FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BD/LVT/2019/0009**
Property	**:**	**Selwyn Court Church Road Richmond Surrey TW10 6LR**
Applicant	**:**	**Selwyn Court Residents Limited**
Representatives	**:**	**Mr Tim Hammond of Counsel**
Respondents	**:**	**The leaseholders of Selwyn Court**
Objecting tenants	**:**	**Bernard Vinycomb (Flat 8) and Margaret Garner (Flat 26)**
Type of Application	**:**	**To vary leases (Part IV Landlord and Tenant Act 1987)**
Tribunal Members	**:**	**Judge Professor Robert M Abbey** **Mr Luis Jarero FRICS (Chartered Surveyor)**
Venue of Hearing and Date of Hearing	**:**	**10 Alfred Place, LondonWC1E 7LR** **24 February 2020**
Date of Decision	**:**	**2 March 2020**

DECISION

Decisions of the Tribunal

(1) The Tribunal grants the application for the variation of leases at the property under sections 37 and 38 of the Landlord and Tenant Act 1987, ("the Act"). The precise form of variations is more particularly referred to in the following determination. The relevant legislation is set out in an appendix to this decision. Further the Tribunal Orders that the Applicant do pay Bernard Vinycomb compensation in the sum of £2225.

(2) The reasons for the decisions are set out below.

The background to the application

1. The applicant seeks to vary leases at Selwyn Court ("the property") under the provisions of Part IV**,** (Variation of Leases), of the Landlord and Tenant Act 1987. The applicant is the freeholder of the property which is a tenant owned company, owned by 26 of the 28 leaseholders at the property. The block is a five storey building dating from the 1930s. The applicant's freehold title is registered at the Land Registry under Title Number SY 5539 and has been since April 17, 1996. The freehold is subject to 28 leases all of which are the subject of the application. They are all residential flats with leasehold interests and all the leases of the flats are effectively in the same form.

2. The applicant has identified one specific issue or problem. Hot water and heating at the property is currently provided by a communal boiler system. (Not all rooms in flats have radiators, bedrooms lack them). The boilers are situated in a basement boiler room within the property. All controls are central to the boiler system and not within the flats (other than on/off radiator valves). The boilers are approximately 40 to 50 years old. It seems that they are not serviceable as the necessary spare parts are no longer available. The former boiler service company used by the applicant would not continue to service the boilers as they could not guarantee their serviceability. The applicant says the system is near the end of its working life and requires replacement before it fails completely, leaving tenants with no heating or hot water.

3. Pursuant to clause 3(4) (v) in the leases of the flats in the property the applicant covenants to provide hot water and heating to the leaseholders. Consequently, the cost of the provision of hot water, heating, and the maintenance and repair of the existing communal system is paid for by the leaseholders through their contribution to the annual service charges. Because of the problems with the communal boiler system, the applicant now proposes that each leaseholder will install and be responsible for their own individual boiler, and that the existing communal system be decommissioned thereafter. The cost of hot water to and heating of an individual flat would then be paid by

each leaseholder. Bearing in mind the lease provision at clause 3 (4) (v) that proposal of a move to individual flat boilers requires a variation to the terms of the leases.

4. The applicant therefore issued draft variations that were sent to all the tenants in December 2018, together with a "tick box" form asking the tenants to confirm either support or opposition to the draft variations. Subsequently the applicant received 23 responses: 22 positive and 1 negative. 5 leaseholders did not respond. At the time of the hearing 2 leaseholders opposed the application and they are the objecting tenants mentioned above. (Margaret Garner did not oppose the draft variations at the time that the application was made on 29 August 2019 but lodged an objection thereafter.)

5. By Directions of Judge Korn on 9 September 2019 and of Mrs Bowers on 8 October 2019 the Tribunal required the applicant landlord to send copies of the Directions to the tenants. If a tenant opposed the application then they were required to make their objections known. At the time of the determination only two written objections were known by the tribunal namely from the objecting tenants.

The hearing

6. By directions of the tribunal dated 9 September 2019 it was decided that the application be determined with an oral hearing. At the hearing held on 24 February 2020 the applicant was represented by Mr Hammond of Counsel and one of the objecting tenants did attend, (Mr Vinycomb), and did advance his objection as set out in documentation in the trial bundle. Additionally, one further tenant, (Mrs Garner), attended at the hearing and did advance her own thoughts and views on the application before the Tribunal but these had not previously been expressed in a statement of case.

7. The tribunal had before it two bundles of documents prepared by the applicant and detailed written representations made on behalf of one objecting tenant Mr Vinycomb.

8. Accordingly, the applicant seeks to make the variations to address the problem with the communal boiler. The applicant says these are all required to improve the good management of the property and to give the tenants autonomy when dealing with heating and the provision of hot water for the flats.

The issues

9. For the purposes of this application, the applicant relies on s.37 of the Landlord and Tenant Act 1987 the details of which can be found in an appendix at the end of this decision. To comply with the provisions of

section 37 the Tribunal noted that the application relates to the property that comprises two or more long leases of flats where the applicant is the landlord in respect of each lease; and of course the landlord, makes the application. Section 37(3) is critical in that it 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.*"

To comply with this requirement of the Act the applicant says that: -

> *"The proposed variations of the Leases have as their object a change in the parties' existing obligations, to enable the changeover from the existing communal system to individual boilers;*
>
> *The current provisions of the Leases do not permit a changeover to individual boilers; and*
>
> *If there are to be individual boilers rather than a communal system, the object cannot be achieved without all the Leases being varied to the same effect."*

In the light of these statements the Tribunal were satisfied that this was sufficient to comply with section 37(3).

10. Sections 37 (5) and (6) both deal with required threshold percentages. An application such as this one can only be made if 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. Parties concerned shall be the tenants under the leases of the property and the landlord shall also constitute one of the parties concerned. By this definition 10% amounts to 2.9 and as there were only 2 objecting tenants this percentage threshold is not an issue. Similarly, 75% amounts to 21.75 and as 22 tenants and the applicant support the application/variations, (i.e. 23); this too is not an issue. (While it makes no difference in relation to the 10% threshold, it should be borne in mind that the objection from Mrs Garner was not made before the application was made to the Tribunal. In these circumstances *Dixon v Wellington Close Management Ltd* [2012] UKUT 95 (LC) makes clear that the date at which the determination of percentage of the parties concerned in favour or opposed to the variation must be ascertained is the date of the application.)

11. The Tribunal must then have regard to section 38. This says 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, the tribunal may make an order varying each of the leases in such manner as is specified in an order to be issued by the Tribunal.

12. It was clear to the Tribunal that as between the parties the need to replace the old boiler system was not in doubt. However, how to replace the centralized system was at issue. The applicant favours allowing all the tenants to install and manage their own systems, hence this application. The Objecting tenants disagree and favour a like for like replacement of the centralised boilers. The applicant provided expert evidence to the Tribunal but despite Directions allowing the objecting tenants to do so they did not provide expert evidence to support their contention. However, Mr Vinycomb did robustly and properly cross examine all the witnesses mentioned below.

13. The Tribunal heard evidence first from Jon Hallas a member of the Royal Institution of Chartered Surveyors and a building surveyor with significant experience in renewing domestic boilers but limited experience of communal boilers. Gino Fantoni of Fantoni Designs was appointed to advise on the communal plant and heating; his evidence will be referred to subsequently.

14. Mr Hallas confirmed that the boiler plant system has reached the end of its useful life and is no longer maintainable and that the pipework system in the building was also very old. It seems that the pipework was incorporated within the fabric of the property and was consequently not open to close inspection. However, it seems that the pipework could well all be original from the time of the erection of the building in the 1930s. He referred the Tribunal to guidelines issued by CIBSE (Chartered Institution of Building Services Engineers) that advised that the working life for pipework systems such as presently exist was limited to approximately 25 years. He pointed out that the existing system was considerably older than that and was plainly at the end of its useful life in accordance with CIBSE guidelines.

15. Mr Hallas then provided four different solutions to the boiler problem. His option 1 is for the like for like replacement advocated by the objecting tenants while option 3 is the preferred option for the applicant giving the tenants autonomy over their own heating and hot water systems. His view was that option 3 was fairer cheaper and better suited to the needs of the tenants. (It was confirmed to the Tribunal that some 7 or 8 tenants had already installed their own heating and hot water systems.) It also avoided connecting to the old or original pipework.

16. Mr Fantoni was next to give evidence in his capacity as a mechanical services engineer. He said while it was feasible to make a like for like replacement of the boilers, to do so might produce other problems; it was in his words “a big risk” bearing in mind the age of the old

pipework. Accordingly, both experts were firmly of the view that the like for like replacement advocated by the objecting tenants was not appropriate and that they advocated the tenants being allowed to use their own systems. Option 1 could promote the risk of existing pipework failing and in need of replacing. This was specifically not recommended by them.

17. Finally, Mr Iain Davies gave evidence for the applicant in his capacity as someone qualified in Estate Management, as a Registered Valuer and as a member of the Royal Institution of Chartered Surveyors. His evidence was in relation to a claim for compensation advanced by Mr Vinycomb. This will be referred to later on in this decision.

18. The Tribunal then had the benefit of the evidence from Mr Vinycomb. He accepted that he had not put in expert evidence but he asserted that he had his own views and that these had been set out in detail in his submissions to the Tribunal. Furthermore, the Tribunal permitted Mrs Vinycomb to read out a lengthy statement of case and of his views that in detail set out his opinions about the merits or otherwise of the application. Mr Vinycomb resolutely asserted that the like for like option was the appropriate way forward. He believed it to be fairer, cheaper and better for the block and the tenants and the environment to proceed in this way. He was of the view that there had been no proper assessment of the state of the pipework because the experts had confirmed that much of it had not been inspected. He thought it was functioning properly at the present and therefore could be used on a like for like replacement option.

The determination

19. Accordingly, having heard and read the evidence and submissions from the Applicant and having considered all of the copy deeds, reports and documents provided by the applicant, and the written submissions from the objecting tenants, the Tribunal determines the lease variation issues as follows.

20. The Tribunal has taken careful note of the reports and evidence from the experts and this has enabled the Tribunal to make an informed and proportionate decision notwithstanding all the assertions made by the objecting tenants. The Tribunal has therefore determined that given the numbers of tenants who want the changes and given the limited number of objectors and given the expert evidence the Tribunal is of the view that a variation of the leases should be ordered and it will so order.

21. The tribunal also considered whether there should be any form of compensation pursuant to section 38(10) of the Act and in the light of the assertions made by Mr Vinycomb took the view that it was appropriate that there be any award for compensation given the circumstances of the application. In particular whilst he did ask for

compensation he also supplied some limited evidence in support of the claim. Furthermore, to make an order for compensation the Tribunal must be satisfied that in making the variation order that prejudice has been caused as a result. On looking at the suggested form of variations to be made the Tribunal was of the view that there was limited prejudice and the elements of this will now be considered.

22. Mr Vinycomb advanced a six point claim for compensation totalling £23368. The first part, £13868 was for the difference in cost between the two preferred options. The Tribunal was not persuaded by the arguments by Mr Vinycomb in this first part as he seems to have ignored the potential cost of pipework works. The Tribunal declines to make any compensation award in this regard. The second part, £1200 was for the ongoing cost of Annual Gas Safety Certificates for his flat. He claimed ten years at an annual cost of £120.The Tribunal thought that a ten year period was appropriate given the average life expectancy of a boiler but accepted the view of Mr Davies when in his expert report said that the annual cost is more likely to be £75. The Tribunal therefore assesses this point of the claim at £750.

23. The third part, £2600 was for 10 years on-going cost of the maintenance of the boiler. He claimed ten years at an annual cost of £260. The Tribunal thought that a ten year period was appropriate given the average life of a boiler but accepted the view of Mr Davies when in his expert report said that the annual cost is more likely to be in the region of £150. The Tribunal therefore assesses this point of the claim at £1500. The fourth part, £2500 was for the loss of space in his kitchen so as to accommodate a new boiler which Mr Vinycomb assessed at this figure. Mr Davies in his expert report did not think that the installation of a boiler in Mr Vinycomb' s flat would affect the market value of the property and the Tribunal agree with this view and therefore order a nominal compensation sum of £50 in this regard.

24. The fifth part is £1000 for interference with quiet enjoyment. However, bearing in mind the flat is tenanted and that there really is no evidence to support this claim the Tribunal took the view that it would decline to make any order in this regard. The sixth and final point was a claim by Mr Vinycomb for £3200 potential loss of rent while the individual works proceed, being 2 months at £1600 per calendar month. Mr Davies thought that 2 to 3 days would be sufficient to complete the works and the Tribunal agreed with this view and therefore assesses this point of the claim at £150.

25. Adding the individual amounts together give a gross sum of £2450. However, this sum does not take into account the accelerated receipt of the money over the ten year time frame. The Tribunal considered that a 1.5 % allowance should be made each year giving a deduction of 15% for the ten year period set out above. Therefore, the certificate item is now £675, boiler maintenance is £1350, loss of space remains at £50 and

loss of rent remains at £150. This produces a total of £2225 and this is the amount of compensation to be paid by the applicant to Mr Vinycomb.

26. The Tribunal considered the method by which the variations should be made. It decided that to try to make formal written deeds for each lease was likely to prove disproportionately expensive and very time consuming. Therefore, it determined that the applicant should draft an Order for the approval of the Tribunal. This Order should set out the terms of this determination and should be drafted in such a way so as to enable an application to the Land Registry in relation to each lease in the property to make sure that the variations were duly registered against each and every leasehold title. To that end the applicant submitted a proposed Order that has been seen and approved by the Tribunal. The applicant is now required within 14 days from the date hereof to send an engrossment of the Order, including the complete schedule thereto, to the Tribunal for signing/sealing.

27. Also within 21 days of this decision the applicant shall file stamped addressed envelopes addressed to each leaseholder, (all 28), to enable the Tribunal to serve a copy of this decision on the lease variations (as is now required following the Upper Tribunal decision in *Hyslop v 38/41 CHG Residents Co Ltd* [2017] UKUT 0398 (LC)).

28. Rights of appeal made available to parties to this dispute are set out in an Annex to this decision.

Name: Judge Professor Robert M. Abbey **Date:** 2 March 2020

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.

Appendix

Relevant legislation

Landlord and Tenant Act 1987

Part IV Variation of Leases

Applications relating to flats

35 Application by party to lease for variation of lease.

(1)Any party to a long lease of a flat may make an application to the appropriate tribunal for an order varying the lease in such manner as is specified in the application.
(2)The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—
(a)the repair or maintenance of—
(i)the flat in question, or
(ii)the building containing the flat, or
(iii)any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;
(b)the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);
(c)the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;
(d)the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);
(e)the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;
(f)the computation of a service charge payable under the lease.
(g)such other matters as may be prescribed by regulations made by the Secretary of State.
(3)For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—
(a)factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and
(b)other factors relating to the condition of any such common parts.
(3A)For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(4)For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—
(a)it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and
(b)other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and
(c)the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.
(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002and Tribunal Procedure Rules shall make provision—
(a)for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and
(b)for enabling persons served with any such notice to be joined as parties to the proceedings.
(6)For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—
(a)the demised premises consist of or include three or more flats contained in the same building; or
(b)the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.
(8)In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.
For the purposes of this section and sections 36 to 39, "appropriate tribunal" means—
(a)if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
(b)if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.

36 Application by respondent for variation of other leases.

(1)Where an application ("the original application") is made under section 35 by any party to a lease, any other party to the lease may make an application to the tribunal asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application.
(2)Any lease so specified—
(a)must be a long lease of a flat under which the landlord is the same person as the landlord under the lease specified in the original application; but
(b)need not be a lease of a flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease.
(3)The grounds on which an application may be made under this section are—

(a)that each of the leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application; and
(b)that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons who are parties to the leases specified in that application, to have all of the leases in question (that is to say, the ones specified in that application together with the one specified in the original application) varied to the same effect.

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.

Orders varying leases

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 tribunalwith 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) 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.