UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – variation of lease – validity of application – requirement that not more than 10% of tenants should be opposed to application – whether LVT had wrongly assessed number of tenants opposed to application – held they had not – appeal dismissed – Landlord and Tenant Act 1987 s 37(5)

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL

BETWEEN **MARSHALL DIXON AND OTHERS** **Appellants**

and

WELLINGTON CLOSE MANAGEMENT LIMITED **Respondent**

Re: Flats
Wellington Close
Hepworth Way
Walton-on-Thames
Surrey KT12 4XN

Before: The President

Sitting at 43-45 Bedford Square, London, WC1B 3AS
on 21 March 2012

The appellant Mr Marshall Dixon in person
Philip Sissons instructed by Howlett Clarke of Hove for the respondent

No cases referred to

DECISION

1. The issue in this appeal is the validity of an application under section 37 of the Landlord and Tenant Act 1987 for the variation of leases. The application relates to 132 leases, each one being of a flat in a development, consisting of three blocks, known as Wellington Close, Hepworth Way, Walton-on-Thames. The application was made by Wellington Close Management Ltd, which has been since 1992 the registered proprietor of the premises. The company was formed for the purpose of managing the premises, and the long leaseholders are shareholders in the company.

2. The application was prompted by the need to deal with the disrepair of the exterior cladding of the blocks. The remedial works that are required involve the replacement of the external doors and windows, which under the terms of the leases of the flats are demised to the tenants. The application sought the variation of each lease so as to amend the definition of the premises demised to the tenant so that it excluded the doors, door frames, windows and window frames. The company was to take on the responsibility for repairing these items, and the service charge provisions were to be amended to require the tenants to pay for the cost of any repairs carried out. Variations were also sought in the leases to impose an obligation on the company to clean the exterior of the windows (the rationale being that the warranty for new windows would be vitiated if they were not kept clean) and to increase the amount the company could charge under the lease for the registration of assignments and underlettings.

3. Under section 37(1) as amended an application may be made to a leasehold valuation tribunal in respect of two or more leases for an order varying the terms of those leases in such manner as is specified in the application. Under subsection (3) the grounds on which an application may be made are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect. Section 38(3) provides that, if such grounds are established to the satisfaction of the LVT, it may order the variation of the leases in such manner as is specified in the order.

4. Section 37(5) provides:

> "(5) Any such application shall only be made if –
>
> (a)…
>
> (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."

Under subsection (6) each tenant and the landlord counts as a party concerned, so that for these 132 flats the total number of the parties concerned is 133.

5. On 8 September 2009 the company's solicitors, Howlett Clarke, wrote to each of the tenants setting out the proposals for the variation of the leases. It appears that

appended to each letter was a schedule setting out the terms of the variations that were sought. The letter said:

> "We should be grateful, if you are happy to do so, if you would please indicate your agreement to the proposed changes and to the application to the Leasehold Valuation Tribunal by signing and returning in the enclosed pre paid envelope, the duplicate copy of this letter.
>
> On the other hand, if for any reason you are not happy to agree to the proposed amendments, perhaps you could please contact us directly so that we can clarify any points about which you are concerned."

At the foot of the letter the declaration that the recipient was asked to sign was in these terms:

> "I/we agree with the proposal and consent to the application to the LVT."

6. Having received replies to this letter, the company on 12 March 2010 applied to the LVT under section 37. The application stated that more than 75% of the lessees had consented to the application and less than 10% opposed the application. On 29 March 2010 the LVT issued directions, identifying all the lessees as "the Respondents" and including the following:

> "5. If any of the Respondents wish to oppose the Application they shall within 21 days from the receipt of all the documents referred to in Paragraph 4 hereof send to the Applicant and to the Tribunal a Statement in writing saying why they contest the Application and the reasons why they do so..."

7. The substantive hearing was held on 22 September 2010, and the decision records as the lessees who attended the hearing Mr Dixon, said to be the lessee of flats 23, 53, 92, 113 and 128; Mr Martin Lincberg, the lessee of flat 116; and Mr Paul Courtel, the lessee of flat 124. The summary of their case includes the following:

> "15. Mr Courtel challenged the fact that the Applicant had satisfied the required percentages as laid down in the Act for a variation under Section 37. He pointed out that in the Applicant's documentation on submitting the application ten lessees were shown to have opposed the application. Since that time a further four lessees had registered their objection to the Tribunal and therefore a total of 14 lessees would appear to oppose the application. This exceeds 10% of the total number of parties required to consent, which is 133.
>
> 16. At this point the Tribunal went through the documents of objection that they had received and it appeared that the lessee of one flat had not confirmed his or her objection to the application making the total number of objections 13. The objectors present contended that if that was the case then 13 was sufficient to defeat the application under Section 37. They argued that 10% of the total number of objections would be 13.3. This should be rounded down to the nearest whole number so that 13 objectors would be sufficient to defeat the application.

> 17. It was evident, however, from the objectors present that they did not object in principle to the variations sought in so far as those variations related only to the clauses desirable to effect efficiently the external cladding work. What was objected to was the manner in which the consent to the variations had been obtained by the Applicant in giving an incentive to those who agreed the proposals by offering to extend their leases to 999 year leases at no premium whereas those who raised objections to the terms of the variation would be penalised by not receiving such an offer. The objectors felt that they were being unfairly prejudiced by this tactic when all they were doing was exercising their rights under the Act."

8. The LVT rejected the contention that more than 10% of the total number of parties concerned opposed the application. It said:

> "24. The tribunal first considered whether the Applicant had established that it had achieved the necessary percentages to comply with Section 37(5)(b) of the 1987Act. There was no dispute that more than 75% of the lessees consented to the variation. The objectors however did query whether they had established that more than 10% of the lessees objected to the variation. There are 132 flats therefore the total number of 'parties concerned', including the landlord, is 133. 10% of 133 is 13.3. The Tribunal determines that it is necessary for 14 'parties concerned' to oppose the application for it to be defeated. The Tribunal did not accept that the percentage should be rounded down to 13. The act requires that the application be not opposed by more than 10% of the parties concerned. 13 would be less than 10% and therefore the requisite number is 14. The tribunal also determined that the relevant proportion had to be determined as at the date of the hearing. The evidence was that at that date 13 of the lessees objected to the application as made and therefore the Tribunal determines that there were insufficient objectors to form 10% of the parties concerned and it therefore had jurisdiction to go on to consider the application under Section 37 of the 1987 Act."

9. Applications for permission to appeal were made to the LVT by Mr Courtel, Mr Lincberg, and Mr Dixon and by a Mr Ayres, the lessee of flat 14. The LVT granted permission on the ground raised by Mr Dixon but refused permission on the other grounds. Mr Dixon's contention was that one person who had objected to the company's consultation had not confirmed that objection in answer to the tribunal's direction. In granting permission the LVT said that it was arguable that the objector to the first consultation who did not respond one way or the other to the second consultation should have been counted as an objector. If the objection had been so counted the threshold of 10% of lessees objecting would have been exceeded.

10. Mr Dixon sought permission from the Lands Chamber to advance grounds additional to the one on which the LVT had given permission to appeal, but I refused permission. He gave notice of appeal on behalf of himself, Mr Courtel and Mr Lincberg, and he dealt with all interlocutory matters himself, filing a statement of case and (in response to an order) a revised statement of case that related to the ground on which permission had been granted. He also lodged a skeleton argument. At the hearing he asked if Mr Courtel could also address the Tribunal, and I allowed this

11. The statements of case made clear Mr Dixon's position, that he did not object to the outstanding parts of the variation that was sought, including in particular the provisions making the company responsible for repairs to the external doors and windows. Mr Dixon told me that the reason for his continued pursuit of the appeal was because, despite the fact that he agreed with the proposed variations, the company would not grant him the lease extension that it had been prepared to grant to those who had not opposed the application.

12. The company's refusal to grant Mr Dixon an extension of his leases does not, in my view, have any relevance to the validity of the company's application – the only issue in the appeal – and Mr Dixon did not contend that it did. It was the reason that he saw fit to pursue the appeal, but his case was that on the facts the number of lessees opposing the application was more than 10% of the parties concerned.

13. The first question that needs to be addressed is by reference to what point in time the issue of whether the application is not opposed for any reason by more than 10 per cent of the total number of the parties concerned needs to be addressed. Is it at the time the application is made or, as the LVT thought, the date of the LVT hearing? In my judgment, in the light of the wording of the provision, which says that the application "shall only be made if" (etc), it can only be the former. The requisite numbers have to be established when the application to the LVT is made, and it follows that any consent received or opposition expressed after that time is not material to the question of compliance with section 37(5)(b).

14. The company says that at that point in time the application was opposed by the lesses of 11 of the flats that responded to the company's consultation – flats 23, 53, 92, 113 and 128 (Mr Dixon), 116 (Mr Lincberg), 124 (Mr Courtel), 125 (Ms C Dixon), 91 (Mr Day), 70 (Mr Powell) and 14 (Mr Ayres). In addition the company accepts that the lessees of flats 107 (Mr Heavens) and 120 (Ms Reid) should also be counted as objectors. Together these total 13. Mr Dixon contends that the lessee of flat 93, Mrs Mills, should also be included, thus bringing the number up to 14 and the percentage to more than 10%.

15. It is Mrs Mills's response to the company's consultation, therefore, that requires consideration. On 20 September 2009 Mr Rupert Mills sent an email to Mr Tony Newey of Howlett Clarke on behalf of Mrs Mills. It said:

> "I am writing in response to the letter recently sent regarding the proposed lease changes to Wellington Close in Walton On Thames, specifically number 93.
>
> We have reviewed the proposed changes and whilst we are in essence in agreement, prior to sending the letter back to you as requested we would like to understand the impact this will have on our flat as one of the spur blocks.
>
> Obviously the costs involved in maintaining the spur flats is hugely less than that of the tower blocks, both due to height restrictions and also differences in construction…

> With that in mind, we would like to understand whether or not other spur flat owners have raised this question and what the management companies approach will be prior to signing in agreement for you.
>
> Please could you update us as to the plans at your earliest convenience…"

16. Expressed in those terms the email clearly did not suggest that Mrs Mills was opposed to the variation. On the contrary it said that she was "in essence in agreement". (It is to be noted – although this is not a matter that affects how the email is to be understood – that she later wrote to Mr Newey on 3 March 2011 saying that in not responding to the consultation process she was not intending to signify her opposition to the application and that indeed she supported the application.) That is sufficient, in my judgment, to dispose of Mr Dixon's contention: Mrs Mills was not as a matter of fact opposed to the application. Mr Dixon said that many of the other so-called objectors' correspondence letters were as innocuous as Mr Mills's email, for example making points concerning the proposed variations that were not related to the project for which variations were required. Most of them were, like Mrs Mills, simply waiting for a response to points raised in their letters before accepting (or otherwise) the proposed variations. Since no response was forthcoming, he said, all the objectors, "as defined by WCMC", must remain objectors, including Mrs Mills. Mr Dixon accepted – indeed, he emphasised – that responses that the applicant had treated as objections were not objections at all. His point was that if the applicant treated them as objections then the Tribunal should do also. I cannot accept this. Whether a person is opposed to a section 37 application for the purposes of subsection (5)(b) is to be determined objectively and not by the way in which he or she is regarded by the applicant. It may indeed be the case that others counted by the LVT as objectors were not in fact opposed to the application, but this, obviously, does not assist Mr Dixon. The fact is that there were not letters or other indications opposing the application from more than 10% of the parties concerned.

17. I have said that the date at which the determination of the percentage of the parties concerned in favour or opposed to the variation must be ascertained is the date of the application. It is necessarily for the applicant to satisfy the LVT that the requirements of section 37(5)(b) have been met. The Act, however, does not prescribe or even hint at any particular procedure which the applicant must follow in order to establish the numbers in favour or opposed. I have felt some doubt as to whether the terms of the consultation letter were in fact adequate to ensure that the number of objectors was established. While the letter invited those in favour of the variation to sign a duplicate indicating their agreement, those who might be opposed were given no similar simple way of indicating that they were opposed. Rather those who were "not happy to agree to the proposed amendments" were invited to contact the company directly "so that we can clarify any points about which you are concerned". In the event I am satisfied that the letter was adequate to enable those lessees who were opposed to the variation to indicate their opposition, and indeed it formed no part of Mr Dixon's case that it was not.

18. Mr Dixon expressed a complaint that before the LVT hearing potential new objectors had been given only 21 days to state their objections while those confirming their agreement to the variation had been given 87 days. He also produced a letter dated 15 March 2012 from Ms Anna-Maria Pereira-Rigo of 131 Wellington Close, which said,

"I confirm that I formally object to the lease variations as proposed in the above case." Mr Courtel said that an examination of the responses, which had not been made available at the hearing, suggested that the number consenting was less than 75%. None of these matters, however, has any bearing on the issue in the appeal, which is, as I have said, the purely factual question of whether when the application was made on 12 March 2010 it was opposed by more than 10% of the persons concerned.

19. For the purpose of determining such issues when they arise in future it would, I think, be appropriate if the LVT application form included in the details to be provided the total number of parties concerned, the number of those consenting to the application and the number opposing the application, together with an indication of the need for the applicant to produce evidence establishing these numbers and to make it available to any party opposing the application.

20. The appeal is dismissed.

Dated 26 March 2012

George Bartlett QC, President