



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

Case reference : **CAM/26UD/LVT/2020/0003**

HMCTS code (paper, video, audio) : **P:PAPERREMOTE**

Property : **Tewin Water House, Tewin Water, Welwyn, Hertfordshire AL6 0AA**

Applicants : **As set out in Schedule 1 (being the leaseholders of all apartments except No.3)**

Representative : **Vivienne Hay (No.6)**

Respondents : **1. John and Helen Brook (No.3)
2. Tewin Water House Management Company Limited**

Application : **To vary two or more leases by a majority – s.37 of the Landlord and Tenant Act 1987**

Tribunal member : **Judge David Wyatt**

Date : **30 September 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote determination on the papers which the parties are taken to have consented to, as explained below. The form of determination was P:PAPERREMOTE. A hearing was not held because it was not necessary and all issues could be determined on paper. The documents that I was referred to are described in paragraph 11 below. I have noted the contents and my decision is below.

The tribunal's decision

As requested by the Applicants, I order under subsection 38(3) of the Landlord and Tenant Act 1987 that the Leases (as defined below) are hereby varied with effect from the date of this decision by deleting the wording at paragraph 11 of Part Two of the Eighth Schedule to each of the Leases and substituting the following wording:

“Not to reside or allow to reside in the Demised Premises unless all floors (other than kitchens and bathrooms) are covered in either wall to wall fitted carpet or any other floor covering including a wooden or laminate floor provided that suitable and appropriate soundproofing measures to absorb noise are taken. Such soundproofing should conform to at least the standard required by Building Regulations relating to resistance to the passage of sound at the time of the floor covering change”

Reasons for the tribunal's decision

Background

1. Tewin Water House is an 18th Century Grade II listed manor house. In 2000, it was converted into six large apartments. The Land Registry entries in the bundle indicate that:
 - a. the freehold title is now held by Tewin Water House Management Company Limited (the “**Company**”); and
 - b. long leases (each for a term of 999 years from 1 August 2001) of the six apartments were granted in 2001 and 2002, registered under title numbers HD408175 (No.1), HD407774 (No.2), HD407879 (No.3), HD415582 (No.4), HD410198 (No.5) and HD414434 (No.6) (together, the “**Leases**”).
2. The freehold title also refers to another lease, but it appears this was a lease of a garden and is not the subject of this application.
3. The Leases are tripartite, between the “*Lessor*”, the “*Manager*” and the relevant leaseholder. Paragraph 11 of Part Two of the Eighth Schedule to the Leases (the “**Covenant**”) is a covenant by the leaseholder with the Lessor, the Manager and the other leaseholders of the Property:

“Not to reside or permit any other person to reside in the Demised Premises unless the floors hereof (including the passages) are completely covered with wall to wall fitted carpet or in the case of the bathroom lavatory and kitchen only then with vinyl floor covering or other sound hardwearing material except while the same shall be removed for cleaning or repairing or redecorating the Demised Premises”

Application

4. The Applicants (represented by Ms Hay) are the leaseholders of five out of the total of six Leases. They applied to the tribunal to vary all six Leases under section 37 of the Landlord and Tenant Act 1987 (the “**1987 Act**”).
5. The Applicants said in their application form that several apartments had already been converted to solid wood flooring even when the Leases were granted, and that five out of the six apartments are currently in contravention of the Covenant because their floors are not covered in wall-to-wall carpeting.
6. The Applicants proposed that the Covenant be varied as follows:

~~“Not to reside or allow permit any other person to reside in the Demised Premises unless all floors (other than kitchens and bathrooms) are covered in either wall to wall fitted carpet or any other floor covering including a wooden or laminate floor provided that suitable and appropriate soundproofing measures to absorb noise are taken. Such soundproofing should conform to at least the standard required by Building Regulations relating to resistance to the passage of sound at the time of the floor covering change the floors hereof (including the passages) are completely covered with wall to wall fitted carpet or in the case of the bathroom lavatory and kitchen only then with vinyl floor covering or other sound hardwearing material except while the same shall be removed for cleaning or repairing or redecorating the Demised Premises~~”

7. The Applicants said in their application form that the only leaseholder currently complying with the Covenant was one of the Applicants and they, and the Company, consented to the proposed variation. They said that only one leaseholder, Mr and Mrs Brook of apartment No.3, had objected.

Procedural history

8. On 1 May 2020, the tribunal sent copies of the application form and accompanying documents to Mr and Mrs Brook at Apartment No.3, and to the Company.
9. The tribunal then issued case management directions on 5 June 2020. These directions identified the issues to be determined (as set out below) and:
 - a. required the Applicants to serve the relevant documents on the Respondents, and give notice to any other persons not named as parties who may be likely to be affected by any variation of the Leases;
 - b. required any Respondent who wished to submit any comments or representations to do so by 17 July 2020; and

- c. said that the tribunal did not consider an inspection would be needed and the matter would be determined based on the papers in the bundle to be produced by the Applicants, without a hearing, unless the tribunal decided on review of the bundle that a hearing was necessary or any party requested a hearing.
10. On 5 June 2020, the tribunal sent copies of the directions to the parties, including the Respondents. Pursuant to the directions, Ms Hay confirmed to the tribunal on 10 June 2020 that she had also sent copies of the application form and the directions to each Respondent, and on 17 June 2020 that she had made enquiries of each party, asking them to confirm details of any other persons likely to be affected by any variation of the lease, and had received no such details.
11. There has been no request for a hearing. Neither Mr/Mrs Brook nor anyone else has responded to oppose the application or make any other comments on the proposed variation. Ms Hay produced the requisite bundle of documents pursuant to the directions and has by e-mails on 21 September 2020 answered queries sent to the parties by the tribunal following my review of that bundle, as described below. Having reviewed these documents and the tribunal file, I am satisfied that a hearing is not necessary; the issues in this application can be determined on paper.

The issues and the law

12. In the case management directions, the tribunal identified the issues to be determined, including:
 - a. What is the status of the Company? Is it the freeholder and successor to the original Lessor and the original Manager (as defined in the Leases), or are there any other parties?
 - b. Is there a sufficient majority for an application under section 37 of the 1987 Act?
 - c. What is the object to be achieved by the proposed variation? Can the object be achieved satisfactorily without all the Leases being varied to the same effect?
 - d. Is the proposed variation within the contemplation of sections 37 and 38 of the 1987 Act?
13. These issues are examined in turn below.
14. Sections 37 and 38 of the 1987 Act are set out in Schedule 2 to this decision. Section 37 specifies the requirements for an application by a specified majority for variation of leases. Section 38 sets out the tribunal's powers in respect of orders on applications under sections 35 to 37 inclusive.

Lessor/Manager

15. The freehold title entries indicate that the Company is the Lessor under the Leases, having acquired the freehold title by transfer registered in 2010.
16. The original Manager under the Leases was Peverel OM Limited. That company is now named Firstport Property Services Limited (“**Firstport**”).
17. A letter in the bundle from Robert Hay (No.6) explained that the building has since 2018 been managed by Tewin Water House RTM Company Limited (the “**RTM Company**”) following a successful right to manage claim under Part 2 of the Commonhold and Leasehold Reform Act 2002 (the “**2002 Act**”). Mr Hay stated that Firstport have remained the Manager of grounds, which are registered under a separate title number and held by a different company owned by 28 leaseholders including the leaseholders of Tewin Water House. Mr Hay said that the RTM Company was the relevant Manager under the Leases because the proposed variation relates only to the interior of the building, not the grounds.
18. I raised an enquiry about this, given the nature of the right to manage under Part 2 of the 2002 Act (as opposed to the potential contractual rights and responsibilities of the Manager under the Lease, which could subsist even if they were currently subject to the right to manage). In response, Ms Hay has on behalf of the Applicants informed the tribunal that when the RTM Company acquired the right to manage the building all rights and responsibilities in respect of Tewin Water House “... *known as Schedule 4* ...” were irrevocably transferred to the RTM Company. Further, Ms Hay produced an e-mail from Firstport dated 21 September 2020, which confirms that:

“... FirstPort have irrevocably transferred all rights and responsibilities for Tewin Water House Schedule 4 under the Lease to Tewin Water House RTM Company Limited as of 1 January 2018, and therefore have no legal interest in the lease variation.”

The tribunal’s decision

19. For the purposes of this application, I am satisfied that the Company is from 2010 the Lessor under the Leases.
20. As for the Manager, the reference in the e-mail from Firstport to “*Schedule 4*” is likely to be a reference to a different document (as Ms Hay seems to be suggesting), since the Fourth Schedule to the Leases sets out rights included in the demise to the leaseholder, not rights or responsibilities of the Manager, so I do not read that reference as limiting what they were saying. On the evidence produced and for the purposes of this application, I am satisfied that it is more likely than not that the RTM Company is from 2018 the Manager under the Leases. Even if that is wrong, Firstport are clearly aware of this application and have no objection, confirming their position is that they have no legal interest in the proposed lease variation.

Is there a sufficient majority for a s.37 application?

21. By section 37(5) of the 1987 Act, an application in respect of less than nine leases shall only be made if all, or all but one, of the “*parties concerned*” consent to it. By section 37(6), this means: (a) the *landlord*; and (b) in the case of each Lease, the tenant under the Lease. It appears that section 60 defines the “*landlord*” as the “*immediate landlord*”. Simon v St Mildred’s Court Residents Association Ltd [2015] UKUT 0508 confirms that the effect of section 37(5) is that the requisite consents must be obtained before the application is made to the tribunal.
22. The application was dated 6 April 2020. Ms Hay has produced in the bundle evidence of written consents from the Applicants (as five of the six leaseholders under the Leases and, separately, in their capacity as five of the six directors of the Company), all dated 23 March 2020.
23. The wording of section 37(6) indicates that Mr and Mrs Brook are together to be treated as one of the parties concerned. That was the approach taken by the Applicants in their application form; Mr and Mrs Brook did not respond to dispute that or to oppose the application.
24. By letter dated 24 July 2020, Mr Hay confirmed (as director) that the RTM Company consents to the proposed variation.

The tribunal’s decision

25. For the purposes of section 37 of the 1987 Act, I am satisfied that the landlord, and all but one of the tenants, had consented to the proposed variation before the application was made.
26. I am not satisfied that Firstport or the RTM Company did so but, in the absence of any issue between the parties or Firstport about this, I am satisfied that Firstport and the RTM Company are not “*parties concerned*” as defined in section 37, so their prior consent was not essential for this application. I would of course still have been interested in any objections from Firstport or the RTM Company to the proposed variation, but they have now confirmed, respectively, that their position is that they have no legal interest in the proposed variation and that they consent to it.

What is the object to be achieved by the variation? Can the object only be satisfactorily achieved by varying all the Leases?

27. Under section 37(3) of the 1987 Act: “*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*”. Shell Point Trustees Ltd v Barnett [2012] UKUT 375 confirms that: (a) if the Leases already have sufficient or satisfactory provisions there will be no object, or purpose, to any variation; and (b) this is a narrow jurisdiction, which does not allow a rewriting of the lease merely because that is the will of the majority.

28. The Applicants said that the objective was simply to allow non-carpeted flooring in the six apartments that form Tewin Water House. Their proposed variation would allow this if soundproofing measures were taken to absorb noise.
29. As mentioned above, the Covenant is with each leaseholder as well as the Lessor and the Manager. The first recital to the Leases states that the Lessor has in every Lease and intends in every future Lease to impose the obligations set out in the Eighth Schedule to the intent that the leaseholder for the time being of any one of the Properties may enforce the observance by the leaseholder “...of any other of the Properties of the covenants set out in Part Two of the Eighth Schedule”. Further, paragraph two of the Ninth Schedule to the Leases is a covenant by the Lessor that the Leases of the Properties contain covenants on the part of the various leaseholders “...to observe the like obligations as are contained in the Eighth Schedule as appropriate to each Property”.
30. Under each Lease, the “Properties” are the flats and maisonettes shown uncoloured on the lease plan, other than the Demised Premises.

The tribunal’s determination

31. Given the undisputed facts that all the apartments (including Mr & Mrs Brook’s apartment) except one are not complying with the Covenant, and the estate management scheme under the Lease provisions mentioned above (expecting like obligations to be contained in each Lease), I am satisfied that the current Covenant is not satisfactory and the object to be achieved by the variation cannot be satisfactorily achieved unless all the Leases are varied to the same effect.

Is the proposed variation within the contemplation of sections 37 and 38 of the 1987 Act?

32. Section 38(1) gives the tribunal power to make orders on applications under sections 35 and 36 (which do not rely on consents, but on demonstrating that lease(s) fail to make satisfactory provision for prescribed matters).
33. Section 38(3) gives the tribunal a similar power to make orders on applications (like this application) under section 37 (which are made with specified majority consent, as considered above).
34. In each case, the power is to make orders varying the relevant leases “*in such manner as is specified in the order*”. In isolation, this might be thought to allow some flexibility to amend the wording of the proposed variation. However, section 38(4) gives the tribunal power to, in applications under sections 35 and 36, make the variation specified in the application or “*such other variation as the tribunal thinks fit*”. That power is conspicuous by its absence in relation to applications under section 37. Reading section 38 as a whole, it appears that I do not have power to re-write the proposed variation, at least to any significant extent. That is consistent with the nature of applications under section 37, which (unlike applications under sections 35

and 36) require specified majority consent to the variation being proposed. It is also consistent with the opinion in *Tanfield Chambers' Service Charges and Management* (4th Edition, 2018) at paragraph 33-07 that: *"In relation to a s.37 application, the tribunal is only empowered to order the variation sought in the application."*

35. Further, the power is subject to section 38(6), which provides that a tribunal shall not make such an order effecting any variation of a lease if it appears to the tribunal that: (a) the variation *"would be likely substantially to prejudice any respondent ... or any person who is not a party to the application"* and that compensation would not be an adequate remedy; or (b) that: *"for any other reason it would not be reasonable in the circumstances for the variation to be effected."*

The tribunal's decision

36. In my view, the drafting of the proposed variation is not ideal. As explained above, I cannot change it and nor can the Applicants without starting all over again. Broadly speaking, I can either make the variation sought or dismiss the application. Accordingly, the tribunal wrote to the parties on 9 September 2020, warning that the proposed wording could create risks of disputes between leaseholders in future (particularly about the language used, when floor coverings were changed and which part(s) of which building regulations applied at the relevant time(s)), the tribunal could not give advice on drafting or otherwise, the Applicants might wish to consider withdrawing the application and starting again, and that, if the tribunal did ultimately make the proposed variation, it would be at the parties' risk. The parties were invited to consider this and take legal advice, generally and on best practice modern form wording for leases, and given until 23 September 2020 to respond.
37. The Respondents did not make any representations about this. Ms Hay, for the Applicants, confirmed that some of the Applicants had taken legal input and, after consulting between themselves and with the RTM Company, wished to proceed with the application. Ms Hay confirmed that the Applicants are aware that, if the proposed variation is accepted, it is at their risk.
38. Even with my reservations about the drafting, I have seen nothing to indicate that the proposed variation would be likely substantially to prejudice any person or that for any reason it would not be reasonable in the circumstances for the variation to be effected. On balance, it seems to me that the proposed variation would improve the current unsatisfactory position, where all but one of the apartments are not complying with the Covenant and the only apartment which is complying is held by one of the Applicants. In the circumstances, I exercise my discretion to make an order to vary the Covenant as requested by the Applicants.

Judge David Wyatt

30 September 2020

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).

SCHEDULE 1

The Applicants

Leaseholder	Apartment
Stelio and Susie Stefanou	1
Rodney and Janet Leggetter	2
Grant Castle	4
Michael and Diana Crotty	5
Robert and Vivienne Hay	6

SCHEDULE 2

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.