

12201



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

Case Reference : CHI/21UC/LVT/2017/0003

Property : Merlswood, Meads Road, Eastbourne,
BN20 7ES

Applicant : Merlswood Residents Association Limited

Representative : Mayo Wynne Baxter LLP

Respondents : The Lessees

Representative :

Type of Application : Landlord & Tenant Act 1987 - to vary two
or more leases by a majority

Tribunal Member(s) : Mr D Banfield FRICS

Date of Decision : 2 May 2017

DECISION AND ORDER

Summary of decision

The Tribunal orders that pursuant to section 37 of the Landlord and Tenant Act 1987 that each and every lease of Flats 1-12 and 14 - 23 including stores and garages being part of the development known as Merlswood, 33 Meads Road, Eastbourne, East Sussex BN20 7ES be varied in the terms set out in the Schedule of Proposed Amendments appended to this Decision.

It is further ordered that all the clauses, covenants, conditions and provisions of each lease shall continue in full force and effect and shall henceforth be construed as if such amendments were originally contained therein.

It is further ordered that the Chief Land Registrar shall make such entries on the registers of the titles hereby affected or to open a new title or titles as shall be deemed appropriate for the purpose of recording and giving effect to the terms of this order.

Background

- 1) The Applicant seeks to vary 22 leases under Section 37 of the Landlord & Tenant Act 1987 ("the 1987 Act").
- 2) Forms were sent to each lessee requesting a response to "*I support the application for a lease variation in accordance with the documents and schedules that accompanied Stredder Pearce's letter dated 03/01/17*". Affirmative responses were received from 21 of the 22 leaseholders. Copies of the forms were attached to the Application form sent to the Tribunal.
- 3) Also included was an email dated 17 January 2017 from the Lessee of Flat 22 who referred to matters discussed at the AGM and indicating that he agreed to the variations in respect of insurance but objected to the variation in respect of the change to Year Ends.
- 4) On 7 March 2017 the Tribunal made Directions requiring the Applicant to send them together with a reply form to those Respondents who had not agreed the variation.
- 5) The Directions indicated that the application was to be determined on the papers **without a hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013** unless a party objects in writing to the Tribunal within 28 days. No objections have been received and the matter is therefore determined on the papers received.

Evidence and Submissions

- 6) In their statement of case the Applicant confirms that the provisions of Section 37 are complied with and that more than 75% of Lessees and the Lessor consent to the variations. They challenge the account of the AGM

given by the Lessee of Flat 22 and confirm that all of the variations were discussed in detail.

- 7) The changes sought are set out in a Schedule of Proposed Amendments a copy of which is appended to this decision.
- 8) The grounds for seeking the variations are that ;
 - a) The amendment set out in Clauses A and B permit the proper recovery by the Freeholder from the Lessees of expenditure incurred or to be incurred by the freeholder for the benefit of the Lessees, the provision of a reserve fund or extra levy and for the instalments of an interim service charge to be paid twice rather once a year.
 - b) Clause C provides for the proper insurance of the buildings and brings all the leases into one form.
 - c) Clause D expands the obligations on the landlord to enable the repair and maintenance of the building and flats.
 - d) Clause F is a small amendment to clarify the drafting.
- 9) The Tribunal identified the following issues.
 - Should the tribunal order the proposed variations to be made to the leases?
 - Do the proposed variations fall within the grounds set out in section 37(3) of the Act, that is to say, *the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.*
 - If it does make an order varying the lease, should the tribunal order any person to pay compensation to any other person (see section 38(10) to the Act).

The Law

10. Section 37 of the Act states:

(1) Subject to the following provisions of this section, an application may be made to [a leasehold valuation 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 leases are

varied to the same effect.

(4) An application under this section in respect of any leases may be made by the landlord of any of the tenants under the leases.

(5) Any such application may 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.

Section 38 provides that:

(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 subsection (6) and (7) make an order varying each of the leases in such manner as its specified in the order.

Section 38 provides;

(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 any variation would be likely to 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

Decision

11. The Tribunal is satisfied that the requisite percentage of parties, (including the landlord), consenting to the agreed lease variation has been met. Further, the Tribunal is also satisfied that not more than 10 per cent of the total parties concerned disagree with the proposals and that the statutory criteria have therefore been met.
12. The Tribunal is satisfied that the Applicant's object in seeking the lease variation cannot be met unless all subject leases are varied to the same effect and that none of the reasons for not granting an order as set out in section 38 applies.
- 13. The Tribunal therefore makes an order varying the leases as requested and as set out in the Schedule of Proposed Amendments appended to this Decision.**
14. No application for compensation has been made under section 38 of the Act and no order for compensation is therefore made.

D Banfield FRICS
2 May 2017

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. 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.
2. 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.
3. 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.

PARTIES: -

MERLSWOOD RESIDENTS' ASSOCIATION LTD

- and -

LESSEES OF 22 FLATS MERLSWOOD

**SCHEDULE OF PROPOSED AMENDMENTS TO BE MADE BY
ORDER UNDER THE LANDLORD AND TENANT ACT 1987**



Mayo Wynne Baxter LLP
3 Bell Lane, Lewes, BN7 1JU

IRC.146605-1 Merlswood

- (A) The Recitals shall have the following clause added:-
- (4) For the purposes of this Lease the "Service Year" means the year ending on the 23rd day of June in each year or such other accounting period as the Lessor acting reasonably may determine
- (B) The Lessee's covenant in Clause 3 of the Lease shall be amended so as to read as follows:-
- (c) Each Service Year to pay to the Lessors by half yearly instalments in advance on the Twenty-fourth day of June and the Twenty-fifth day of December in every year (or by such other periodic instalments as the Lessor shall determine) or within twenty eight days thereof per cent ("the Lessee's Contribution") of the sum which the Lessors shall estimate that they require to expend in the next Service Year ~~ensuing year~~ in complying with the covenants on their part contained in Clauses 5 (b) (c) (d) (e) (f) (g) (h) (i) (j) (k) (l) (m) and (n) of these presents and also of such annual sum as the Lessor or its Managing Agent shall determine from time to time as appropriate to provide a reserve fund ("the Reserve Fund") in respect of the performance of the lessor's covenants and other obligations and such percentage if not so paid shall be forthwith recoverable by action and shall carry interest at a rate equal to one per centum per annum above the Bank Rate from time to time until payment PROVIDED that if the sum spent in such next ensuing year (as certified by the Lessors' Accountants ~~Lessors' Auditors~~) shall exceed the sum so estimated as aforesaid of the excess within twenty eight days of the demand therefor by the Lessors but if the certified sum shall be less than the estimated sum such proportionate part calculated as aforesaid of the difference between the two sums shall be allowed as a deduction from the next following payment due from the Lessee pursuant to this Clause or paid by the Lessor into the Reserve Fund as the Lessor acting reasonably shall determine PROVIDED FURTHER THAT in the event of any additional expenditure being required for the performance of the Lessor's covenants the Lessor or its Managing Agents may give notice in writing to the Lessee at any time requiring payment within twenty eight days from Lessee of the Lessee's Contribution subject to prior due compliance with any appropriate statutory requirements in this respect

(C) The Lessors covenant to insure in Clause 5(b) shall be replaced in with the following clause

(b) To insure the Buildings and all additions to it of which the Lessee notifies the Lessor under a policy which satisfies the conditions set out below and to produce to the Tenant on request the policy or policies of such insurance and the receipt for the last premium for the same

(i) The conditions with which an insurance policy must comply are:

(A) Cover is provided against the risks normally covered by a policy of comprehensive insurance for a building situated where the Buildings are sited ("insured risks") so far as that cover is generally available for the type of buildings

(B) The sum insured is at least the full rebuilding cost of the Buildings and any additions to it which should be insured plus as appropriate percentage for professional fees

(C) The policy issued by a reputable insurance office

(ii) In the event of the Buildings or any parts thereof being damaged or destroyed by any insured risk the Lessor shall as soon as reasonably practicable lay out any insurance monies in the repair re-building or reinstatement of the Buildings so damaged or destroyed subject to the Lessor at all times being able to obtain all necessary licences consents and permissions from all relevant authorities in this respect PROVIDED ALWAYS that if for any reason other than default of the Lessor the obligation on its part hereinbefore contained to rebuild or otherwise make good such destructions or damage as aforesaid becomes impossible then performance of the said obligation shall be deemed to have been discharged and the lessor shall stand possessed of all monies paid to it under and by virtue of the policy of insurance hereinbefore required to be maintained upon trust to pay to the Lessee such proportion (if any) of the said monies as may be agreed in writing between the Lessor and the Lessees or in default of agreement as aforesaid as shall be determined by a Valuer appointed

by the President for the time being of the Royal Institution of Chartered Surveyors upon the request of the Lessor or the Lessee to be fair and reasonable having regard only to the relative values of the respective interests of the Lessor and the Lessee in the Buildings immediately before the occurrence of the said destruction or damage and it is hereby declared that any such determination as aforesaid shall be deemed to be made by the said valuer as an expert

(D) The following additional sub clauses shall be included in Clause 5 of the Lease (the Landlord's Covenant)

- (g) That (subject as aforesaid) the Lessor will provide and supply such other services for the benefit of the Lessee and other lessees and to carry out such other works and repairs and to defray such other costs including borrowing money and paying interest thereon that the Lessor shall reasonably consider necessary or convenient to maintain the Buildings or suitable for the convenience or comfort of the Lessee and the other lessees
- (h) That (subject as aforesaid) the Lessor will provide for the payment of all legal accountancy surveyors and other costs incurred by the Lessor including management fees charged by its Managing Agents in the running and management of the Buildings including the routine administration expenses of Merlswold Residents Association Limited that is Company Registration No. 990037 whilst that company is the Lessor and in the enforcement of the covenants conditions and regulations contained in or affecting the leases granted of flats in the Buildings
- (i) That (subject as aforesaid) the Lessor will pay all taxes which may be assessed or charged upon the Lessor or upon its Managing Agents in respect of the Reserve Fund or its income
- (j) That (subject as aforesaid) the Lessor will pay all other outgoing and liabilities now or hereinafter due in respect of any facilities rights or services enjoyed in common by the lessees of two or more flats in the Buildings in common over under or along any land not included in the Buildings

- (k) that (subject as aforesaid) the Lessor will take or defend any Court or Tribunal proceedings where reasonably necessary
 - (l) Subject as aforesaid as long as the Lessor shall be Merlswold Residents Association Limited that is Company Registration No. 990037 the Lessor will take all necessary steps to maintain and administer the Company including complying with all legal requirements imposed by legislation relating to companies and appertaining thereto
 - (m) That (subject as aforesaid) the Lessor will keep proper books of account showing the expenditure incurred under this Schedule
 - (n) Subject as aforesaid as soon as reasonably may be after the end of each service year the Lessor will supply the Lessee with a copy of the final account for that year
- (E) Clause (g) of Clause 5 of the Lease shall be renumbered 5(o)
- (F) Clause 6 of the Lease shall be amended so as to read

6. THE Lessors may employ and pay such Contractors Managing Agents Accountants solicitors surveyors or servants as it shall think necessary in and about the performance of the covenants and provisions of Clause 5 hereof PROVIDED ALWAYS that the Lessor shall not be liable for any act or omission of any such persons ~~Contractors Managing Agents or servants~~ in and about the performance of the said covenants and provisions or any of them for failure to perform all or any of the said covenants if the Lessors shall forthwith have taken and continue to take all reasonable steps to secure the performance of the same.