First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	**:**	**CHI/00HN/LVT/2021/0006**
Property	**:**	**Bay View Gardens,** **14b West Cliff Road,** **Bournemouth,** **BH2 5JB**
Applicant **Represented by**	**:**	**Bay View Gardens Freehold Ltd.** **Stuart Wright of counsel (direct instruction)**
Respondents	**:**	**The long leaseholders of the 36 flats in the Property**
Representative (Flat 26)		**Roger Charles Wenn & Julienne Mary Wenn represented by Mathew McDermott of counsel (Furley Page LLP)**
Date of Application	**:**	**25th November 2021**
Type of Application	**:**	**Application to vary leases (Part IV Landlord and Tenant Act 1987 as Amended ("the 1987 Act"))**
Tribunal	**:**	**Judge Bruce Edgington** **Nigel Robinson FRICS**
Date of Hearing	**:**	**27th April 2022**

DECISION

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1. The application to vary the long leases of the flats in the property is granted and the wording is as set out in paragraphs 13 and 14 below.

2. No order as to costs.

Reasons

Introduction

3. This is an application for the Tribunal to vary the long leases of all 36 flats in the property. The Tribunal issued a directions order on the 28th January 2022 timetabling the case to a determination on the papers. The Respondents Mr. and Mrs. Wenn from Flat 26 have asked for an oral hearing which, because of issues arising from the global COVID pandemic, has been conducted by video hearing.

4. A paginated bundle of documents has been delivered to the Tribunal and any reference to a page number will be from that bundle.

5. The application is made pursuant to section 37 of the **Landlord and Tenant Act 1987** ("the 1987 Act") and is described in the 1987 Act as being an 'Application by majority of parties for variation of the leases'. In this case it can only be made if, at the date of the application, it is not opposed by more than 10 per cent of the parties and at least 75 per cent of the parties consent to the variation requested.

6. Sub-section 37(6) makes it clear that in respect of each lease, the tenant, be it one person/company or more, counts as one party. The landlord is a single party which means, in this case, that there are 36 tenants as parties and 1 landlord i.e. 37 parties in total. Consents to the application have been filed from flats 1-12, 15, 17, 18, 20-25, 27, 28 and 30-36.

7. There was a suggestion within the hearing that some of the leases may have a manager as an additional party and the question was raised as to whether that company was a 'party' to this application. As the 'parties' set out in sub-section 37(6) of the 1987 Act are the tenants and the landlord, the manager would not be a party because, presumably, the manager's role is simply to manage the property rather than have any interest in the title.

8. Only Mr. and Mrs. Wenn oppose the application. They have raised the point that they don't know whether all of those who have consented can be described as 'parties' as defined by sub-section 37(6). As a result of that the Applicant has filed copies of the property and proprietorship registers from the Land Registry. These show that of the 30 parties who signed consent forms as tenants, all except one were registered proprietors of the long leasehold interests in the Flats as at the date of this application. That one is from Flat 4 but the copy Land Registry entry is dated 6th October 2021 when Katie Bennett took over ownership from Mr. and Mrs. Cowell who signed the consent form.

9. Thus, there would appear to be a consent from the landlord together with consents by or allegedly on behalf of at least 29 tenants. 1 tenant objects and 5 or 6 have not committed themselves. As the wording of the proposed variations was sent to the tenants (page 112) before they made their decisions, the test in **Simon v St Mildreds Court Residents Association** [2015] UKUT 0508 (LC) is satisfied. The tenants were, at the same time, urged to seek their own legal advice if they were unsure.

10. The Applicants say that there are 2 objectives in making this application and the Tribunal interprets them as being, in essence, (1) to enable leaseholders to put washing out to dry on their balconies and (2) to clarify that the specified parking spaces can be used not only for parking but also for storage.

11. It is clear from the bundle provided that there has been extensive correspondence between the Applicant, Mr. and Mrs. Wenn and their representatives covering many subjects most of which are not the subject of this dispute. Mr. and Mrs. Wenn complain about breaches in the terms of the leases which, they say, are allowed by the Applicant. They complain about the way the estate is managed.

The Tribunal has noted these disputes but it will concentrate on this application only and will not be diverted by these other matters.

The Inspection

12. With the present pandemic, the Tribunal members have not carried out a visual inspection of the property. However, they have looked at Google Earth and some current sales particulars published by estate agents. Mr. and Mrs. Wenn have also included some photographs in the bundle.

The Proposed Variations

13. There is no dispute that the relevant wording in all the leases is the same and the applicable clauses are:-.

    Schedule 8, Part 1, Paragraph 24 is on page 54 and is one of the restrictions imposed on tenants i.e. "*Not to display or hang any window boxes clothes washing aerials satellite dishes or any similar telecommunication transmission or reception apparatus or thing from the Demised Premises (except aerials placed there by the Lessor or the Manager*".

    The proposal is that this clause be deleted and substituted with:

    "*Not to display or hang any window boxes aerials satellite dishes or any similar telecommunication transmission or reception apparatus or thing from the Demised Premises (except aerials placed there by the Lessor or the Manager) PROVIDED that placing clothes for drying on apparatus placed on the balcony or patio forming part of the Demised Premises on the days designated from time to time by the Lessor in writing shall be permitted PROVIDED FURTHER those clothes or apparatus remain within the Demised Premises not protruding beyond the same and do not exceed the size designated from time to time by the Lessor in writing*"

14. Schedule 4, paragraph 6 is on page 43 and is one of the rights enjoyed by the tenants and is "*The right to exclusive use of the Parking Space for the purpose of parking a private motor vehicle not exceeding three tonnes gross laden weight*".

    The proposed new substitute clause is "*The right to exclusive use of the Parking Space PROVIDED ALWAYS that use is consistent with Paragraph 2 to Part 2 of Schedule 8 of this lease*"

    Schedule 8, Part 2, Paragraph 2 is on page 55 and is a covenant by the tenant "*Not to use the Parking Space for any purpose other than for the purpose of parking a private motor vehicle not exceeding three tonnes in gross laden weight or motor cycle thereon and not to park or allow to be parked any motor vehicle wheeled vehicle or form of transport on any other part of the Estate save any part thereof which may be specifically designated for visitors parking*".

    The propose new substitute clause is "*Not to use the Parking Space other than:*
    2.1 for the parking of a private motor vehicle not exceeding three tonnes in gross laden weight;
    2.2 for the parking of a private motor cycle not exceeding three tonnes in gross laden weight; and or

2.3 for the storage of domestic non-hazardous household items in such receptacle(s) as shall have been previously approved by the Lessor in writing

PROVIDED ALWAYS that:
2.4 the use of the Parking Space shall be at the risk of the Lessee and in compliance with all relevant statutory obligations
2.5 any permitted use of the Parking Space by 2.3 of this Paragraph must cease immediately upon written notice by the Lessor that the storage of such items is not in compliance with any statutory obligations or has resulted in any vehicle or motor cycle upon the Parking Space at the same time overhanging the extent of the area or causing inconvenience to others in accessing other parking spaces or obstructing the circulation areas of the parking area
2.6 parking any motor vehicle or motor cycle or other form of transport on any other part of the Estate is expressly prohibited save for any part thereof which may be specifically designated for visitors parking."

15. One of the Respondents, Christopher John Small, of Flat 31, has suggested an additional variation to clause 2.2 above in that he has added "*a bicycle or*" before the words "*private motor cycle*". This is on page 442. It is not dated but is clearly written after the original suggested wording had been approved by tenants. Thus, the additional wording has not been approved by at least 75% of the parties. The Tribunal determines that as this is a substantive change to the terms of the variation, it has no power to assume that 75% of the parties agree to it and therefore cannot accept this change as part of the application.

The Law

16. Section 37 of the 1987 Act permits any party to a long lease of a flat to apply to this Tribunal for an order varying 2 or more leases if "*the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect*".

17. Section 38(6) says that a Tribunal shall not make a variation order if it appears to such 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 sub-section (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"

18. Sub-section (10) enables a Tribunal to order compensation to be paid to any person in respect of any loss or disadvantage that the Tribunal considers he is likely to suffer as a result of the variation.

19. It should be mentioned that unfortunately, one of the directions given in the Directions Order made by the Tribunal on the 28th January 2022 is not correct. In paragraph 5 it says that one of the issues identified by the Tribunal is whether 'the leases fail to make satisfactory provision for one of the relevant matters'. These relevant matters are set out in section 35(4) of the 1987 Act. This application is made pursuant to section 37 which does not contain the same

requirement. The parties seem to have understood that.

The Hearing

20. The hearing was attended by Stuart Wright and Mathew McDermott, counsel, respectively, for the Applicant and Mr. and Mrs. Wenn. Mr. Wright also put forward the views of the tenants who had consented to the application although, as he rightly pointed out, he did not formally represent them. Both counsel provided very helpful skeleton arguments.

21. Also in attendance were the witnesses Mr. Strong and Mr. Small for the Applicant and Mr. Wenn himself. The Tribunal Chair introduced everyone and explained that he would be asking the parties questions arising from the papers submitted. He would then ask the parties to put their cases, invite cross examination and any final summing up before closing the hearing. This was how the hearing proceeded.

22. The witnesses gave evidence and were cross examined. They gave evidence more or less in accordance with their written statements. Mr. Wenn accepted in his written evidence (at page 158) that if the Tribunal were to make an order varying the leases as requested, then"*…all of the leases would need to be varied in order to achieve the Objectives*". However, he had commented on page 159 that the hanging of washing on the balconies "*would substantially devalue the Flat…*". When giving his evidence he withdrew that comment and accepted that there would be no devaluation.

23. The Tribunal asked questions of the witnesses and put several issues to counsel so that they could reply and make any representations. One particular matter of concern to the Tribunal members was whether a proper risk assessment of the parking area under the new proposals had been obtained. Evidence was given by both Mr. Small and Mr. Strong that a company specialising in risk assessments had reported every year and any recommendations had been complied with. The insurance company was aware of the storage proposals for the underground car parking area and accepted them.

Discussion

24. The evidence, largely from Mr. Wenn, is that people have been hanging washing out since at least 2018 and probably before then. From photographs supplied it is also clear that some people have installed cupboards and other containers and items in their parking bays. It seems clear that the intention is to authorise those things but, at the same time, to restrict their use and ensure that people do not park anywhere other than their parking bays without encroaching outside such bays.

25. Mr. McDermott pointed out that some of the restrictions had not been specified and would have to be issued by the Applicant. He suggested several times that this was unreasonable and that the variations should not be implemented without these particulars. The Tribunal did not accept those comments. Such restrictions were likely to have to be changed from time to time and it would be impractical to expect the leases to be varied on each occasion. Many long leases in residential developments state that tenants are bound by regulations imposed by landlords which can change from time to time.

26. Mr. and Mrs. Wenn have owned Flat 26 since June 2005 but did not move into it until 2018 when Mr. Wenn retired as a Project Manager. He says that he worked on many significant construction projects which would often mean that he had to interpret leases. They bought this flat because they felt that the terms of the lease would protect their interests and ensure that they had a peaceful retirement. It had been marketed as a luxury flat in a 2004 'state-of-the-art development'. Mr. Wenn asserts that using the balconies for drying clothes etc. has been occurring for at least the last 4 years and yet Tribunal members have seen advertisements from selling agents on the internet still describing these flats as being luxurious. A current one on the Winkworth website was mentioned to the parties.

27. The Tribunal has no problem in accepting Mr. Wenn's assertions about his purchase of his flat although the power of a long leaseholder to sublet could be seen by some as a possible problem. In his statement at page 257, Mr. Wenn says that in 2018 a number of terms of the leases which were not being enforced by the Applicant company of which he says he is a member. At least 2 of those are relevant to this application i.e. that residents were 'displaying and/or hanging clothes and washing on balconies' and that 'parking spaces .... were being used for storage'.

28. One of the problems which has not been mentioned by Mr. Wenn is that enforcing these covenants can be difficult. Persuading a county court to forfeit a lease or put a tenant in prison for breaching an injunction because there has been some washing on a balcony or because part of a parking bay has been used for storage would be difficult.

29. Mr. and Mrs. Wenn rely on the Upper Tribunal case of **Shellpoint Trustees Ltd. and another v. Barnett and others** [2012] UKUT 375 (LC) and a copy of this decision has been included in the bundle. This is said to be the leading authority on the legal tests to be applied in these cases. It is indeed correct to say that a number of comments were made about the tests to be applied but the context of those comments must be understood.

30. In **Shellpoint**, the applicant landlord sought variations to the leases to enable the communal heating and hot water systems to be replaced with individual boilers in each of the flats and the cost to be recovered as a service charge. In essence, the Leasehold Valuation Tribunal (now First-tier Tribunal) granted the variations to cover that purpose i.e. to install the boilers at the cost of the leaseholders.

31. The appeal related only to what were described as 'non-consequential variations' which enabled the landlord to recover its costs of enforcing covenants contained in the leases from all tenants through the service charge, whether they were at fault or not. The landlord already had the power to recover costs from the relevant tenant.

32. The LVT refused to allow this secondary variation and the Upper Tribunal, in paragraph 83 of its decision said that it agreed with the LVT and added "*There was insufficient evidence to support any finding other than the object of the clause being (part of the deal) to replace the communal heating and hot water system; but it did not in fact achieve that object as it was unrelated to it*".

33. On page 157, Mr. and Mrs. Wenn say that **Shellpoint** made it clear that the Tribunal's jurisdiction in relation to these applications was not intended to allow rewriting of leases merely because that is the will of the majority and in many cases may seem sensible. They add "*it is submitted that this is case (*sic*) falls squarely with those comments*".

34. It is this Tribunal's view that this is an incorrect interpretation of what was actually said by the Upper Tribunal in paragraph 74 of its decision. What it said was:

> "*In our judgment, the purpose of section 37 is to enable the majority to apply to the tribunal for a variation to achieve a particular object; if they cannot bring themselves within those requirements, then there is no jurisdiction to entertain the application or consider it further. The jurisdiction is relatively narrow, and is not intended to allow rewriting of leases merely because that is the will of the majority and in many cases may well seem sensible*".

35. In other words, one must look at the objective and if one of the variations does not come within that objective, then the application relating to that part of such variation will not succeed. Mr. and Mrs. Wenn seem to be suggesting that the Upper Tribunal is saying that a majority of parties cannot simply apply for a variation of their choosing, which is not, of course, what section 37 says. Section 37 specifically allows 75% of the parties to ask for a variation provided that no more than 10% oppose it and provided (a) that there is no 'substantial prejudice' to anyone who could not be adequately compensated and/or (b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

36. It is also relevant to refer to paragraph 90 of the decision which records that counsel for the landlord accepted that "*certainly so far as his clients were concerned, the applications had sought more than was wanted or, presumably, they thought had been agreed with the majority tenants. Had the LVT made the ordered variation of the leases by insertion of the new clauses it would have been, as (*counsel*) put it, 'wrong'*".

37. The Tribunal went on to say "*If the landlords misunderstood these new provisions, it may well be that the majority tenants did as well, in which case it may call into question the validity of the ballot*".

38. In making his submissions, Mr. McDermott said that the 75% consent proportion had not been achieved because 5 of the flats who allegedly gave consent, could not be accepted as having done so. In the case of flat 4, the owners at the date of the application to this Tribunal were not the people who signed the consent form i.e. Mr. and Mrs. Cowell. In the case of flats 7 and 15, only one of 2 leasehold owners had signed. Flat 8 was owned by a limited company and had been signed by a Mr. Williams but it was not known whether he was able to commit the company. Flat 17 was owned by trustees of a trust fund where Samantha Coe was a beneficiary.

39. Mr. Wright said that flat 4 had consented because the new owner was bound by the consent given by the previous owners. The fact is that at the date of this application, the people who signed the consent were not the owners and the Tribunal cannot see any legal basis for suggesting that such consent bound the new owner.

40. As far as flats 7, 8, 15 and 17 are concerned, all of the legal owners of the leasehold interests had been notified of the proposed variations. The addresses used were those used for all purposes by the Applicant and the managing agent. For example, those addresses were used to obtain service charges and if there are 2 tenants, they are liable on a joint and several basis. The task for this Tribunal is to determine, on the balance of probabilities, whether the owners of the legal and/or beneficial interests in the leasehold titles consented to the variations.

Conclusions

41. On the question of whether 75% of the parties had consented to the variations, the Tribunal concludes that they had. The minimum number was 28 of the 37 parties. Flats 4, 13, 14, 16, 19 and 29 did not consent. Flats 7 and 15 produce a consent form signed by 1 of 2 tenants without any objection from the other. Flat 17 was signed by a trustee and beneficiary of a trust and flat 8 was signed by a director, a Mr. Williams, of a company called Williams Funerals (Telford) Ltd. with no objections from anyone else involved with the title. The Tribunal concludes, on the balance of probabilities, that the other people with an interest the leasehold titles in flats 7, 8, 15 and 17 supported lor at least did not object the person signing the consent form in a situation where the tenant(s) could be said to be jointly and severally only 1 'party' according to section 37(6) of the 1987 Act.

42. As to whether the variations needed to apply to all of the leases, the evidence of Mr. Wenn was, as stated, that they did.

43. The Tribunal has carefully considered whether these proposed variations would 'substantially' prejudice anyone. It bears in mind that only 1 of 37 parties has objected to the variations. Mr. Wenn acknowledged that washing on the balconies could only be seen from the front of the property on the ground although it seems probably that he meant to say the rear i.e. when viewed from the sea. In other words, a tenant sitting in his/her flat or on his/her balcony would not be able to see such washing. This is supported by the pictures seen on Google Earth by the members of the Tribunal.

44. On the storage issue, he said that he also objected to people storing such things and bicycles or surfboards on their balconies, which they could do at the moment. He had suggested a bike shed in the grounds but this had not been agreed. He had no other suggestion as to how people should store things and at one stage even suggested that people would just have to store less things.

45. Having considered all of the documents and representations made, and using its knowledge and experience, the Tribunal concludes that the requirements of section 37 had been met and that there was no real evidence of substantial prejudice being suffered by anyone. It did not see any reason for determining that it would not be reasonable in the circumstances for the variation to be effected.

46. Thus, the alleged questions raised by **Shellpoint** and set out on page 156 can be dealt with in this case as follows:

(i) What is the object to be achieved by the variation? Answer: allowing tenants to dry washing on the balconies and allowing tenants to use their designated parking areas for storage.
(ii) Can the objective be satisfactorily achieved by the proposed variation without varying all of the leases? Answer: no.
(iii) Would the proposed variations be likely to substantially prejudice the respondents to the applications such that it cannot be adequately compensated by an award under s.38(10)? Answer: no.
(iv) Are there any other reasons why it would not be reasonable in the circumstances for the variations to be effected? Answer: No.
(v) In all the circumstances should the Tribunal exercise its discretion to make an order varying the leases? Answer: Yes.

47. In his skeleton argument, Mr. McDermott says that his clients will ask the Tribunal to make an order pursuant to section 20C of the **Landlord and Tenant Act 1925** preventing the landlord from recovering its costs of representation in these proceedings as part of any service charge. In view of the decision in the main application, the Tribunal does not think it reasonable to make such an order.

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Judge Bruce Edgington
28th April 2022

ANNEX - RIGHTS OF APPEAL

i. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. 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.

iv. 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.