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

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| **Case Reference** | **:** | **CAM/34UD/LVT/2019/0004** |
| **Property** | **:** | **Fair Mile Building, Reading Road, Cholsey, Wallingford Oxfordshire comprising:**<br>**Basildon Court OX10 9GR**<br>**Blewbury Court OX10 9GS**<br>**Faringdon Court OX10 9GB**<br>**Frilsham Court OX10 9GA**<br>**Hermitage Court OX10 9GE**<br>**Howell Court OX10 9GT**<br>**Ipsden Court OX10 9GD**<br>**Ridgeway Court OX10 9GU** |
| **Applicant (Tenants)** | **:** | **Fair Mile Residents Association**<br>**Colin MacGregor (Chair)** |
| **Respondent (1)** | **:** | **Cholsey Fair Mile Limited (Landlord & Freeholder from 28th September 2018)** |
| **Respondent (2)** | **:** | **Thomas Homes Limited (Developer, Landlord & Freeholder prior to 28th September 2018)** |
| **Respondent (3)** | **:** | **Cholsey Meadows Management Company** |
| **Respondent (4)** | **:** | **Soha Housing Association Ltd** |
| **Type of Application** | **:** | **To vary two or more leases by a majority (s37 Landlord and Tenant Act 1987)** |
| **Tribunal** | **:** | **Judge Ruth Wayte**<br>**Judge Simon Brilliant**<br>**Mrs M Hardman FRICS IRRV (Hons)** |
| **Date** | **:** | **11 November 2019** |

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**DECISION**

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**The tribunal has determined that:**

**(1)It will not make an order varying the leases in the manner specified in the application;**

**(2)It does make an order under section 20C of the Landlord and Tenant Act 1985 so that the First Respondent's costs of the application cannot be added to the service charge payable by the Applicant leaseholders.**

## BACKGROUND

1. Fair Mile Building ("the Building") is part of the redeveloped former Victorian Fair Mile Hospital site, now called Cholsey Meadows. There are 130 flats within the Building and 224 new build properties on the site, which includes a large communal hall and extensive grounds. The grounds are now under the management of the Third Respondent, which is a company limited by guarantee with the leaseholders and freeholders throughout the development as its members.

2. In addition to 91 "private" leases, represented by the Applicant residents' association; there are 39 affordable flats in the Building, let to Soha Housing Association, the Fourth Respondent. The provision of affordable housing on the site was confirmed in an agreement made under section 106 of the Town and County Planning Act 1990 dated 29 July 2010, ("the section 106 agreement") between South Oxfordshire District Council, the Homes and Communities Agency and the developers of the site, including Thomas Homes Limited, the Second Respondent.

3. The Affordable Housing Provisions in the section 106 agreement restricted any service charge payable in respect of property let by an Affordable Housing Provider on an assured tenancy or on a shared ownership lease to no more than £522 per annum for the first year subject to an annual increase (if any) in accordance with the Retail Prices Index. In fact, this translated into the leases between Thomas Homes and Soha being subject to the cap.

4. In 2014 Soha obtained permission from South Oxfordshire District Council to sell three of its flats on the open market as it was unable to find suitable tenants. Those leases also contain a cap, despite no longer being let as affordable housing.

5. The section 106 agreement did not indicate who should bear any shortfall between the actual cost of the service charges and the cap. The developer and now the current freeholder maintains that it is entitled to recover the difference from the "private" leaseholders, although concedes that there is no provision in their leases to that effect.

6. The private leases contain complicated provisions in respect of the service charge and, with one exception, aimed to charge a percentage of the total

expenditure. Unfortunately, the freeholder concedes that the percentages are wrong and, if strictly enforced, would lead to a 900% over recovery. The managing agents for the freeholder have thus limited their demands to date to interim charges, calculated by deducting the amounts received from Soha (and presumably the three flats mentioned in paragraph 4 above) from the total expenditure and then recharging the balance to the private leaseholders on percentages calculated to reflect the number of rooms in each flat. Again, there is no provision in the private leases to support this approach.

7. The exception is the lease for 9 Farringdon Court which was sold in 2015. That lease was varied prior to sale to state that the service charge for that property will be a fair and reasonable proportion of the service charges for the nine privately leased flats in Farringdon Court. In practice, the managing agents have still charged interim service charges for that flat on the same basis as the other private leases.

8. Once the private leaseholders became aware of the scale of the problem and in particular the amount of the subsidy they were paying on behalf of Soha and the other capped leases, Mr MacGregor brought proceedings in a personal capacity to challenge his service charges. He succeeded before the FTT but that decision was over turned on appeal, due mainly to the fact that the service charges had been demanded as interim charges and were held to be reasonable in terms of the amount sought: *Thomas Homes Limited v Colin MacGregor* [2016] UKUT 495 (LC).

9. In those proceedings, Thomas Homes had mistakenly stated that the error in the percentages in the leases amounted to a 3,000% over recovery. In his decision on appeal, HHJ Huskinson stated at paragraph 50: "*In light of the drafting error it appears inevitable that, unless appropriate variations can be made by agreement, an application will be made to the F-tT under section 35 for a variation of the leases. That is a matter for the future. The merits of the appellant's and the respondent's arguments upon whether a variation should be made and if so what the variation should be are matters for the future. Also upon any such application there may be numerous other parties involved.*"

10. The Applicant states that it has tried to negotiate a "fair and reasonable" service charge scheme and that following negotiations, Thomas Homes agreed to sell the freehold of the Building for £1 to a new company, Cholsey Fair Mile Ltd - the First Respondent and current freeholder, with the intention that it will become leaseholder owned and run in due course. However, the leaseholders represented by the Applicant do not wish to become members until the service charge position can be resolved. Matters are now coming to a head as major works are being contemplated to the windows. Mr MacGregor's estimate of the level of subsidy that the "private" leaseholders will soon be asked to pay in respect of the Soha leases is in the region of £57,000 per annum, taking the likely cost of the major works into account, although this was disputed to some extent by the current freeholder.

11. Mr MacGregor recognises that the current freeholder is not in a position to cover the shortfall. It is a company limited by guarantee with only the ground

rent of some £15,000 as annual income. His long term aim is that Soha (and presumably the other capped leases) should bear their fair share of the service charge.

## The Application

12. Despite the reference to section 35 in the previous case, the Applicant decided to apply to vary their 91 leases under section 37 of the Landlord and Tenant Act 1987 ("the 1987 Act"), as they thought it was more flexible than section 35. The application was dated 29 May 2019 and included a number of other requests, which were limited to the application for variation by directions issued on 20 June 2019.

13. In accordance with those directions, statements of case were received from the current freeholder, Cholsey Meadows and Soha. The current freeholder and Soha made an application to strike out the application and further directions were issued on 12 September 2019, listing the strike out to be heard with the hearing of the main application on 7 October 2019.

14. At the hearing, the Applicant was represented by Mr MacGregor, the Chair of the association; the current freeholder by counsel Mr Talbot-Ponsonby, Cholsey Meadows by Mrs Irving, the Chair of that estate management company and Soha by counsel Mr Bowker. Thomas Homes, the developer and Second Respondent, took no part in the proceedings, although it appears that two of the directors of the current freeholder company were also directors of Thomas Homes.

15. Although Cholsey Meadows is a party and was present at the hearing, their involvement was really to provide a summary of the Estate Charges throughout the whole development. Mrs Irving confirmed that the charges were apportioned at one third for the Fairmile Building and two-thirds for the new build properties, roughly based on the number of units on the estate. In terms of collection, they adopted a similar process to the managing agents for the current freeholder, obtaining monies from Soha and then seeking payment for the balance of expenditure from the other owners. The estate charge is currently in the region of £500 per unit. It was unclear how much was paid by Soha but if paid in full this alone would use up nearly all of the capped charges under those leases.

## The Issues and the Law

16. The issues were partly set out in the directions and agreed at the hearing as:
    - Is there a sufficient majority for an application under section 37 of the 1987 Act?
    - 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?
    - Is the proposed variation within the contemplation of sections 37 and 38 of the 1987 Act?

17. Sections 37 and 38 of the 1987 Act are contained in an annex to this decision for ease of reference. Section 37 sets out the requirements for an application by a majority of parties for variation of leases, section 38 deals with the tribunal's powers in terms of orders on applications under section 35 to 37 inclusive.

**Is there a sufficient majority for a s37 application?**

18. Section 37(5) sets out the requirements for consent to the application which in respect of more than 8 leases is 75% in favour and not more than 10% against.

19. As stated above, the application was in relation to the "private" leases only. The Applicant maintained that by 20 May 2019, 73 of the 91 private leaseholders or 80% had voted in favour of the application, exceeding the requirement set out in section 37(5)(b). There had been no votes against the proposal, although it is of course opposed by the current freeholder who counts as one party as set out in section 37(6). The application was made to the tribunal on 29 May 2019.

20. Both the current freeholder and Soha argued that consent was also required from Soha, as they must be a "party concerned" as set out in section 37. This phrase appears in s.37(5) and (6) which deal with the majority required for the application under that section. The Applicant's response was simply that they are not seeking to vary the Soha leases and a natural reading of section 37 makes it clear that "parties concerned" are the parties to the leases sought to be varied and not some wider category. It was not disputed that if the Soha leases were included, there would not be the requisite majority in favour of the application.

21. The arguments advanced on behalf of the current freeholder and Soha relied on the fact that since the application would affect the Soha leases, as recognised by the fact that they were joined to the application, they must be counted as "parties concerned". Mr Talbot-Ponsonby for the current freeholder admitted there was nothing specific in section 37 and in particular, no mention of third parties in s.37(6) which confirms that in respect of each lease the tenant shall constitute one of the parties concerned and the landlord shall also constitute one of the parties concerned. Mr Bowker for Soha similarly relied upon the natural meaning of "parties concerned", rather than the Act.

22. In his skeleton argument dated 19 September 2019, Mr Bowker raised an additional objection as to whether the votes conformed to the "strict requirements of section 37". This was not further explained in the skeleton but at the hearing Mr Bowker expanded his argument by reference to the different versions of the application voted on at a meeting of the leaseholders called by the Applicant and on paper afterwards, together with the subject of the ballot. In particular, he submitted that the request for consent not only to the variations as drafted by the Applicant but also any changes that may be made by the tribunal following any hearing, was not in accordance with section 37. He relied on the case of *Simon v St Mildred's Court Residents*

*Association Ltd* [2015] UKUT 0508, which confirms that consent must be obtained before the application is made to the tribunal.

23. Mr MacGregor for the Applicant explained that the latter proposal had developed during the meeting and therefore the subsequent voters had been provided with an explanation and an opportunity to vote on that proposal in addition to the variations as drafted. The application to the tribunal was further varied to take on board the first directions order and in particular the limitation of the application to the variation of the leases as opposed to wider issues. The actual lease variations drafted by the Applicant have not been changed since the vote.

## The tribunal's decision

24. This application is made under section 37 of the 1987 Act and the tribunal agrees with the Applicant that the clear reading of that section is that "the parties concerned" are the parties to the leases sought to be varied and not any other leases. The obvious place to extend the meaning to other leases is in s.37(6) which again mentions only the landlord and tenant under the lease i.e. the lease which is the subject of the application to vary. The tribunal does not deny that Soha is affected but their interest can be taken into account as part of the tribunal's consideration of whether to order the variation, as set out in section 38(6).

25. In terms of Soha's additional objection, the tribunal accepts that Mr MacGregor's attempt to demonstrate consent in relation to any amendments to the variations which may be made by the Tribunal at the hearing, does not fit with the concept of section 37 or the *St Mildred's Court* case above. However, the Applicant has clearly demonstrated the requisite consent before the application was issued in relation to the variations drafted by them, which have not changed since the leaseholders voted, whether at the meeting or subsequently by post. As to whether any changes to the wider application may have nullified that consent, section 37(1) refers to an application to the tribunal for an order varying leases "*in such manner as is specified in the application*". The tribunal therefore considers that it is the variations which are key to the question of consent, not the wider application.

26. In the circumstances the tribunal considers that there is a sufficient majority in respect of the Applicant's variations in accordance with section 37.

## What is the object to be achieved by the variation?

27. These were described by the Applicant as "Aims", which were to:

- Correct the service charges shown in the lease;
- Replace the existing service charges apportionments with fair and reasonable apportionments;
- Correct the maintenance provisions of the lease;
- Enable the leaseholders to take control of the Building landlord company;

- After variation of the lease, clarify any retrospective effects of the variations;
- If possible and subject to the agreement of the leaseholders, do what we can to mitigate the impact of this case of the affordable flats tenants.

28. It is only the first three bullet points which directly link to the variations sought, the Applicant admitted in the hearing that the remaining aims are really consequences should the leases be varied. The application sought six "sets" or groups of variations, which were summarised by the Applicant as:
    - Set 1 – variation to the definitions of building service charges
    - Set 2 – apply the new building charges definitions to the lease text
    - Set 3 – variation to the definitions of estate service charges
    - Set 4 – apply the new estate charges definitions to the lease text
    - Set 5 – variation to the provisions for maintenance quality and timeliness
    - Set 6 – 9 Faringdon Court (basically to make this lease the same as the others).

29. Broadly speaking the variations in respect of the service charges sought to separate out the service charges for the private leases from the Soha leases, in order to ensure that the private leases paid for a percentage of those charges only and remove the subsidy to the Soha leases. The variation in relation to the maintenance provisions was to ensure that the maintenance of the building was to a reasonable standard and in a workmanlike and timely manner, by adding words to that effect to the provisions which currently state that works will be carried out "*so often as in the opinion of the Landlord is reasonably necessary*".

30. Soha in its Statement of Case submitted that the object was at least in part an abuse of process as the real intention of the variations in respect of the service charge was to undermine the section 106 agreement in terms of the capping arrangements. For that reason, the application ought to be struck out or refused.

## The tribunal's decision

31. The tribunal does not accept that the Applicant's object in respect of the service charges is an abuse of process on the basis argued by Soha. As stated above, the section 106 agreement does not appear to require the service charges paid by Soha to be capped (as opposed to their tenants) or that the private leases pay any shortfall in respect of the cost of the services. In the circumstances, the tribunal refuses to strike out the application on this basis.

## Can the object be achieved?

32. This issue refers to section 37(3) of the 1987 Act which states that: "*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*".

33. The current freeholder's objections to variations 1 to 4 were set out in their statement of claim under three heads:
    (i) It was not feasible in practice to separate out the service charges for the private leases from the Soha leases as many of the services were provided generically and the Soha flats were "sprinkled" among the private leases, as opposed to being together in one part of the Building;
    (ii) There would be a shortfall in the service charge collected in excess of the current freeholder's income, meaning that the company would become insolvent and unable to perform its covenants under the leases;
    (iii) The variations as drafted required amendment – in particular, the reference to "this Lease" and "other Leases" was too simplistic – there needed to be a clearer description of the other private leases as well as the Soha leases.

    In the circumstances, the current freeholder submitted that the object in relation to the service charge provisions could not be achieved by varying just the private leases in the manner specified by the Applicant.

34. The objection to the variation to the maintenance provisions was that they were "meaningless" as the leaseholders already had remedies in the event of the landlord failing to comply with their covenants in the lease. In his skeleton argument on behalf of the current freeholder, Mr Talbot-Ponsonby relied on the case of *Shell Point Trustees Ltd v Barnett* [2012] UKUT 375. That decision is authority for the proposition that if the leases already have sufficient or satisfactory provisions there will be no object, or purpose, to any variation. Mr Talbot-Ponsonby submitted that the maintenance provisions were satisfactory in this lease. Any reference to the landlord's "reasonable opinion" would be determined by the court objectively and therefore the variations sought were superfluous.

35. Mr Bowker's submissions for Soha stated that the Applicant has not adequately explained the relationship between the object, the variation and the leases and for that reason the application ought to be refused. He also stated that there had been no adequate explanation as to why Soha's leases should not be varied. The skeleton really focussed on the claim that the application had "not been correctly formulated in accordance with section 37". Of the authorities quoted in support of Mr Bowker's proposition that section 37 is to be applied strictly, only one directly concerned section 37, namely the *Simon* case on consent referred to above in paragraph 22. The other cases are more relevant to the question of the tribunal's powers under section 38 which will be dealt with below.

## The tribunal's decision

36. It seems to the tribunal that the requirement in section 37(3) really goes to whether the amendment is collective or can be confined to one lease. It therefore seems obvious that if what is sought is a change to the service charge regime, all of the relevant leases need to be varied. The current freeholder and Soha submit that this must include the Soha leases and therefore the variation cannot be satisfactorily achieved unless they are varied too. As stated before, this application is in relation to the private leases only and from that

perspective the variations sought in respect of the service charge would appear to satisfy section 37(3).

37. However, the tribunal agrees with the current freeholder that there is no object or purpose to achieve in respect of the amendments to the maintenance provisions, as the current provisions are satisfactory. The Applicant's response to that argument was that the variations would aid transparency but in the view of the tribunal this is insufficient for the purposes of section 37(3).

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

38. Section 38(3) provides that: "*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…make an order varying each of those leases in such manner as is specified in the order*." This is subject to section 38(6) which provides that: "*A tribunal shall not make an order effecting any variation if it appears to the tribunal that: (a) the variation would be likely substantially to prejudice any respondent 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*."

39. Although the current freeholder had raised the issue of compensation in its Statement of Case, Soha had proposed that compensation should be dealt with as necessary, after determination of the application to strike out the claim. The Applicant only referred to compensation for the leaseholders and does not appear to have appreciated that the tribunal's powers under section 38(10) to order compensation would apply to any party or other person who were likely to suffer loss or disadvantage as a result of the variation. As stated by the current freeholder, they were the immediate party in this position, although Soha and even Cholsey Meadows may have an argument in this respect which has not yet been considered.

40. The Applicant appeared convinced that no loss would arise as Mr MacGregor submitted that the current freeholder had the power to vary the Soha leases now, as a result of further development to the site which triggered a power to vary the service charge payable as set out in paragraph 2 of Schedule 7 to the specimen Soha lease in the bundle. No argument to the contrary was made by Mr Bowker but it appears to the tribunal that it is extremely unlikely that this power is sufficient to remove the cap as it is expressed as applying only "*If due to any re-planning of the layout of the Development of the Building by the Landlord it should at any time become necessary or equitable to do so…*". As the tribunal understands it, the "re-planning" is the conversion of the former pharmacy and farm into residential units. This would only affect the proportions in terms of the total number of units on the development. Any attempt by the current freeholder to remove the cap on this basis is likely to be met with a powerful challenge that the variation was not necessary or equitable in the context of a few more residential units.

41. Both the current freeholder and Soha also argued that the tribunal had no power to order its own variations on a section 37 application, as opposed to applications under section 35 and 36. In particular, they relied on section 38(4) which states that: "*The variation specified in an order under subsection (1) and (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*." Subsection 38(1) refers to an application under section 35 and subsection 38(2) to an application under section 36. This is particularly relevant to the argument raised by Mr Bowker in paragraph 22 above, in opposition to the Applicant's attempt to obtain consent for any amendments the tribunal may make, in advance of the decision or in the event that the Applicant's drafting is considered defective as argued by Mr Talbot-Ponsonby.

## The tribunal's decision

42. The tribunal agrees that section 38(4) clearly relates only to applications under sections 35 and 36 as it applies to orders made under section 38(1) and (2). The question then becomes whether section 38(3) limits the tribunal to the actual wording specified in the application as the words "*or such variation as the tribunal thinks fit*" are missing from that subsection. The Applicant contended that the power to make an order *"in such manner as is specified in the order*" in section 38(3) was flexible but that wording is the same in sections 38(1) and (2), which then benefit from section 38(4). In these circumstances, although the wording in section 38 could have been clearer, the tribunal agrees with the respondents that the tribunal's powers are less flexible in section 37 cases. This is consistent with the need for consent to the variation before the application is made. Support for that position can also be found in Tanfield Chambers' Service Charges and Management 4th Edition, 2018 at paragraph 33-07 where it states that: "*In relation to a s.37 application, the tribunal is only empowered to order the variation sought in the application*."

43. So should the tribunal make that order? As stated by Soha, apparently without irony, the fundamental problem with the application is that the Applicant's object cannot be achieved unless *all* of the leases are varied i.e. including the Soha leases (and the other capped leases sold on the open market), so that the service charge regime for the estate is consistent throughout. Varying the leases for the private flats alone is not practicable and would lead to problems with the calculation of the service charges and the likely insolvency of the current freeholder, leading to chaos in the management of the estate. Even if the tribunal had been minded to vary the private leases only, the tribunal also agrees with the current freeholder that the variations specified in the application require re-drafting to avoid further problems and unfortunately it has no powers to do so.

44. In the circumstances the tribunal considers that it would not be reasonable for the variations to be effected and declines to make an order under section 38(3).

45. The tribunal appreciates that the situation remains totally unsatisfactory for the Applicant. Mr MacGregor prepared his case meticulously and fought a

valiant case against counsel for the current freeholder and Soha. What is now required is for those Respondents and the other parties to the section 106 agreement to take responsibility for the mess they have created. In particular, the tribunal encourages the current freeholder to take the initiative for an application under section 35 in respect of all the leases and for the variations to be professionally drafted. Soha should also consider whether it is now prepared to bear its fair share of the service charge or at least play a more constructive part in discussions with the Applicant, which would clearly be in its own interests in terms of securing the future management of the development.

## Application under section 20C Landlord and Tenant Act 1985

46. The Applicant had also applied for an order under section 20C of the 1985 Act so as to prevent the current freeholder from claiming their costs of the proceedings as part of the service charge. Mr Talbot-Ponsonby stated that he didn't have instructions "to make a big fuss about costs" and was unable in any event to identify a relevant clause entitling his clients to claim costs as part of the service charge.

47. Mr MacGregor pointed out that the reason for the application was that Thomas Homes had only admitted the errors in the lease during his proceedings in respect of the service charge and had not been transparent with any of the private leaseholders about the subsidy to Soha when they bought their flats.

48. As with the Upper Tribunal decision on the service charge appeal, the tribunal determines that this litigation has substantially arisen because of the drafting errors in the lease and the freeholder's failure to take responsibility for putting it right. The developer bears an additional responsibility for their apparent failure to appreciate the problem with granting leases to Soha with capped service charges and failing to make any clear provision for recovery of that shortfall. In the circumstances the tribunal considers that it is just and equitable to make an order in favour of the Applicant so that all of the costs incurred by the current freeholder in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant leaseholders.

**Judge Ruth Wayte**

## 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).

ANNEX

**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.