of the Leases does not make adequate provision in this regard. She argues that an additional sub-clause be inserted under Clause 4 of each of the leases worded "To comply with all statutory requirements regulation or requirement of any competent local or other authority relating to the Property" or such wording that causes the same effect.

### **The Respondents Reply**

4. In their response dated 20<sup>th</sup> January 2009, the Respondent's for Flats 1-5 and Flat 8 say that they in principle agree to the variation of the lease in the manner suggested but request that before such variation takes place the fire alarm system and related components are in full, satisfactory working order and that a fire certificate is issued. They require the system to be stable for at least three months and that they the Respondents are not liable for any of the costs of the variation or the application to the Tribunal.
5. They attach for the Tribunal's consideration the decision of the LVT in September 2008.

### **The Inspection**

6. The Tribunal inspected the property on the morning of the hearing in the presence of Ms. Williams and Ms. Chidgey. No one was present from the Applicants.
7. The subject property is a four storey property converted into 8 flats. It has a communal entrance hall, stairs and landings. In the entrance hall the Tribunal were able to inspect a wall mounted control box. Each of the floor landings had ceiling mounted smoke detectors and sounders as well as emergency lighting. The sounder units showed no lights and the LED lights in the control box were flashing and lit. The box showed a red warning light indicating that something was either activated or was otherwise wrong with the system. Similar faults had been found at the inspection for the earlier application in September 2008.

### **The Hearing**

8. The Applicant did not attend the hearing. The Tribunal did receive a fax dated 3<sup>rd</sup> February 2009 in which they referred to an attempt to postpone the hearing because of the inclement weather conditions coupled with the lengthy journey that would entail in order to get to Gravesend by 10:00am. They note that the hearing would continue in their absence and therefore they awaited receiving the Determination.
9. It was unclear from the fax whether they were actually requesting an adjournment. Nevertheless the Tribunal would not be prepared to grant one as the issue of location of the property would be one that would be the same whatever the weather and the Tribunal were satisfied that no proper reason had been provided that the route that the Applicant was due to take was impassable or in some other way impossible to take. The Tribunal itself was composed of members and support staff who had travelled some distance in order to attend the inspection and hearing and arrangements were clearly open to the Applicant, for example to travel the previous day in order to prosecute what was after all their application. The matter therefore proceeded in the absence of the Applicant.

## **The Evidence**

10. The Tribunal had regard to the Applicant's Statement of Case as well as the Respondent's Reply. The Tribunal also had before it the decision of the Tribunal in CH1/29UG/LSC/2008/56 which was the s.27A matter heard in September 2008. The Tribunal also had made its own observations when inspecting the subject property. In addition Ms. Williams in oral evidence stated that the alarm system still had not been rectified since the September Tribunal and that she thought it very unfair that if the lease were varied before the alarm system had actually been sorted out, than the Respondent's would be liable for something that had never (since 2003) worked. She reiterated that the Respondent's had no objection to the variation but that the alarm system must be a workable first.

## **The Law**

11. This is contained in s.35 of the Act. This says as follows:

"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 court 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."

12. The Tribunal are satisfied that the leases as presently drafted fail to make satisfactory provision in respect of 35(2) (c) above, namely the repair or maintenance of installations which are reasonably necessary to ensure that occupiers of the flats enjoy a reasonable standard of accommodation. We are guided in our interpretation by s.35 (3) (a) which refers explicitly to factors relating to the safety and security of the flat and its occupiers and of any common parts of the building. The provision of an adequate fire safety alarm system for the subject property is such a factor, especially so where you have a number of flats within the building occupied by a number of different people.

13. The Tribunal then went on to consider whether it would make the order required by the Act under s.37. This says as follows:

*"38. Orders by the court 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 court, the court 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 court with respect to the leases specified in the application under section 36, the court 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 court with respect to the leases specified in the application, the court 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 court 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 court 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) The court shall not make an order under this section effecting any variation of a lease if it appears to the court —*

*(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) The court 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) The court 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) The court 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 the court makes an order under this section varying a lease the court 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 court considers he is likely to suffer as a result of the variation.*

14. It is clear from the wording of s.38 that the Tribunal has discretion as to whether it makes an Order varying the lease. That discretion is subject to the provision of s.38 (6) and (7) where the Tribunal is directed not to make an order if the variation is likely substantially to prejudice any respondent.
15. The Tribunal in the instant case note that the Applicant has still not remedied the faults identified in the fire alarm system in September 2008. Indeed the Tribunal was able to observe at the inspection that the alarm system was still flashing in a default error mode. It seems abundantly clear to the Tribunal that the Applicant has simply chosen to ignore the findings of fact made by the Tribunal in September 2008. The response of the Applicant when they were unable to recover their costs in respect of the fire alarm system under the terms of the lease is to launch the present application to have the lease itself varied.
16. The Tribunal are satisfied that were it to make the Order, having been satisfied as to the nature of the variation sought, the effect would be that the Respondent's would end up paying for any defects to the fire alarm system to be rectified. Effectively the variation if ordered would circumvent what can only be described as a disgraceful neglect of the fire alarm system since installation by the Applicant, as has been pointed out the system has never worked due it would appear to either the incorrect equipment being provided or incorrect installation.
17. The Tribunal are satisfied that to order the variation would substantially prejudice the Respondent's and, considering the history of the matter and the frankly lamentable inaction by the Applicant, would not be reasonable in the circumstances in any event. This was not a matter that could be resolved by compensation as the failure to fit a working fire alarm system was and is an ongoing necessity.

18. The Tribunal is satisfied that the grounds for the variation as requested are satisfied but are not prepared to make the order giving effect to the same for the reasons above. The Application is therefore dismissed.
19. The Applicants are of course at liberty to reapply to the Tribunal in the future for the variation to be ordered but they will have to demonstrate that the problems with the fire alarm system have been rectified and that the repairs are sustainable. That means in practical terms the system must be operative without problems for a period of at least three months. In the light of the fact that the Respondent's do not in principle object to the variation, the matter can be disposed of by consent or indeed by paper hearing.
20. The Tribunal makes no Order for Costs and certainly would not expect to see any part of the Applicant's relevant costs incurred in this application to be added to the service charges, particularly in the light of the view taken by the Tribunal of the Applicants inaction following the September Tribunal.
21. The Tribunal makes no Order to vary the lease.



Chairman

