RESIDENTIAL PROPERTY TRIBUNAL SERVICE

LEASEHOLD VALUATION TRIBUNAL

LANDLORD & TENANT ACT 1987 : SECTION 37

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

Case Nos:	CHI/21UD/LVT/2004/0002
Property:	**63 Warrior Square** **St Leonards-on-Sea** **East Sussex**
Applicants:	63 Warrior Square Limited and Rev J Boyce & Mrs S A Boyce & Others
Respondents:	Mr Roger Oxenbury Mrs Saeko Oxenbury
Date of Application:	3 March 2004
Pre-trial review hearing:	24 May 2004
Hearing:	5 July 2004
Members of the Tribunal:	Mr P B Langford MA LLB (Chairman) Mr J N Cleverton FRICS Ms J Dalal
Date decision issued:	11 August 2004

63 WARRIOR SQUARE, ST LEONARDS-ON-SEA

1. The Application

This is an application made jointly by five of the six leaseholders of 63 Warrior Square and the Landlord of that property, 63 Warrior Square Ltd, under Section 37 Landlord and Tenant Act 1987, as amended by Section 163 Commonhold and Leasehold Reform Act 2002. The Respondents to the application Mr Roger Oxenbury and Mrs Saeko Oxenbury, have a lease of the basement flat at 63 Warrior Square. All the applicants (with the exception of the Landlord) and the Respondents have 99 year leases of their respective flats from 25 March 1979. The variations sought by the Applicants are set out in Schedule 1 to this decision.

2. The Law

Under Section 37 of the 1987 Act the application for variation may be made in respect of two or more leases, being long leases and the grounds of such an application are that the object to be achieved by the variation could not be satisfactorily achieved unless all the leases are varied to the same effect. Any such application shall only be made if in a case where there are less than nine leases (as in this case) all, or all but one, of the parties concerned consent to it. If the grounds of the application are established to the satisfaction of the Tribunal, then under Section 38(3) the Tribunal may make an Order varying each of the leases "in such manner as is specified in the Order". The variation may either be the variation specified in the application "or such other variation as the Tribunal thinks fit". However under Section 38(6) of the 1987 Act, the Tribunal shall not make an Order effecting any variation of a lease if it appears to the Tribunal (a) that the variation would be likely to substantially to prejudice (i) any respondent to the application.....or (b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected. Under Section 38 there is power for the Tribunal to award compensation in appropriate cases, but neither party suggested that this would be appropriate in the present case.

3. The Hearing

A hearing was held at the Horntye Sports Centre, Bohemia Road, Hastings on 5 July 2004. The Applicants were represented by Mr Daniel Dovar of Counsel, instructed by Mr Christopher Bernard, Solicitor, of Housing & Property Law Partnership. The Applicants, Mr and Mrs Hopkins, Mr Bell and Miss Davies were present at the hearing. The Respondents, who were present at the hearing, were represented by Mr David Collins, Solicitor of Meneers. Mr Dovar explained that the variations sought, as set out in Schedule 1, had in certain instances been amended to satisfy some of the points made in the Respondent's ten objections, as set out in the "Respondent's Schedule of Variations" dated 17 June 2004. It was explained in the original form of application that extensive works needed to be undertaken at 63 Warrior Square to repair and secure the property, in particular in relation to a rotten wooden support beam in the basement flat which might, if not repaired, cause the collapse of the building. The variations sought would enable the freeholder to defray the expenses of works more easily amongst the Leaseholders, allow for a sinking and reserve fund, and clarify the scope of the works that the freeholder could undertake and charge to the Leaseholders. Such variations could not be satisfactorily achieved unless uniformly applied to all the leases. The liability for service charges needed to be apportioned equally amongst the leaseholders. Mr Dovar then went through each of the objections and Mr Collins was given an opportunity to make his representations, after Mr Collins' submission on each individual objection.

4. Objection 1

"The Applicants' intention would seem to be to ensure that the remedying of the problem with the support timber beam in the basement is work within the freeholder's repairing covenant and thus related costs are within the service charges recoverable from the lessees. However, varied clauses 2(5)(a),(c) and (d)(i) make no mention of the new clause 4(a)".

Mr Dovar said that this point was accepted and the revised variation sought (as set out in Schedule 1) included the references to the proposed new clause 4A in the new clauses 2(5)(a), (c) and (d).

5. **Objection 2**

"At varied clause 2(5)(e), the tenant's liability is so widely drafted as to render the tenant liable for the landlord's costs, fees, charges, disbursements and expenses incurred for whatever reason even wholly unconnected with this property".

Mr Dovar said that the Respondent's proposal that the words "in connection with the management or the maintenance of the building" being inserted after the words – "incurred by the landlord" was accepted by the Applicants and these additional words now appeared in the revised proposals for variation set out in Schedule 1.

6. **Objection 3**

This was an objection to the Applicants' drafting of the new clause 2(5A) in the following terms:- "As a matter of conveyancing drafting, a clause which imposes an obligation upon the landlord (i.e. to furnish the tenant with a statement of account) does not fit easily in a part of the lease which deals with the tenant's covenants. A re-draft could provide that the tenant's liability to pay is subject to a pre-condition that the tenant has received a statement of account". The Respondent had continued by suggesting a variation which would meet this point. Mr Dovar said this was an objection without substance. Accepting Mr Dovar's contention that this was a point of no substance, Mr Collins said that it was a matter of taste. In his proposed variation, Mr Collins had provided a stipulation that the tenant should pay the service charge within 21 days of receipt from the landlord of the service charge account. Mr Dovar accepted that this was an amendment which should be made and in his revised variation, as set out in Schedule 1, this change was incorporated.

7. **Consideration**

We considered the respective arguments of the parties. It was obviously sensible that the lease should prescribe a time for payment of the service charges and the Applicants' revised variation now did this. However we accepted that the remainder of Mr Collins' objection was purely stylistic and we saw therefore no reason why the Applicants' proposed variation (as varied

and shown in Schedule 1) should be amended. There was no suggestion of the Respondent being prejudiced by the variation put forward by the Applicants.

8. **Objection 4**

In relation to a proposed new clause 2(5B), under which the tenant was liable to pay to the landlord the landlord's costs on an indemnity basis, where the landlord properly and reasonably incurred costs in connection with an act or omission by the tenant, the tenant raised two objections. Under the first of these (objection 4) the tenant claimed:- "The tenant's liability as drafted is too wide, potentially rendering the tenant liable for any costs, fees, charges, disbursements and expenses incurred as a result of the tenant's act or omission, whether or not related to the building".

Mr Dovar contended for the Landlords that there was a sufficient safeguard in stating that the costs had to be properly and reasonably incurred by the landlord but he was prepared to include the additional words "in connection with management or maintenance of the building" as a further limit. These additional words had been incorporated in the revised variations submitted by the Landlords, as set out in Schedule 1. Mr Collins argued that the clause should be limited to the tenant's act or omission "in breach of any covenant which the tenant is liable to observe under the terms of this lease". Mr Dovar did not accept this limitation and he referred to the situation which existed at the present time, under which the surveyor appointed by the landlords had been threatened with defamation proceedings by the Respondents. Mr Collins said that he did not see the relevance of that, since any threat of defamation proceedings would be against the surveyor, not against the landlords. Mr Dovar said that he would be prepared for the word "unreasonable" to be inserted after the word "tenant's" and before "act or omission". Mr Collins did not accept that this was sufficient.

9. **Consideration**

It appeared to us to be reasonable that there should be some safeguard against the tenant acting lawfully but becoming liable to the landlord under this proposed change for fees incurred in taking professional advice. It was conceivable that there might be circumstances in which the tenant had acted

lawfully but nevertheless it was reasonable for the landlord to incur professional fees as a result and under the new clause proposed by the landlord the tenant would be responsible for those fees. In this context we did not consider the threat of defamation proceedings against the Applicants' surveyor, since we were not given all the facts relating to that dispute. Mr Dovar had suggested the inclusion of the word "unreasonable" before the words "act or omission" in the first line of the proposed clause 2(5B) would solve the problem. We preferred the use of the word "wrongful", which was more precise. A civil wrong may be either contractual (e.g. the breach of covenant which Mr Collins had referred to) or tortious. We saw no reason why the tenant should not be liable for the landlord's costs if his (the tenant's) conduct was in either way wrongful. Accordingly the word "wrongful" would be inserted before the words "act or omission".

10. **Objection 5**

Also in relation to the proposed new clause 2(5B) the Respondent objected to the provision for costs being payable on an indemnity basis, in the following terms – "It is inappropriate that costs should be payable on an indemnity basis. The standard basis is adequate to protect the Landlord's interests".

Mr Dovar said this objection was not accepted. He considered that leases normally provided for a party to pay costs to another party on an indemnity basis. This certainly ought to be the case where the freehold was held by a company, of which all the lessees were entitled to be equal shareholders (as was the present case). Mr Collins said that he had enquired the position from conveyancing colleagues in his office and none of them had seen a clause in a lease providing for costs on an indemnity basis. For the benefit of the Tribunal, he explained the difference between the two basis, namely that on a standard basis the costs should take account of proportionality and secondly, in the event of doubt, the benefit should go to the paying party and not (as with indemnity costs) to the receiving party.

11. **Consideration**

To qualify the words "the whole of those sums" (at the end of the proposed clause 2(5B) with the words "on an indemnity basis" appeared to us tautologous. On the other hand to use the words "on the standard basis" seemed to be capable of conflicting with the words "the whole of those sums". Applying our own knowledge and experience, we accepted Mr Collins' contention that reference to "indemnity costs" in Leases – certainly in Leases of residential property as opposed to commercial property – was unusual. We concluded that it would be best to eliminate the reference to the basis of the costs – whether indemnity or standard. The clause deprived of the proposed words "on an indemnity basis " would then leave the tenant liable to pay "the whole of those sums" subject to the pre-condition appearing earlier in the clause that those sums should be "properly and reasonably" incurred by the landlord. This pre-condition in our view means first that in the circumstances it is reasonably necessary for the landlord to employ a professional person and secondly that the level of work and expertise applied is reasonably appropriate in the circumstances. Thus, for example, if the tenant's conduct raised a legal issue which justified taking legal advice, but the issue involved only a small sum of money, it would not be reasonable for the landlord to employ Leading Counsel to give an opinion and the whole of his fees would therefore not be recoverable under this clause. The proposed new clause 2 (5B) would therefore be approved with the words "on an indemnity basis" removed.

12. **Objection 6**

In relation to the proposed new clause 2(5C), which provided for payments for which the tenant was liable to the landlord carrying interest at the rate of 15% per annum from the date of the demand, the Respondent objected in the following terms – "The interest rate of 15% per annum in the current climate is punitive rather than compensatory. The interest rate ought to be variable according to market conditions". The Respondent proposed that interest should be assessed at a rate of 4% above the base rate for the time being of HSBC Bank plc. Mr Dovar said that, in stipulating an interest charge of 15%, the Applicants were simply applying the same rate of interest as set out in Clauses 2(5) and (6) of the leases.

13. **Consideration**

All the leaseholders had accepted their leases on the basis of a 15% interest charge and the great majority of the leaseholders (i.e. all except the Respondents) accepted that 15% should still apply. We saw no reason to alter that.

14. **Objection 7, Objection 8, Objection 9, Objection 10**

The Respondents made a number of objections to the Applicants' proposed new clause 4. This clause was designed to redraft the landlord's obligations regarding repair and maintenance of the building so that all leases were the same and the obligations properly linked in with the mechanism for payment. The Respondent's objections were that there were omissions in the clause which should be rectified. Thus in Objection 7, the point was made that the new clause 4 did not mention the cleaning of the common parts. In Objection 8, the point was made that, in defining the extent of the landlord's repairing obligation, there was no reference to the walls of the building and in Objection 9, the point was made that the clause did not provide for the intervals at which exterior redecoration should be undertaken. (The Respondents suggested once in every five years). In Objection 10, the point was made that for the sake of clarity the common parts should be defined to include interior passages, landings and staircases and the steps and gate leading to the entrance to the Respondent's basement flat. Mr Collins made that point that, in adding an express obligation as to cleaning and in making it clear that it would include common parts, the Respondents were in effect acting against their own interests because expenditure would be incurred in keeping the common halls and stairways clean, which would not benefit the Respondents who had separate steps down to their basement flat. Mrs Hopkins, the Company Secretary of the freeholder company, in a witness statement submitted to the Tribunal by Mr Dovar, made the point that Objections 7-10 were in effect new areas introduced by the Respondent and she feared that, if the variations proposed by the Respondents were admitted, these would provide the Respondents "with further excuses to cause difficulties for the freeholder and other lessees". This point was refuted orally by Mr Oxenbury. Mr Dovar

relied principally on one point in opposing the Respondent's variations proposed under Objections 7-10. He said that the freeholder company and the lessees whom he represented were not asking for these alterations and they did not want them. He considered that was the end of the matter. Mr Collins accepted that the Respondents had not made a cross application but he said that the Tribunal was now seised of the matter and the opportunity should be taken to remedy shortcomings in the lease, highlighted by Objections 7-10.

15. **Consideration**

It was not necessary for us to consider the difference of opinion between Mrs Hopkins and Mr Oxenbury. In any event we were not in a position to make a judgement upon the rights and wrongs of their dispute. The crucial point was whether, on an application made by the landlords and by the leaseholders of five of the six flats at 63 Warrior Square, it was open to us to authorise variations proposed by the Respondents, which went outside the variations proposed by the Applicants. There had been no cross application under Section 37 of the 1987 Act by the Respondents but, even if there had been, it is clear that they would have failed at the first hurdle, namely that they would not have been able to satisfy the unanimity or near-unanimity condition set out in Section 37(5)(a). It might be said that viewed objectively, some of the variations proposed by the Respondents were not harmful and might even be beneficial to the interests of all the lessees. Although Mr Collins had not said so expressly, it may be that, in making his submission, he had in mind the general nature of the power of the Tribunal under Section 38(3) to make an order varying each of the leases "in such manner as is specified in the Order". However in our view these words did not give the Tribunal a general jurisdiction to conduct a tidying-up exercise but had to be related to the particular variations sought by the Applicants. Thus the Tribunal could alter the wording of the variation sought if, for example, it was unclear and certainly if it was likely to prejudice the Respondent. However the words could not be construed as giving the Tribunal an unfettered jurisdiction to alter the leases at the behest of an individual Respondent because that would be contrary to Section 37 of the Act which made it clear that variations to all the leases could only be made if all, or all but one, of the Leaseholders supported

the variations. It would be wrong to allow Respondents to obtain through the back door a variation which they could not achieve through the front door i.e., by making an application themselves under Section 37. Accordingly the further changes proposed by the Respondents under Objections 7-10 will not be allowed.

16. **New Variations sought – the Third Schedule – Clause (2)**

Mr Dovar referred to this exception and reservation of a power for the landlord to enter the demised premises for the purpose of carrying out its obligations under Clause 5 of the lease. However Clause 5 contained the usual forfeiture clause, a clause regarding an abatement of the rent in the case of a fire destroying the demised premises and finally an arbitration clause. However there was no power, as the leases now stood, for the landlords to enter the premises for the purpose of carrying out their repairing obligations and he considered that the reference in paragraph (2) of the Third Schedule was a mistake and should have referred to clause 4 (dealing with the landlord's repairing obligations) and now also to the proposed new clause 4A. Mr Collins said that he accepted this was clearly a drafting error in the lease and he accepted the proposed variation.

17. **Miscellaneous**

At the conclusion of the hearing, Mr Collins raised the point as to whether all the parties named as applicants in the application in fact consented to the variations proposed. He also asked for leave for Mr Oxenbury to submit a statement signed by him and his wife to the Tribunal. Mr Dovar objected to the consent point being raised at this stage, when the Respondents had not raised the issue in the statement which they had been ordered to file setting out their reasons for not accepting the variations proposed. He said however that Mr Bell of Flat 3, Miss Davies of Flat 5, Mr and Mrs Hopkins of Flat 2 were present and they duly confirmed to the Tribunal their consent to what was proposed in the application. Mrs Hopkins was also the Company Secretary of the freeholder company. A letter was produced from the Reverend and Mrs John Boyce of Flat 1 to confirm their consent and a further letter was produced from Housing & Property Law Partnership to Mr Jonathan Moulten and Mrs

Marion Moulten, setting out the course of action proposed to be taken on their behalf and on behalf of their co-applicants. This letter had been returned to the solicitors and bore Mr Moulten's signature and a manuscript alteration to indicate that Marion Moulten had changed her surname to Moulten, we assumed, on marriage. Mr Dovar also made the point that his instructing solicitor, Mr Bernard of Housing & Property Law Partnership objected to the notion that he would purport to act for someone who had not instructed him. After considering the point, we indicated that on the basis of what we had heard and seen, we were satisfied that the variations proposed by the Applicants were made with the consent of all the named applicants. After a short adjournment, during which Mr Dovar was given an opportunity of reading Mr and Mrs Oxenbury's written statement, he indicated that he had no objection to the witness statement being handed in for our consideration. We have considered that statement, much of which underlines the acrimony which exists between the parties in this case. It did raise the issue of consent and we have already given our answer on that. It also stated that no variations were necessary to the leases but this was a point which was not developed by Mr & Mrs Oxenbury in any way and it is inconsistent with the "Respondent's Statement" which had been prepared on their behalf by Mr Collins and which we assume met with their approval before it was submitted to the Applicants' solicitors and to the Tribunal. We therefore see no reason to deviate from the views we have already expressed regarding the variations proposed by the Applicants.

18. **Decision**

Pursuant to Section 37 Landlord and Tenant Act 1987, as amended by Section 163 Commonhold and Leasehold Reform Act 2002, the Leasehold Valuation Tribunal hereby orders that

A. The leases of each of the Flats – Flats 1,2,3,4,5 and the basement flat at 63 Warrior Square Hastings be varied by substituting respectively clauses 2(5)(5A)(5B) and (5C), 4 and 4A as set out below for the existing clauses 2(5) and 4 and that in paragraph (2) of the Third Schedule there should be

substituted a reference to "clause 4 or 4A" for the existing reference to "clause 5".

"2(5) To bear and pay one-sixth part of the Service Charges, which comprise:

a) all costs and expenditure in respect of or incidental to all or any of the matters referred to in clauses 3(2), 4 and 4A whenever paid or incurred;

b) any costs incurred by the landlord in complying with any notice served by any public body in respect of the Building;

c) the Reserve Sum. The Reserve Sum shall be a sum on account of the costs anticipated to be expended by the landlord in complying with the covenants in Clause 3 (2), 4 and 4A. During any financial year the landlord may revise the contribution on account of the Service Charge for that financial year so as to take into account any actual or expected increase in expenditure;

d) the Sinking fund. The Sinking fund shall be a sum on account of the anticipated costs of carrying out specific matters in compliance with:

(i) the covenants contained in Clause 4 and 4A; or

(ii) any notice served by any public authority in respect of the Building;

e) all costs, fees, charges, disbursements and expenses properly and reasonably incurred by the landlord in connection with the management and maintenance of the building including but not limited to those payable to counsel, solicitors and surveyors. The tenant shall not be liable for sums under this clause (2 (5) (e)), where clause 2 (5B) applies or where the landlord recovers the aforesaid sums from another tenant.

(5A) As soon as reasonably practicable after the end of each financial year, the landlord must furnish the tenant with an account of the sums payable to him for that financial year, credit being given for payment made on account. The tenant must pay those sums, or any balance of them payable to the landlord within 21 days of receipt of the said

account. The landlord must allow to the tenant any amount overpaid by him against future payments of those sums, whether on account or not.

(5B) Where due to the tenant's wrongful act or omission, the landlord properly and reasonably incurs in connection with management or maintenance of the building, costs, fees, charges, disbursements and expenses, including but not limited to those payable to counsel, solicitors and surveyors, the tenant must pay to the landlord the whole of those sums.

(5C) All the aforesaid payments to be paid on demand and in default to be recoverable as liquidated damages together with interest thereon at the rate of fifteen per cent per annum before as well as after any judgement from the date of the demand until actual payment thereof by the tenant.

4. The landlord hereby covenants with the tenant that (subject to the contribution and payment as required by clause 2 (5) and (5C) hereof) he the landlord will maintain, repair, redecorate and renew as often as may be necessary:
   (a) the main structure in particular, but not limited to, the foundations, roofs, gutters and rainwater pipes of the building;
   (b) the water pipes drains and electric cables and wires and other conduits in under and upon the building and enjoyed or used by the tenant in common with the owners and tenants of the other flats;
   (c) all other parts of the building used or enjoyed in common with other tenants and/or occupiers of the building and including, but not limited to, the boundary walls and fences of the building.

4A The landlord must remedy any latent defect to the support timber beam situated between the basement flat and the ground floor flat running East to West in the four storey (including basement) back extension to the property.

B. A memorandum of this Order be endorsed on each of the leases (and counterpart leases) of the above mentioned Flats.

Dated: 10 August 2004

P B LANGFORD (Chairman)

SCHEDULE 1

DRAFT OF VARIATIONS SOUGHT

Amended Clauses

"2(5) To bear and pay one-sixth part of the Service Charges, which comprise:

a) all costs and expenditure in respect of or incidental to all or any of the matters referred to in clauses 3(2), 4 and 4A whenever paid or incurred;

b) any costs incurred by the landlord in complying with any notice served by any public body in respect of the Building;

c) the Reserve Sum. The Reserve Sum shall be a sum on account of the costs anticipated to be expended by the landlord in complying with the covenants in Clause 3 (2), 4 and 4A. During any financial year the Landlord may revise the contribution on account of the Service Charge for that financial year so as to take into account any actual or expected increase in expenditure;

d) the Sinking fund. The Sinking fund shall be a sum on account of the anticipated costs of carrying out specific matters in compliance with:

(i) the covenants contained in Clause 4 and 4A; or

(ii) any notice served by any public authority in respect of the Building;

e) all costs, fees, charges, disbursements and expenses properly and reasonably incurred by the landlord in connection with the management and maintenance of the building including but not limited to those payable to counsel, solicitors and surveyors. The tenant shall not be liable for sums under this clause (2 (5) (e)), where clause

2 (5B) applies or where the landlord recovers the aforesaid sums from another tenant.

(5A) As soon as reasonably practicable after the end of each financial year, the landlord must furnish the tenant with an account of the sums payable to him for that financial year, credit being given for payment made on account. The tenant must pay those sums, or any balance of them payable to the landlord within 21 days of receipt of the said account. The landlord must allow to the tenant any amount overpaid by him against future payments of those sums, whether on account or not.

(5B) Where due to the tenant's act or omission, the landlord properly and reasonably incurs in connection with management or maintenance of the building, costs, fees, charges, disbursements and expenses, including but not limited to those payable to counsel, solicitors and surveyors, the tenant must pay to the landlord on an indemnity basis the whole of those sums.

(5C) All the aforesaid payments to be paid on demand and in default to be recoverable as liquidated damages together with interest thereon at the rate of fifteen per cent per annum before as well as after any judgement from the date of the demand until actual payment thereof by the tenant.

4. The landlord hereby covenants with the tenant that (subject to the contribution andpayment as required by clause 2 (5) and (5C) hereof) he the landlord will maintain, repair, redecorate and renew as often as may be necessary:

(a) the main structure in particular, but not limited to, the foundations, roofs, gutters and rainwater pipes of the building;

(b) the water pipes drains and electric cables and wires and other conduits in under and upon the building and enjoyed or used by the tenant in common with the owners and tenants of the other flats;

(c) all other parts of the building used or enjoyed in common with other tenants and/or occupiers of the building and including, but not limited to, the boundary walls and fences of the building.

4A The landlord must remedy any latent defect to the support timber beam situated between the basement flat and the ground floor flat running East to West in the four storey (including basement) back extension to the property.

NEW VARIATION SOUGHT

The Third Schedule

Exceptions and Reservations

There is excepted and reserved out of this lease to the landlord and the owners and tenants of the other flat comprised in the Building:-

(2) Power for the landlord and its duly authorised servants and agents with or without agents or others upon giving three days previous notice in writing (or in the case of emergency without notice) at all reasonable times to enter the Demised Premises for the purpose of carrying out their obligations under Clause 4 or 4A of this lease.