



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

Case reference : LON/00AG/LVT/2018/0003

Property : 20 Daleham Gardens
London NW3 5DA
20 Daleham Gardens Ltd (Lessor)
Jennifer Elizabeth Edith Fasal (Flat 1)
Barry John Bruce Driver and Yael Driver
(Flats 2 & 4)

Applicants : Harivadan Patel (Flat 3)
John Robert Fletcher and Sarah Jane
Fletcher (Flat 6)
Lindy Ann Wootton and Leon Richard
Cane (Flat 7)

Respondent : Raphael William Ellis (Flat 5)

Type of application : Variation of all leases – section 37 of the
Landlord and Tenant Act 1987

Tribunal : Judge Nicol

Date of decision : 4th April 2018

DECISION

Decision of the Tribunal

The application is granted and the subject leases are varied in accordance with the terms proposed and described in the reasons below.

Reasons

1. The Applicants are the lessee-owned freeholder of the subject property, a 4-storey Victorian house converted into flats, and the lessees of six of the seven flats. The Respondent is the lessee of the remaining flat.

2. On 15th January 2018 the Applicants applied under section 37 of the Landlord and Tenant Act 1987 (which is set out in the Appendix to this decision) for the leases, identical to all seven flats, to be varied in relation to one clause. The existing clause 4(6) states:

THE Lessor hereby covenants with the Lessee ... That (save and subject as aforesaid) the Lessor will so often as reasonably required decorate the exterior of the Building and in particular will paint the exterior parts of the Building usually painted with two coats at least of good paint at least once in every four years.

3. The Tribunal notes that the existing clause essentially contains two separate obligations which it is not clear the parties have appreciated:

- Firstly, that the Lessor will decorate the exterior of the Building “so often as reasonably required”; and
- Secondly, that the Lessor will paint those exterior parts of the Building which are usually painted at least once every four years using at least two coats of good paint.

4. In 2017 the First Applicant commissioned a surveyor’s report. The surveyor advised that, at least on this occasion, decoration was not required within four years and that the normal decorative cycle for a building of this type was 5-7 years. The Applicants were collectively concerned that the obligation to paint at least every four years may become onerous, particularly in the light of the need to erect scaffolding to do it. By letter dated 30th October 2017 the First Applicant proposed to all the lessees that clause 4(6) should be replaced with the following:

That (save and subject as aforesaid) the Lessor will maintain in good repair and decorate the exterior of the building (hereinafter the “External Maintenance and Redecoration”) at times and in a manner recommended by the Lessor’s surveyor. In this respect the Lessor undertakes:

(i) To commission from his appointed Surveyor at such time as the Lessor may determine but in any event no later than four years from the completion of the previous External Maintenance and Redecoration a report (hereinafter the “Inspection Report”) regarding:

(a) the general condition of the building and recommendations for any maintenance or redecoration activity required or likely to be required; and

(b) the timing recommended for any such maintenance or redecoration activity in order to ensure that the exterior of the building is kept in good repair, always taking into account the desirability of carrying out such external maintenance and redecoration activities concurrently when the building is scaffolded

(ii) To carry out the External Maintenance and Redecoration at the time recommended in the Inspection Report and with a scope of work agreed at such time by the Lessor and his surveyor, subject always to any legally required consultation with the lessees.

(iii) In any event to paint the exterior parts of the building usually painted no later than seven years from the completion of the previous External Maintenance and Redecoration.

5. The remaining Applicants have all consented to the variation. The Respondent objects which has resulted in the current application.

6. The Applicants state that their primary reasons for seeking the variation are:

(a) The surveyor advised that the normal cycle for external maintenance and redecoration for this type of building is 5-7 years whereas the current lease stipulates a fixed cycle of four years. In fact, as noted by the Tribunal above, it is only the painting which is required on a fixed cycle of four years, not any further maintenance or redecoration.

(b) They wish to avoid incurring the major costs, including the significant costs of scaffolding the building, associated with cyclical works more frequently than is required.

(c) They wish to incorporate the professional advice of a surveyor into the process for determining the timing and scope of the cyclical works.

7. The Respondent contends that the proposed amendment is unreasonable and, therefore, contrary to section 38(6)(b) of the Act, for a number of reasons:

(a) The Respondent points out that the Applicants' reasoning is based on a surveyor's report which he says represents only one point in time whereas the variation is intended for the length of the leases (the terms of which were varied to 999 years in 2005). In the Tribunal's opinion, this misunderstands the Applicants' position. The fact that, on this one occasion, decoration appears not to have been required on the lease-mandated cycle suggests that the lease requirements are unnecessarily stringent and potentially onerous. If it happened once, it could happen again.

(b) The Respondent also points out that clause 4(4) already provides for repair and maintenance of the building. He asserts that, therefore, there is a conflict between clause 4(4) and the new proposed 4(6). It is a principle of lease construction that potentially conflicting lease terms should be read, if possible, so that they do not conflict. That is easily achieved here. Clause 4(4) provides for reactive maintenance, meaning that disrepair is addressed if and when it arises, whereas clause 4(6) provides

for cyclical or planned maintenance. The Tribunal is satisfied that the two clauses can operate in a complementary way.

- (c) The Respondent asserts that the proposed variation is unnecessary and over-complicated. The Tribunal disagrees. It is clear that the existing clause 4(6) has the potential to result in significant and unnecessary cost. While the proposed variation is obviously more complicated than the existing clause, the Tribunal is satisfied that its terms are clear and may be operated without difficulty.
- (d) The Respondent is concerned that the obligation to use a surveyor would be unnecessarily onerous on the lessor and incur a cost which may be unnecessary but which would be put on the service charge. In the Tribunal's opinion, the use of a surveyor is standard good practice and likely to be required on the 5-7-year cycle envisaged.
- (e) The Respondent asserts that the proposed long-stop of seven years is worse than the current four years. However, that misunderstands the role of a long-stop and fails to take into account the fact that the proposed variation can result in a cycle lasting only four years, depending on what the surveyor identifies. The Respondent also asserts that the deletion of the requirement for at least two coats of good paint allows for a lower standard of work. The Tribunal agrees with the Applicants that, instead, the proposed variation allows for compliance with a wider range of technical requirements and, with the use of a surveyor, is highly unlikely to result in lower standards.
- (f) The Respondent suggests that replacing the four-year cycle in the existing clause with a 7-year cycle would achieve the same objective as the proposed variation but it is difficult to see how that would avoid the possibility of unnecessary works. The problem is as much the fixed period of the cycle as its length.
- (g) The Respondent points out that the building is in a conservation area and any delay in the decoration cycle could be prejudicial. However, that is what the input of a surveyor is for. If in future maintenance or decoration is required four years after the last such programme, then the proposed new clause will require the lessor to execute such works.
- (h) The Respondent asserts that any delay would affect the buildings insurance. However, he has presented no evidence that any insurers would be concerned by the proposed variation. In the Tribunal's experience, insurers have no particular concerns simply on the basis that a lease does not have a fixed period for cyclical maintenance.
- (i) The Respondent provided some photos which indicated there may be some need for repainting of some external areas. To an extent, that is irrelevant to the Tribunal's consideration. In any event, if the lessor fails to repaint when required, each lessee would have a remedy under the proposed variation and/or

clause 4(4) whereas, under the existing clause 4(6) alone, such a remedy would depend on the timing of the fixed period.

8. The Tribunal is satisfied that the object to be achieved by the Applicants' proposed variation cannot be satisfactorily achieved unless all the leases are varied to the same effect and that no lessee would be prejudiced. On the contrary, it appears to the Tribunal that the lessees' position would be improved. There are no grounds on which it could be said that the variation would be unreasonable and there is no claim, let alone grounds, for compensation.

Name: NK Nicol

Date: 4th April 2018

Appendix of relevant legislation

Landlord and Tenant Act 1987

Section 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.

Section 38 Orders varying leases

- (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.
- (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.

(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.

(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 court considers he is likely to suffer as a result of the variation.