UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LRX/44/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – variation of leases – application by landlords and majority of leaseholders for variation of all leases to allow replacement of communal heating system with individual boilers and recovery of management and legal costs through the service charge – appeal against LVT's refusal to order recovery of management and legal costs variation – whether single or multiple objects of variation – sufficiency of reasons – appeal dismissed – Landlord and Tenant Act 1987 sections 37 and 38

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL

BETWEEN

(1) SHELLPOINT TRUSTEES LIMITED
(2) ANSTON INVESTMENTS LIMITED **Appellants**

-and-

(1) JAMES JOHN HENRY BARNETT
(2) JEREMY CLYNE
(3) KATHERNINE ZOGRAPHOS
(4) CONSTANTINE JOHN ZOGRAPHOS **Respondents**

Re: Eton Hall
Eton Place
Eton Rise
Eton College Road
London NW3

Before: His Honour Judge Gerald and A J Trott FRICS

Sitting at 43-45 Bedford Square, London, WC1B 3AS
on 19 and 20 September 2012

Howard Lederman, instructed by Teacher Stern LLP, for the Appellants
The Respondents appearing in person

The following cases are referred to in this decision:

Lucie M v Worcestershire County Council and Evans [2002] EWHC 1292
Flannery v Halifax Estate Agencies Limited [2000] 1 WLR 377
English v Emery Reimbold & Strick Limited [2002] 1 WLR 2409
South Buckinghamshire DC v Porter (No 2) [2004] 1 WLR 1953
Thirlway v Troy [2012] UKUT 302 (LC); LRA/57/2012
Schilling v Canary Riverside Development PTE Limited LRX/26/2005 (Lands Tribunal)

The following cases were referred to in argument:

Pepper and others v Appleby Consultancy Limited BIR/00CN/LVL/2007/0001 (LVT)
Curtis v London Rent Assessment Committee (1999) QB 92
Baystone Investments Limited v Perkins [2010] UKUT 70 (LC)
LB Havering v MacDonald [2012] UKUT 154 (LC)
Dixon and others v Wellington Close Management Limited [2012] UKUT 95 (LC)
Arrowdell Limited v Coniston Court (North) Hove Limited (2006) LRA/72/2005 (Lands Tribunal)
Pittalis v Grant [1989] 1 QB 605

DECISION

Introduction

1. The appellant landlords, Shellpoint Trustees Limited and Anston Investments Limited, appeal against the decision of the Leasehold Valuation Tribunal (the "LVT") dated 13 January 2011 (the "Decision") refusing to order variation of the subject leases to allow recovery of the landlords' management and legal costs of enforcing divers covenants contained in the leases through the service charge under section 37 and 38 of the Landlord and Tenant Act 1987 ("the 1987 Act").

2. There is no extant appeal against the principal part of the Decision ordering variations to the leases to permit replacement of the communal boiler system with individual flat boilers and a change to the insurance covenant: the appellants do not pursue their appeal against the insurance variation as they now accept that the LVT ordered what they had asked for.

3. The appellants are together the landlords of the 365 flats comprised within the three blocks known as Eton Hall, Eton Place and Eton Rise all situate at Eton College Road, London NW3 (respectively, "Eton Hall", "Eton Place" and "Eton Rise", collectively "the Etons"). Shellpoint is the freehold reversioner of the majority of the flats ("the Shellpoint flats"); Anston holds a headlease of the remainder ("the Anston flats").

4. The material covenants of the leases of the Shellpoint flats are in common form, as are those of the Anston flats albeit that their clause numbering and layout is slightly different and they do not have clause 6(8)(b). For the purposes of these appeals we adopt the approach of the LVT of addressing itself to the sample lease granted on 16 April 1984 by Shellpoint's predecessor in title, Linthaven Limited, to Jackinstant Limited ("the Shellpoint Leases") and, where necessary, the sample lease granted on 9 June 1975 by Anston's predecessor in title, Peachey Property Corporation Limited, to Anthony Rudolf Sascha Suchy ("the Anston Leases"). "Leases" refer to both Shellpoint and Anston Leases.

5. Two applications, both dated 25 January 2010, were issued to reflect the different reversionary ownerships and leases of the flats by the appellants and, to demonstrate the requisite level of section 37(5)(b) support for the variations, by a total of 299 of the 365 tenants, 96 from Eton Hall, 103 from Eton Place and 100 from Eton Rise. The rest either opposed the proposed variations, or did not respond to the ballot of all 365 flats conducted shortly before issuance, the results of which were as follows, "S" referring to Shellpoint flats and "A" to Anston flats:

	ETON HALL		ETON PLACE		ETON RISE		TOTALS
	S	**A**	**S**	**A**	**S**	**A**	
In favour	80	16	88	15	84	16	**299**
Against	9	0	4	1	2	1	**17**
Unreturned	8	2	13	4	18	3	**48**
Abstained	1	0	0	0	0	0	**1**
Totals:	**98**	**18**	**105**	**20**	**104**	**20**	**365**

6. There were pre-trial reviews in both applications on 4 February 2010 at which the LVT consolidated the applications and ordered that any person wishing to oppose the variations must serve a statement in reply setting out their reasons.

7. Despite the number of those who balloted their opposition, only three tenants actively opposed the applications before the LVT: Jeremy Clyne ("Mr Clyne") lessee of flat 57 Eton Hall and Katherine Zographos ("Miss Zographos") and her brother Constantine joint lessees of 75 and 76 Eton Hall (all Shellpoint flats) and James Barnett ("Mr Barnett") lessee of flat 6 Eton Place (an Anston flat) each of whom served statements in reply setting out why they opposed the variations.

8. In broad terms, the applications sought variations to the Leases to enable the communal heating and hot water systems to be replaced with individual boilers in each flat with consequential provisions for recovery of those costs through the service charge and what have been described as "non-consequential" variations to the Leases to enable the landlords to recover its costs of enforcing covenants contained in the Leases through the service charge.

9. The only evidence served in support of the applications were two witness statements dealing with the heating and hot water issues and two witness statements explaining the background to the proposals. One was from Nicholas Goldreich ("Mr Goldreich") a solicitor and partner in Comptons who had been instructed by New Etons Residents Association ("NERA"), a formally constituted and recognised residents association, and the other from Dr Seth Rankin ("Dr Rankin"), the tenant of flat 73 Eton Rise and a former chairman and committee member of NERA.

10. The hearing before the LVT took place on 19 April 2010 but was adjourned and resumed on 15 and 16 November 2010 by which time the applicants had adduced a further witness statement from Mr Goldreich. Refinements to the proposed variations appended to the applications were also provided, which were further refined after the conclusion of the hearing by email dated 22 November 2010. It is this last version of the variations to which we will refer in this decision.

11. The LVT issued its decision on 13 January 2011 and the appellants applied to the LVT for permission to appeal. The LVT refused the application on 23 March 2011 (the "Refusal Decision"), dealing separately with each of the twenty grounds of appeal raised and to some extent adding to the reasons it had already given in the Decision.

12. On 15 August 2011, the President of the Upper Tribunal (Lands Chamber) granted the appellants permission to appeal because there was a "real prospect of success" and specifying that the appeal would be by way of review. It should be recorded that permission to apply for permission to appeal out of time was also granted.

Representation

13. Before the LVT, the applicants, that is, the landlords and the 299 tenants were represented by Mr Stan Gallagher of counsel who was jointly instructed by the landlords' solicitors Teacher Stern LLP and the 299 tenants' solicitor Messrs Comptons ("Comptons"). The three active respondents represented themselves. Oral evidence was given by some of the witnesses.

14. Before this Tribunal, the appellant-landlords were represented by Mr Howard Lederman of counsel, instructed by Teacher Stern LLP. The 299 applicant-tenants did not appeal the Decision, were not represented and have expressed no views about the merits of the appeal. The three active respondents before the LVT are the sole active respondents to the appeal and, as below, represent themselves; Miss Zographos representing herself and her brother.

15. Each of the respondents was clearly well-acquainted and fully familiar with the issues relating to the non-consequential variations and well able to advance their arguments in opposition to the appeal. Indeed, as will become clear, they appeared at times to have a grasp of the issues superior to that of the appellants and at least some of their advisers who did not appear to understand the extent and scope of the new clauses they had asked the LVT for and were asking this Tribunal for.

16. Whilst each of the respondents advanced different arguments, we shall treat their submissions in a composite manner, without distinguishing between them save where necessary. We do so because the broad thrust of their positions was the same albeit that there were some differences of emphasis, and without intending any disrespect to them.

The legislation

17. Sections 37 and 38 of the 1987 Act permit applications to vary leases where the majority of parties concerned consent. This is in contrast to the separate and distinct section 35 jurisdiction which permits applications by any party to a long lease of a flat to vary a lease with unsatisfactory repairing, maintenance, insurance, service charge or similar provisions.

18. As Mr Lederman reminded us, the applications were made under section 37 and not under section 35. It is nonetheless necessary to set out the material parts of both provisions as reference has been made to them. Section 35 states so far as relevant:

> "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 a leasehold valuation 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…"

Sections 37 and 38 of the 1987 Act state:

> "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 a leasehold valuation 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 can not 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 court 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 court 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 court—

(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."

The case before the LVT

Introduction

19. The applicants were wholly successful in securing all of the variations they asked for to enable the communal boiler system to be replaced with a system providing for individual boilers in each flat and attendant changes to the service charge provisions and also to the insurance covenant, albeit that the LVT amended some of the wording in respect of which no complaint is made.

20. The applicants were wholly unsuccessful in securing the "non-consequential" variations they asked for (other than in respect of insurance) *i.e.* those variations which were not the consequence of, or required or necessitated by, replacement of the heating and hot water systems.

The three "non-consequential" variations sought

21. Three variations were sought. The first was to make additions to the usual proviso for re-entry contained in clause 5 of both the Shellpoint and Anston Leases. Clause 5 of those Leases ("original clause 5") provides as follows:

> "PROVIDED ALWAYS and it is hereby agreed and these presents are upon the express condition that if the said rents or any part thereof shall be unpaid for twenty-one days next after becoming payable (whether the same shall have been legally demanded or not) or if the Lessee shall not duly perform or observe all the covenants and provisions hereby on the part of the Lessee to be performed or observed then and in any of the said cases and thenceforth it shall be lawful for the Lessor or any person or persons duly authorised by the Lessor in that behalf into or upon the Flat or any part thereof in the name of the whole to re-enter and the same to repossess and enjoy as if these presents had not been made but without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of any of the covenants by the Lessee herein contained"

22. The LVT was asked to substitute the original clause 5 by a new clause 5 ("new clause 5") as follows (noting that new clause 5(i) is a mere repetition of original clause 5):

"5. Provided Always it is hereby agreed and these presents are upon the express conditions that

(i) if the said rents or any part thereof shall be unpaid for twenty-one days next after becoming payable (whether the same shall have been legally demanded or not) or if the Lessee shall not duly perform or observe all the covenants and provisions hereby on the part of the Lessee to be performed or observed then and in any of the said cases and thenceforth it shall be lawful for the Lessor or any person or persons duly authorised by the Lessor in that behalf into or upon the Flat or any part thereof in the name of the whole to re-enter and the same to repossess and enjoy as if these presents had not been made but without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of any of the covenants by the Lessee herein contained

(ii) the Lessor will use all reasonable and economically viable endeavours to recover the legal costs against a defaulting Lessee above if any part of the legal costs shall not be recovered against a defaulting Lessee under the provisions hereof the Lessor may apply the balance of the unrecovered legal costs against the service charge in accordance with the provisions of paragraph 13 of the Fourth Schedule and subject to the following provisions

(a) that no declaration has been made against the Lessor pursuant to Section 20(c) the Landlord and Tenant Act 1985 or other statutory provision or otherwise prohibiting recovery of legal costs through the medium of the service charge

(b) The legal costs shall be subject to a detailed assessment on a full indemnity basis by the Court if not agreed but capped as to the conducting solicitor's hourly charge rate to the maximum amount allowed by the Court for solicitors of equivalent grade in Central London area

(c) The Lessor shall in the first instance be entitled to charge any reasonable legal and professional costs referred to above as a service charge and in particular shall be entitled to charge such costs on an interim basis during the conduct of any action prosecuted by it whether by way of litigation or otherwise before any Court or Tribunal or otherwise."

23. The second variation was to substitute clause 6(8)(b) of the Shellpoint Leases with a new clause intended to enable the landlords to enforce covenants where a tenant initiated a complaint against a fellow tenant without requiring an indemnity and security from the tenant making the complaint. In respect of the Anston Leases, the LVT was asked to insert a completely new covenant because they contain no equivalent to clause 6(8)(b).

24. By clause 6(8)(b) of the Shellpoint Leases ("original clause 6(8)(b)"), the landlord covenants that:

> "6(8)(b) If so required by the Lessee to enforce the covenants and conditions similar to those contained herein on the part of the Lessee entered into or to be entered into by the Lessees of the other flats in the Building so far as they affect the Flat and the Lessee indemnifying the Lessor against all costs and expenses of such enforcement and giving reasonable security for such costs and expenses".

25. Under the substitute clause 6(8)(b) or, for the Anston Leases, the new clause 6(8)(b) (together referred to as the "new clause 6(8)(b)") the landlord covenants that:

> "6(8)(b) If so required by the Lessee for the reasonable protection of the Flat the Lessor shall enforce the covenants entered into or to be entered into by a Lessee of any one or more of the other Flats in the Property and the costs of such enforcement shall be recoverable by the Lessor in accordance with the provisions of clause 5(ii) of the Lease".

26. The third variation was to insert a new paragraph into the Fourth Schedule of the Shellpoint and Anston Leases which deals with what the landlords may recover from the tenants *via* the service charge. By clause 2(2) of the Leases the tenant covenants to pay

> "a proportionate part of the expenses and outgoings incurred by the Lessor in the repair maintenance renewal and insurance of the said Building and the provisions of services therein and the other heads of expenditure as the same are set out in the Fourth Schedule hereto…"

27. The Fourth Schedule refers to clause 2(2) and is entitled "Lessor's Expenses and Outgoings and Other Heads of Expenditure in respect of which the Lessee is to pay a proportionate part by way of Service Charge". It then lists the various heads of expenditure. The LVT was asked to insert the following new paragraph 12 or 13 (depending on the lease) at the end ("new paragraph 12/13"):

> "12/13. The reasonable cost of all proper steps deemed necessary by the Lessor for (a) the recovery of arrears of outstanding service charges from Lessees of the said Property and (b) the enforcement of covenants entered into or to be entered into by a Lessee of any one or more of the other flats in the Property (such costs to include solicitors' and other professional fees incurred in bringing claims to a Court, Tribunal or other competent body) providing that all reasonable and economically viable efforts shall be made by the Lessor to recover such costs from defaulting Lessees".

Nature, scope and effect of proposed new covenants

28. The Leases contain the usual sort of covenants to be expected in a large block of flats granted on varying terms of between 99 and 999 years. So far as relevant, they contain the usual covenants by the tenant to pay the rent, service charge and general and water rates (clause 2(1), (2) and (3) and (4)), to pay the landlord's costs of abating any nuisance, the service of any section 146 notices, entering to carry out required repairs to the demise which the tenant has failed to do and ensuring planning compliance and to indemnify the landlord for any damage caused by visitors and so on: clauses 2(5), (7), (12), (21) and (24). There are also covenants against alterations or the installation of

machinery, using the demise for illegal or immoral purposes or as a trade or permitting a nuisance and assignment without the landlord's consent: clauses 2(14), (15), (16), (17) and (19) and 4. There then follow various covenants by the landlords to maintain, insure and so on the Etons.

29. The only provision in both of the Leases dealing with recovery of the landlords' costs of enforcement of the covenants to which our attention was drawn was paragraph 8 of the Fourth Schedule:

> "8. The fees of the Lessor's Managing Agents for the collection of the rents of the flats in the said Building and for the general management thereof which shall be chargeable on the basis of all the flats being let at notional gross annual rentals equal to the current rack rental values thereof PROVIDED that such fees at not time exceed the maximum allowed in respect of property let at those rentals by the Scales authorised for the time being by the Royal Institution of Chartered Surveyors and the said managing Agents shall on the written request of the Lessee furnish to him a statement showing the gross annual rentals assumed by them for this purpose and the calculation of their fees therefrom".

30. The proposed variations permit the landlords to recover the reasonable costs (legal or otherwise) of "all proper steps deemed necessary by the Lessor" in enforcing *all* of those covenants in the Leases and any new ones entered into (paragraph 12/13(b)). Singled out are the costs of recovering service charge arrears (paragraph 12/13(a)), although that is probably contained within the words already referred to. Those are subject to the paragraph 12/13 proviso that the landlord must have taken all reasonable and economically viable efforts to recover its costs from the defaulting tenant. The wording of paragraph 12/13 is also sufficient to cover any costs of enforcing covenants requested by a tenant under new clause 6(8)(b).

31. Clause 5(ii) by contrast enables the landlords to recover as service charge their *legal costs* of re-entering, or forfeiting, the lease for breach of covenant to the extent that they can not be recovered from the tenant in default subject to the various provisos set out in clause 5(ii)(a) to (c) whose meaning and effect, we confess, is somewhat opaque.

32. The new clauses therefore very considerably widen the nature, scope and effect of what costs the landlord may recoup from the tenants under the existing paragraph 8 of the Fourth Schedule to the Leases *via* the service charge covering as they do not just the normal costs to be expected in managing a block of flats but also the costs of enforcing covenants at the initiative of the landlords and/or the tenants as well as the landlords' own forfeiture proceedings and enforcement of covenants of particular interest to the landlords and their reversions. They go considerably further than the existing paragraph 8 which itself is unusual in permitting recovery of the managing agents' fees for collecting rents which are usually, or often, the responsibility of the landlord as it is the landlord, not other tenants, who are interested in payment of rent. We should say for completeness that Mr Lederman did suggest that there was ambiguity as to whether paragraph 8 was confined to the managing agents' fees for general management of the Etons, it being suggested that it might be wide enough to encompass legal fees. This argument was not developed further, no authorities were cited in support of it and it did

not feature in his submissions so we do not consider it further save to say that it would appear to us to be a somewhat strained construction.

Evidence before the LVT

33. The evidence before the LVT was that after protracted negotiations and considerable expense the landlords and the majority of the tenants (*via* NERA) had agreed that in return for the landlords agreeing to individualise the heating and hot water systems the tenants had agreed to the landlords' request for the non-consequential variations upon which the tenants had been balloted as already described. There was substantial evidence in support of individualisation.

34. There was no evidence at all as to why the non-consequential variations were required: no evidence of any past difficulties (financial or otherwise) of enforcing any covenants whether they be service charge arrears or otherwise, whether enforcement be initiated by landlord or tenant; no evidence of landlords or tenants being inhibited from enforcing covenants due to the absence of the new covenants or, in the Shellpoint Leases, the presence of the original clause 6(8)(b); no evidence of the likely financial impact of the proposed variations; no evidence of whether and if so how and why any so-called deficiencies in the Leases had affected the management of the Etons. Neither was there any evidence about the financial stature of either landlord or their respective ownership, composition, management or otherwise. There was no evidence or suggestion that either landlord had been unable to properly manage the Etons or enforce any of the covenants due to being unable to recover such costs *via* the service charge.

35. Such evidence as there was was confined to Mr Goldreich's explanation about the genesis of the non-consequential variations and some brief observations contained in the witness statement of Dr Rankin. In paragraph 5 of his witness statement dated 30 March 2010, Mr Goldreich, having explained that he had been involved in protracted negotiations with the landlords' managing agents and solicitors with regard to the proposed changes to the heating and hot water systems, said this:

> "5. The landlords' professional advisers were agreeable in principle to the proposed substantive changes to the central heating and hot water systems but wished to address certain deficiencies in the flat leases which were affecting their management of the Etons. In particular, the main deficiencies included the existing provisions enabling the reciprocal enforcement of covenants between lessees and the lack of clauses enabling the effective recovery of service charge arrears from individual non-paying lessees. I was asked to draft the proposed lease variations in my capacity as the solicitor acting for the Residents Association in order to maintain even-handedness between the interests of the landlord and of the lessees and in order to safeguard the position of the lessees."

36. Mr Goldreich then explained that the new clauses as drafted by him in conjunction with NERA and the landlords' managing agents and solicitors Teacher Stern were then submitted by ballot to the tenants, the overwhelming majority of whom accepted them. The front sheet of the ballot paper is before us, entitled "The Etons individual heating and hot water systems replacement project" with a space to vote on all

of the amendments agreed between NERA and the landlords: all the variations were therefore presented as a single "take it or leave it" package upon which the tenants voted to accept all or none. We are told that it was accompanied by a bundle of documents explaining the nature and effect of the proposed amendments as well as a copy of them: these are not in the bundle and, so far as we can tell, were not before the LVT although the respondents thought they might have been although they were not provided with a copy of them. Mr Goldreich concluded that:

> "10. …The impetus to change the individual heating and hot water systems has therefore come from the lessees not from the landlords and the landlords have requested agreement of the non-consequential variations to address deficiencies in the existing leases and to facilitate their management of the estate as a pre-condition of their involvement in the central heating and hot water changes".

37. The LVT summarised the effect of Mr Goldreich's written and oral evidence in paragraph 23 of the Decision (which is not challenged):

> "23. Mr Goldreich gave some evidence concerning his involvement and that of [NERA]. He told us that the lessees wanted to change to the individual [heating and hot water] system. It was a condition of the landlord's agreement to this change that there be alterations to the terms of the lease, particularly with regard to the recoverability of service charges and to the costs associated with recovery. He told us that he had been responsible for the drafting of the proposed amendments and that the clauses had been put to the body of lessees, but not as a separate matter from the question of the proposed new heating arrangements. He told us that if the landlord decided not to go ahead with the individual heating system because the terms could not be agreed, then there will be substantial cost to the lessees for upgrading the existing communal system. He was satisfied that the lessees were fully aware of what was being suggested, and that the clauses concerning the recoverability of service charges and the associated costs in the Deed of Variation were something of a *quid pro quo*".

38. Dr Rankin, in his witness statement dated 30 March 2010, said that NERA had worked with the landlords and their solicitors and managing agents over the previous five to six yeas to permit the individualisation of the central heating and hot water systems "by amending the lease provisions in a way which is mutually acceptable to both the lessees and the landlords" (paragraph 8). He confirmed that the non-consequential variations were at the instigation of the landlords who "have also sought to address a number of deficiencies in the existing leases in relation to the management of the blocks and administration of the service charges" concluding:

> "23. …the proposed changes are to the benefit of the lessees as well as the landlords at the Etons, that they will assist both sides in the beneficial management of the blocks and should be permitted as part and parcel of these applications.
>
> "24. …I strongly believe and submit to [the LVT] that they are to the great benefit of all of the lessees, residents and tenants in occupation of the Etons…"

39. It was Dr Rankin's evidence that the landlords' managing agent had said that the applications to the LVT represented the last opportunity to individualise the heating and hot water systems and that if they did not succeed they "will have no alternative but to replace the communal systems before they fail completely". We comment here that practically speaking this is somewhat of a non-sequitur as by common consent the non-consequential variations were not required to achieve individualisation of the communal heating and hot water system. The reasoning behind this statement appears to be that the landlords would only proceed if the non-consequential variations were also granted. It was in that sense that this represented a "last opportunity", there being no reason advanced as to why the landlords could not carry out the individualisation without the non-consequential variations.

Case as put to the LVT

40. In his written submissions to the LVT dated 19 April 2010, Mr Gallagher said that the applications were to enable replacement of the communal heating and hot water systems "and also so as to up-date the covenants in the leases relating to the recovery of costs, insurance and reciprocal enforcement of covenants" (paragraph 2). He later submitted that the non-consequential variations which "are not directly concerned with the proposed heating and hot water switch-over" are explained in Mr Goldreich's witness statement and "address various deficiencies in the leases which are affecting the management of the Etons". The latter submission was an assertion unsupported, as already noted, by any evidence.

41. There was then an adjournment, and revised variations were put before the LVT as well as supplemental written submissions dated 15 November 2010 in which Mr Gallagher submitted at paragraph 2 that "the objectives of the proposed variations (of dispensing with the central provision of heating and hot water in favour of individual units) can only be satisfactorily achieved if all of the leases demising flats in the Etons are varied to the same effect (section 37(3))". In other words, by this stage if not before, Mr Gallagher refined the applicants' case to one where *all* variations were to achieve that *single object*. That was consistent with the oral evidence of Mr Goldreich as recorded by the LVT and also the "single issue" nature of the ballot.

42. The LVT recorded in paragraph 32 of the Decision that Mr Gallagher confirmed in final submissions "that the existing lease did not include the provision to recover costs and that the proposed amendments would not be retrospective and that accordingly the costs of these proceedings would not sought to be recovered from the Respondents".

43. In its Refusal Decision, the LVT state that "it was never put to the [LVT] that the amendment of the service charge collection arrangements was necessary for the purpose of carrying out the works. In any event the [LVT] dealt with this in paragraph 48". The thrust of the Decision, and the Refusal Decision, is that the applicants put their case forward on the footing that there was a single "object" to be achieved by the proposed variations, *viz* replacement of the heating and hot water systems. This accorded with the respondents' understanding.

The Decision

44. As part of the section dealing with the "background" of the Decision, the LVT explained the reason (singular) for the applications:

> "7. The reason for the request to vary was based on the assertion by the Applicants, or perhaps more particularly those lessees who supported the application, that the communal central heating system, now some 80 years old, was simply corroding away and not functioning satisfactorily. It was suggested that there were constant leaks which were expensive, time consuming and disruptive to remedy and that the wish therefore was to arrange for each flat to have its own individual central heating and hot water system, which is not possible under the present lease terms."

45. In the "findings" section of the Decision, the LVT, aware of course that it was exercising a discretion, sets out its understanding of the law thus:

> "39. It seems to us however that the basis upon which any variation can be made is set out in Section 37 and 38 of the Act. We need to be satisfied as follows:
>
> - Firstly, that the variation can only be achieved if all the leases are varied.
>
> - That the Applicant has garnered sufficient support to enable such an application to proceed.
>
> - We shall not make an order varying the Lease if it appears to us that the variation is likely to substantially prejudice any Respondent, or indeed a person who is not a party to the application and that compensation would not compensate them.
>
> - We should not make an order if for any reason it would not be reasonable in the circumstances for the variation to be effected.
>
> "40. Further, section 38(8) gives us the power to order that the lease may be varied in such manner as we specify; and under section (10) of Section 38 there is the power for us to order compensation. These are the matters that we need to consider. These factors have been taken into account by us when we have determined the terms of the order and the proposed changes to the lease. In that regard we note in the draft order for the Deed of Variation the definition of the enabling works and of practical completion and also the provision in the body of the Order providing for the deeds to be held in escrow until the cut-off date, and in the contents of the conditions precedent and transitional provisions in the Order at paragraphs 8 to 11 inclusive."

46. The LVT found that the replacement of the communal heating and hot water systems could only be effected by varying all the leases and that the requisite majority in support had been established. It considered and amended the applicants' draft order and determined that Miss Zographos and her brother might be substantially prejudiced by the installation of an individual heating system as they owned two flats albeit under a single

lease but that they would be adequately compensated by an award under section 38(10): see paragraphs 41 to 46.

47. The LVT then directed its attention to the wording of the variations to the Leases in two paragraphs, which form the kernel of this appeal, and made the following findings:

> "47. In so far as the variations sought are concerned we think that we can probably take this quite shortly. The new covenants are contained in Schedule 2 and we are content with the wording put forward by the landlord, save and except that we are not persuaded that the changes in respect of the service charge provisions are reasonable. It does seem to us that the suggestions that the landlord should be able to substantially improve his position in respect of the recovery of costs against recalcitrant lessees to the detriment of other lessees, is inappropriate. In addition also, we do not see the need to expand the provisions at clauses 12/13 of the Fourth Schedule of the Lease beyond that which is contained in the existing Lease. We heard from Mr Goldreich that the reason for these clauses was a quid pro quo on the part of the landlord. Mr Gallagher in his submissions to us confirmed that it was open to the Tribunal to order some of the changes and not the others. However, he said that we should not [do] so because this was a quid pro quo arrangement. He suggested it would be objectionable for the tenants to accept part of the deed and walk away from the remainder. He reminded us that our discretion must be exercised judicially. Certainly, Mr Goldreich, as we have indicated, was of the view that these terms were included to sweeten the pill to the landlord for agreeing to the change from the communal to the individual heating system. For our part, we find it difficult to see what loss there is to the landlord in switching from a communal to an individual system. If anything, it ought to be of benefit to the landlord to avoid the responsibilities of a somewhat decrepit and potentially expensive communal arrangement. Furthermore, it seems to us that the original provisions of the Lease, certainly insofar as the ability of the lessee to ask the landlord to enforce covenants, is conventional and perfectly adequate. The original clause provides that the landlord is entitled to an indemnity from the lessee in connection with any costs that may be incurred in seeking to enforce covenants, and we do not see that it is necessary for this power to be further extended.
>
> "48. The original Lease contains reasonable provisions for the recovery of service charge payments, although is deficient insofar as the recovery of costs are concerned. However, the changes proposed by the Applicants do seem to us to give to the landlord more than is justified and certainly in our view are likely to substantially prejudice the Respondents and others and we find it is not reasonable in the circumstances for this particular variation to take effect. The payment of compensation would not be appropriate."

The grounds of appeal and arguments in support and against

48. The appellants seek an order that the Decision of the LVT in relation to the three non-consequential variations be set aside and that new clauses 5, 6(8)(b) and paragraph 12/13 be inserted as requested.

49. The twenty grounds of appeal, and the very lengthy skeleton argument in support, are wide ranging and multi-faceted centring as they do on paragraphs 47 and 48 of the Decision putting the same points in almost every different way conceivable. Without in any way wishing to detract from their complexity and sophistication, in our view there are three central lines of argument.

50. Firstly, the LVT failed to make any, or any adequate or readily understandable, finding as to what the "object" to be achieved by the proposed variations was. It should have found that there were dual objects to the variations; to improve management and administration of the Etons as well as replacing the heating and hot water systems.

51. Secondly, the LVT failed to proceed on the basis that as a matter of law the majority view should prevail unless either the variations would be likely to substantially prejudice the respondent or any non-party and compensation is inadequate or there is some other reason it would not be reasonable in the circumstances to make the variations pursuant to section 38(6). Great weight should have been (but was not) given to the facts that the agreement was supported by the overwhelming majority of tenants and as explained by Mr Goldreich and Dr Rankin was the product of protracted and complex negotiations involving a disparate and fluctuating body of lessees, some resident, some non-resident and amounted to a compromise of how to replace the communal heating and hot water systems in a manner mutually satisfactory to both sides which should not be scuppered by the very small minority of three active respondents.

52. Thirdly, the LVT made erroneous findings of law or approached the issues in ways which were wrong in law and did not give any or any adequate reasons for its findings. It substituted its own views of what was "needed" rather than accepting the views of the majority. It conflated what was "reasonable" with whether the object of the variations could only be satisfactorily achieved by making the variations. It found that the landlord was given more than was "justified". It said it was "inappropriate" for the landlords to improve their position in the negotiations when the reasons for and wisdom of the commercial compromise which had been reached were irrelevant to the exercise of its discretion.

53. The respondents submitted that the Decision is clear and intelligible. The LVT approached the applications on the basis that the "object" was replacement of the communal heating and hot water systems, that the non-consequential variations were required by the landlords as the "price" of replacing the heating and hot water systems which the LVT for the reasons stated found to be impermissible or in any event of substantial prejudice to the respondents or otherwise would not be reasonable in the circumstances to allow. This, they said, was all consistent with the evidence and how the case was presented before the LVT.

Adequacy of reasons given in the Decision

54. Regulation 18 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 does not give any guidance about the details of the reasons which must be given for a decision of the LVT. In *Lucie M v Worcestershire County Council and*

Evans [2002] EWHC 1292 (admin) Lawrence Collins J (as he then was) summarised the position in relation to all tribunals, even though he was dealing with a decision of the Special Educational Needs Tribunal:

> "10. The principles applicable to challenges of the Tribunal's decision are not unique to this Tribunal, but since several cases in relation to its decisions were cited I summarise their effect. First, proper and adequate reasons must be given, so that they are intelligible and deal with the substantial points that have been raised, and the reasons should deal, in short form, with the substantial issues raised in order that the parties can understand why the decision has been reached*: S v Special Educational Needs Tribunal and the City of Westminster* [1996] ELR 102 at 112; *The Queen on the application* of *B v Vale of Glamorgan CBC* [2001] ELR 529, 536: *Crean v Somerset CC* [2002] ELR 152, 164 to 165. Secondly, and as a result of the first principle, the absence of reasons to explain why a case was rejected may make the decision appear irrational: *Crean* at 167. Thirdly, where reasons are inadequate, it is not normally appropriate that the reasons should be amplified on the appeal to the High Court: *Oxfordshire CC v GB* [2002] ELR 8, at 11 (C.A.).
>
> 11. Fourthly, a decision must be sufficiently specific and clear as to leave no room for doubt as to what has been has been decided: *London Borough of Bromley v Special Educational Needs Tribunal* [1999] ELR 260, 297 (C.A.)…".

55. Those principles are broadly consistent with the three authorities considering the nature and extent of the duty of the judge to give reasons to which we were referred. In *Flannery v Halifax Estate Agencies Limited* [2000] 1 WLR 377 the Court of Appeal said at 381G to 382C:

> "We make the following general comments on the duty to give reasons.
>
> (1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in *Ex parte Dave*) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
>
> (2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
>
> (3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about

> events which he claims to recall, it is likely to be enough for the judge (having no doubt summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases.
>
> (4) This is not to suggest that there is one rule for cases concerning the witnesses' truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain *why* he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

56. As was put by Lord Phillips MR (as he then was) in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409:

> "We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost".

In *South Buckinghamshire DC v Porter (No 2)* [2004] 1 WLR 1953 the House of Lords, considering the adequacy of reasons for a planning decision, said at paragraph 36:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal important controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced…".

Discussion and decision

Did the LVT err, and did it give adequate reasons?

57. We have carefully considered the various submissions and arguments made by the appellants, and the conclusion we have reached is that when viewed in the light of the applications, the evidence adduced before the LVT and the case as put to it, the Decision properly, intelligibly and adequately addresses the central issues sufficient for any of the parties, including this Tribunal, to understand what its decision is and why it has reached that decision consistent with the above-cited authorities.

58. In our judgment, it is clear from the Decision that the LVT found, on the basis of the evidence before it and the case put to it by the applicants' then counsel, Mr Gallagher, that there was a single object to be achieved by the proposed variations to the Leases. Although Mr Gallagher makes passing reference in paragraphs 25 and 32 of his original submissions to what Mr Goldreich described as the "non-consequential" amendments, those submissions are almost wholly concerned with the issue of the heating and hot water system. By the time of Mr Gallagher's supplemental submissions in November 2010 this emphasis is even more pronounced. Indeed the parenthesis in paragraph 2 of those submissions refers to a single object of the proposed variations, see paragraph 41 above. The LVT proceeded to assess the proposed variations, as it was entitled to do, by reference to this single object.

59. Mr Goldreich's evidence sought to "clarify and explain" the non-consequential variations which he had drafted. He said that the landlords' professional advisers:

> "wished to address certain deficiencies in the flat leases which were affecting their management of the Etons."

But Mr Goldreich's non-consequential variations, which, in our judgment mostly failed to achieve the landlords' intention (for reasons that we give below), were presented in the context of a single objective, namely to replace the communal heating and hot water system with individual boilers. This was the objective that Mr Gallagher spoke to in his supplemental submissions, and was clear to all concerned. That was the commercial deal or compromise reached by the parties. There was no, or no sufficient, evidence of any other object to be achieved by the non-consequential variations.

60. Having carefully considered all of the written evidence before the LVT and the submissions before us, we are not surprised that that was the common position of all parties by the end of the hearing before the LVT, however it might have been put or explained at the outset. Whilst the LVT could have expressly and deliberately considered each of the possible objects of the non-consequential variations as now submitted to this Tribunal by Mr Lederman, it did not, and did not need to, because by the end of the hearing it was clear to all concerned that there was but one single object to be achieved.

61. That the LVT found a single object is in our judgment clear from paragraph 7 of the Decision, which is carried through and consistent with the rest of the Decision, especially paragraphs 47 and 48 where the LVT tests the proposed variations against that "object" and gives its reasons as to why it will not exercise its discretion and grant the non-consequential variations sought.

62. When viewed in that light, the effect of paragraphs 47 and 48 is that the object could be achieved without the non-consequential variations. That, Mr Lederman accepted, was correct as they were all wholly unrelated to replacement of the communal heating and hot water system save in one respect, namely, without new clauses 5(ii) and paragraph 12/13 the communal heating and hot water systems could not be achieved or satisfactorily achieved. That, as the Refusal Decision notes, was

not an argument put forward before the LVT. Neither was it the subject of any evidence. Nor was it accurate as the Leases all have adequate, standard-form covenants enabling the landlords to recover the service charges and there was no evidence of past difficulties in service charge collection.

63. Paragraphs 47 and 48 have been subjected to lengthy critique and analysis suggesting that the LVT was impermissibly analysing, commenting on, disagreeing with and substituting its own views for the commercial wisdom or solution proposed by the compromise which the landlords and the majority of tenants had reached. At the same time, Mr Lederman submitted that while each variation should be tested against its separate and distinct object, any substantial prejudice caused by the non-consequential variations was balanced out by getting the communal heating and hot water system replaced.

64. We do not accept these arguments. In our judgment, when properly understood, the LVT in paragraph 47 goes through each of the three non-consequential variations and concludes that replacement of the communal heating and hot water system can be achieved without any of those proposed variations. Although it has not slavishly followed the statutory wording, that is the substance of its Decision: the landlords have used the replacement of the communal heating system to obtain the non-consequential variations which are not required to achieve that object and, whilst it and the majority of tenants are fully entitled to reach such an agreement, if they can not point to any other object to be achieved by those variations they fail to satisfy the requirements of section 37(3) and the applications fail.

65. In the alternative and in any event, the LVT goes on to say in paragraph 48 that the non-consequential variations are likely to substantially prejudice the respondents and others and are not reasonable in the circumstances. In stating that the landlord has got more than is justified the LVT is balancing the various aspects of the case against each other.

66. With no disrespect to Mr Lederman, what has happened in this appeal is a complete re-working of the case without a full and proper analysis and understanding of the evidence and the issues. Indeed, as will become apparent, it was with some surprise that this Tribunal was told that the appellants did not understand the full nature and effect of the non-consequential variations sought and that had they got what the applications in fact asked for it would have been "wrong". It may well be that had the appellants properly understood the true nature and effect of the non-consequential variations asked for they would have more readily understood why the LVT refused to grant them.

67. We will now embark upon a fully reasoned decision and exposition addressed to each of the issues now raised by Mr Lederman. We adopt his approach of considering each of the non-consequential variations by reference to the related evidence such as there was. It will become clear that in reality there was only one object. We will also address, as appropriate, the various arguments aired before us, conscious that many were not advanced before the LVT because, as we have already said, it is clear to us on the evidence before us that there was but one object.

68. In embarking upon this lengthy exposition we are conscious that it might be said that that of itself proves that the Decision is insufficient. We do not accept that argument. We are doing so because we must address the central arguments presented to us and give as full an explanation as is necessary to explain why we dismiss the appeal. It was not necessary for the LVT to do so because most of these arguments were not addressed to them – since, as we have stated, this was treated by all as a "single object" case.

69. We make clear that had we concluded that the LVT had erred such that the Decision must be set aside, we would have reached the same conclusion and our reasoning would have been as set out below. What follows should therefore be treated in the alternative as our reasons upon a review for refusing to allow the non-consequential variations. There are however two factors which have made it difficult to treat this as a straightforward appeal or review. Firstly, the appellants misunderstood, and did not want or intend, what they had in fact asked the LVT for. Secondly, it seems – but remains a little unclear – that the appellants have modified their position before the LVT, namely that without the non-consequential variations they would not replace the communal heating and hot water system, to one where they have not reached a final decision.

Detailed reasons

70. The first question to address under section 37 is: what is or are the "object" or objects to be achieved by the non-consequential variations? As a matter of statutory construction, there may be single or multiple objects. In many respects, the object of a variation will be self-evident from the content of the variation itself. But it does not follow that that is necessarily the object, or purpose, of the variations. We accept Mr Lederman's submission that it is for the applicants, not the tribunal, to identify the "object" or purpose which, broadly speaking, may be of infinite variety depending upon the facts and circumstances relating to the leases, buildings and flats in question.

71. What the object is is a question of evidence to be adduced by the applicants: what are they trying to achieve by the variations, and why? What problems or deficiencies are there or have there been in running the blocks and enforcing the leases? What is the purpose of the variation(s)? Without this information, or evidence, the tribunal can not make any findings as to the "object" to be achieved, nor can it properly exercise its discretion, which includes an evaluation of the proposed variation. Whilst the section 37 jurisdiction is wider than and distinct from that of section 35, there is room for overlap. For example, where there are unsatisfactory provisions relating to recouping the costs of repairs or maintenance an application can be made to remedy those deficiencies where there is a sufficient supporting majority of tenants under section 37 and, if not, under section 35. We accept the submission of Mr Lederman that it is not for the tribunal to determine whether they approve of the object, but it is for the tribunal to make a finding, based upon the evidence, of what the object is.

72. The second question is: can the "object" be satisfactorily achieved by the proposed variation without varying all the Leases (we summarise, but do not lose sight of, the statutory wording)? There are two questions here: does the proposed variation achieve the object, and if so do all of the leases need to be varied to satisfactorily achieve

that object? These of course presuppose that the leases do not already have sufficient or satisfactory provisions: if they do it is obvious that they need not be varied as there will be no object, or purpose, to the variation. Or, as Mr Barnett tersely put it, "if it ain't broke don't fix it".

73. These are questions of evidence to be adduced by the applicants: how do the proposed variations achieve that object or objects? Can that only be satisfactorily achieved if all the leases are varied? The nature and extent of the evidence will of course depend upon the variations sought. It is also a question for legal argument: as a matter of law do the variations achieve the object or are they capable of doing so? We accept Mr Lederman's submission that it is for the applicants, not the tribunal, to select the solution or variation from what will frequently be one of a number of different options and if the majority of tenants are supportive then it is not for the tribunal to second guess them although, of course, the tribunal would be at liberty to make suggestions.

74. For convenience, we consider these questions and the related evidence together. We should say however that we do not accept Mr Lederman's submission that the majority view should prevail unless the section 38(6) grounds are made out. In our judgment, the purpose of section 37 is to enable the majority to apply to the tribunal for a variation to achieve a particular object: if they can not bring themselves within those requirements, then there is no jurisdiction to entertain the application or consider it further. The jurisdiction is relatively narrow, and is not intended to allow rewriting of leases merely because that is the will of the majority and in many cases may well seem sensible.

75. *New clause 6(8)(b)*: Mr Lederman drew attention to the annexure to the applications where the stated object of new clause 6(8)(b) is lumped together with the heating-related variations which are described as being one of the "further changes relevant to Individual Heating Systems": that is plainly wrong as it has nothing to do with the replacement of the communal heating and hot water systems.

76. It was the evidence of Mr Goldreich that the non-consequential variations generally were to remedy deficiencies in the leases. New clause 6(8)(b) was, he said, to enable "reciprocal enforcement of covenants between lessees". This was echoed by Mr Gallagher in his opening skeleton argument. Mr Lederman quite properly accepted that new clause 6(8)(b) did nothing of the sort: it enabled a lessee to require the landlord to enforce a covenant against a fellow tenant at the ultimate cost of all tenants *via* the service charge.

77. Mr Goldreich went on to explain in paragraph 8(3) of his first witness statement that the existing clause 6(8)(b):

> "placed an unreasonable and disproportionate burden on a complainant lessee and the change is therefore intended to be for the benefit of the body of the lessees as a whole. It also introduced the safeguard that enforcement action was to be for the reasonable protection of the flat in order to prevent abuse by either an unreasonable lessee or an unreasonable landlord".

78. In the absence of any evidence that the existing clause 6(8)(b) had inhibited Shellpoint tenants from requiring the landlord to enforce covenants or that it had in any way caused problems in the management of the Etons or that anyone regarded it as placing an unreasonable or disproportionate burden on a complainant tenant, Mr Goldreich's comments amount to no more than a theoretical observation of a possible opinion as to the practical effect of this clause. An alternative view advanced with some force by the respondents, particularly Miss Zographos, is that the existing clause contains within it an important brake on tenants making unnecessary and unreasonable complaints by requiring them to take the risk of enforcement especially where the complaint is flat-specific (such as a noisy upstairs neighbour) and does not affect anyone else. It also discourages landlords from initiating enforcement proceedings unless well founded as they can only recover their costs from the tenant in breach. The contractual intent of the original parties should not be altered without good reason or sound evidence of which there was none.

79. Notwithstanding that Mr Goldreich did not in his witness statement distinguish between the Shellpoint and Anston Leases, those comments only apply to the Shellpoint Leases. In relation to the Anston Leases, there was no evidence that the absence of any covenant similar to clause 6(8)(b) had caused any problems in the enforcement of covenants or the management of the Etons. As the respondents argued, it does not follow from the absence of such a provision that there have been any problems or that the covenants have not been enforced by the landlords who have ample tools in their armoury to enforce covenants against tenants in breach and which, of course, one would expect a reasonable and responsible landlord to do. If successful the landlords' costs can be recovered from the tenant in breach. Again, the contractual intent of the original parties should not be altered without good reason or sound evidence.

80. Mr Lederman submitted that the absence of any such evidence did not prevent the LVT or this Tribunal from finding that section 37(3) had been satisfied, and that great weight should be put on the fact that the overwhelming majority of tenants supported the new clause 6(8)(b) from which it could be inferred that they recognised there was a problem which needed to be resolved, and that this was the appropriate resolution of that problem. It was therefore not to address a purely theoretical problem but was something which the applicants, on advice, had agreed to and that it was unreal, impractical and unsatisfactory in an estate comprising 365 flats for all leases not to contain the same provision, at any rate, upon an application to vary.

81. That is a significant inference to be asked to make and it is not a suggestion that was put to the LVT. Had we been making our own decision by review, we would not have been prepared to so infer. In any event, if Mr Goldreich's evidence is taken at face value, there being none other, the object to be achieved by new clause 6(8)(b) was to enable reciprocal enforcement of covenants *between lessees.* If the tenant applicants have taken that at face value, they would (wrongly) be thinking that under the new clause one tenant could directly enforce a covenant against another tenant without resorting to the landlord. We do not think we are taking too pedantic an approach: sight must not be lost of the fact that a section 37 application is a serious matter affecting as it does the contractual rights of others for the remainder of long lease terms (in many cases more than 950 years) and so should be soundly based on evidence.

82. In our judgment, in the absence of evidence, the LVT was right to conclude as it did in the last two sentences of paragraph 47 that the existing provisions of the Leases are conventional and perfectly adequate and it was not "necessary" for the landlord (*i.e.* Shellpoint) to extend its powers of recovery of costs by substituting or inserting, as the case may be, new clause 6(8)(b). It was not necessary or required to achieve replacement of the communal heating and hot water systems.

83. Were we to be considering this aspect of the applications afresh by review, we would reach precisely the same conclusion but with slightly different reasoning. We would have found that *if* the object of new clause 6(8)(b) was to achieve reciprocal enforcement it failed to do so. There was insufficient evidence to support any finding other than the object of the clause being (part of the deal) to replace the communal heating and hot water system; but it did not in fact achieve that object as it was unrelated to it. There was no evidence or explanation that the object, whatever it may be, could not be "satisfactorily achieved" without modification or insertion of the new clause into *all* Leases when, on the evidence, there was nothing to indicate that the existing arrangements in which the Anston Leases had not clause 6(8)(b) had caused any problems or difficulties. We accept that great weight must be given to the views of the majority, but if they have failed to adduce even rudimentary evidence to satisfy the requirements of section 37(3) the applications must fail. Neither, for completeness sake, do we find the wording of existing clause 6(8)(b) (it not unusually puts the onus or risk upon the complainant tenant) or its absence from the Anston leases to be deficient or unsatisfactory.

84. *New clause 5(ii) and paragraph 12/13*: Mr Lederman again drew attention to the annexure to the applications which states that the "object" of new paragraph 12/13 was to "improve management of estate" and new clause 5(ii) is bundled in with all of the other variations described as being one of the "further changes relevant to Individual Heating Systems".

85. Mr Goldreich said in his first witness statement that these variations were to resolve the other main deficiency of "the lack of clauses enabling effective recovery of service charge arrears from individual non-paying lessees". This was echoed by Mr Gallagher in his opening skeleton argument. Mr Lederman quite properly accepted that this was not right as all Leases contain standard form covenants enabling the landlord to sue the tenant for non payment of service charge (clause 2(2)) failing which he must pay interest on arrears (clause 2(4)) and ultimately forfeit his lease (clause 5). Nothing more is required to enable legally effective enforcement.

86. In paragraph 8(1) of that witness statement, Mr Goldreich went on to elaborate:

> "This clause [5(ii)] imposes upon the landlord the requirement to make reasonable and economically viable efforts to recover legal costs in proceedings against the defaulting lessee. Thereafter, unrecovered costs may be applied against the service charges provided that no Section 20C order is made against the landlord and that the costs are subject to a detailed assessment with a capped solicitors charging rate on the basis that those costs could be charged as service charges on an interim basis pending such recovery.

> "The purpose of this clause was both to permit and encourage landlords to seek recovery of legal costs against non-paying lessees rather than relying upon recovery through the service charge to the benefit of the general body of the lessees as a whole. This clause provides a safeguard in that it requires the landlords to "use all reasonable and economically viable endeavours" to recover their costs against individual defaulting lessees on the basis that only non-recoverable costs can be finally applied against the service charges and those will be subject to detailed assessment."

87. In paragraph 8(4), he briefly refers to new paragraph 12/13 as defining "the service charge elements necessary to give effect" to the other new clauses and that it contains safeguards such as "reasonable" and "proper" and so on.

88. As already noted, there was no evidence that the absence of any provisions enabling the landlords to recover their unrecovered costs of enforcing covenants *via* the service charge has caused any problems in the past or was even an issue, and no evidence as to the nature, ownership or financial standing of either landlord, that their financial position had made it difficult or impossible to enforce the covenants or otherwise manage the Etons. There was therefore no evidence of any practical difficulties of enforcing the covenants which is often the case, for example, where the landlord company is owned by the tenants and has one asset (the freehold), one source of income (rent from the leases), and one source of money to pay for managing and maintaining the property and enforcing the covenants (the service charge provisions) as was the case in *Thirlway v Troy* [2012] UKUT 302 (LC); LRA/57/2012.

89. Mr Lederman submitted that the object of these new provisions was principally to improve the management and administration of the Etons but was also linked to replacement of the communal heating and hot water systems by strengthening the provisions for recovery of the service charge inevitably due in respect of those works. The absence of any evidence was not an obstacle as great weight should be put on the fact that the overwhelming majority of tenants supported these new provisions and they had been drafted by NERA's lawyer, Mr Goldreich, who, in paragraph 10 of his first witness statement, had explained that he was there "to draft and negotiate the wording of those new clauses as fairly as possible in order to safeguard the interests of all the lessees at the Etons". There was also the already recited evidence of Dr Rankin that the variations "are to the benefit of the lessees as well as the landlords". Again, appropriate inferences can be drawn.

90. When pressed, Mr Lederman was unable to advance any explanation of, or justification for, the width of these new provisions. Rather, and with commendable frankness, he said that neither he nor, on instructions, his client landlords had understood these new clauses to be quite so far reaching. They intended that only (a) the costs of tenant-initiated complaints under the new clause 6(8)(b) and (b) the legal costs of recovering sums due in respect of the service charge (*i.e.* enforcing clause 2(2)) should be recoverable from all tenants *via* the service charge. He accepted that, in consequence, certainly in so far as his clients were concerned, the applications had sought more than was wanted or, presumably, they thought had been agreed with the majority tenants.

Had the LVT made the ordered variation of the Leases by insertion of the new clauses it would have been, as Mr Lederman put it, "wrong".

91. This puts a quite different perspective on the applications and also upon the evidence before the LVT and therefore us. Quite how the landlords got so much more than they bargained for is unclear, especially as Mr Goldreich regarded himself as protecting the interests of the lessees rather than prejudicing them. Whether Mr Goldreich understood what he had drafted is unclear, although it seems reasonable to infer that he did as the wording of these new clauses is straightforward and was well understood by the respondents and, we have no reason to suppose otherwise, the LVT. Indeed, it appears to us that Mr Goldreich did understand the width of what he had drafted because in paragraph 9 of his first witness statement he addresses the respondents' concerns thus:

> "9. In their written witness statements, the opponents to the changes [the respondents] have characterised the proposed non-consequential variations as effectively giving the landlords 'a limitless pot of money' and 'long-term open-ended costs' and 'no downside from taking legal action' and 'unnecessary legal and professional costs'. Contrary to those contentions I would ask [the LVT] to accept that the proposed new clauses do impose a system of checks and balances on the landlord by requiring them to act reasonably and properly and in an economically viable way. The recovery of costs through the service charge will, of course, remain subject to the provisions of Section 20C and to the discretion accorded to the courts or the LVT by the requirement of for detailed assessment subject to capped charging rates. These clauses will also not affect the rights of the lessees to seek adjudication of the reasonableness of their service charges including legal costs in the LVT in accordance with the provisions of Section 27A nor have I seen any wish on the part of the landlords during my involvement in this process to interfere with those rights."

92. Whether the width of the new provisions had been accurately explained to the tenants in the ballot is also unclear as the supporting information was not in evidence. If the landlords misunderstood these new provisions, it may well be that the majority tenants did as well, in which case it may call into question the validity of the ballot (something challenged by the respondents before but rejected by the LVT which of course did not know about the fundamental misunderstanding made by landlords about the width of the non-consequential variations). If the width of these new provisions was understood by the tenants and their adviser (including Mr Gallagher) it would be relevant to the exercise of the jurisdiction to know why the majority tenants thought that such open-ended and far ranging variations would, as Dr Rankin put it, be to the benefit of the tenants. It may well be, we do not know, that the supporting tenants did not really want these variations at all but were prepared to swallow a bitter pill as the price of getting the communal systems replaced. If so, the parties have ended up in the position that the pill was far bitterer than expected. Or there may be some other reason.

93. Drawing those strands together, we are left in some doubt as to precisely what Mr Goldreich was saying the object of these variations was and how they achieved that object. If, as he says, it is to enable effective recovery of service charge arrears from individual non-paying lessees, it does not achieve that objective because there are

already covenants enabling legally effective recovery by clauses 2(2) and 5 of the Leases and also clause 2(4) enabling the landlord to be compensated by payment of interest to the extent that it is out of pocket for having to fund the non-paying tenant's service charge contribution. If he means it is to be viewed from a purely practical point of view, to relieve the landlords of the financial obligation or risk of enforcing the covenants, no evidence to justify or otherwise explain the same had been adduced.

94. In those circumstances, in our judgment, the LVT was right to conclude as it did in paragraph 47 that the "original provisions of the Lease, certainly insofar as the ability of the lessee to ask the landlord to enforce covenants, is conventional and perfectly adequate". This sentence refers not just to the existing clause 6(8)(b) but also to the normal, and standard-form enforcement provisions in the Leases which we have already referred to. It must be read back to the fourth sentence, where the LVT does "not see the need to expand the provisions at [paragraph 12/13] … beyond that which is contained in the existing Lease". A counsel of perfection would have been for the LVT to specifically refer to and cite them, but in our judgment the provisions are so conventional that it is satisfactory for the LVT to have in effect "taken them as read". It is only had they been unusual that it would have been necessary for them to be recited verbatim. It was not necessary or required to change these provisions to achieve the object of replacing the communal heating and hot water systems.

95. Were we to be considering this aspect of the applications afresh by review, we would reach precisely the same conclusion but with slightly different reasoning. We would have found that *if* the object was to enable "effective recovery of service charge arrears from individual non-paying lessees" it was not made out as all Leases contained legally sufficient provisions and there was no evidence indicating any practical difficulties of recovery of service charge. Furthermore, new clause 5(ii) and paragraph 12/13 covered far more than was required to achieve that limited object. There was insufficient evidence to support any finding other than the object being (part of the deal) to replace the communal heating and hot water system and, for the reasons already stated, that object could be "satisfactorily achieved" with making the proposed variations to any, let alone all, of the Leases. Neither, for completeness sake, do we find anything deficient or unsatisfactory in the wording of the present provisions.

96. We would have reached the same conclusions even if we were to adopt Mr Lederman's submission that these variations were to achieve the wider object of improving the management and administration of the Etons. We would have gone further. We can not see how enabling the landlords to recover their costs of enforcement of all covenants could be sensibly regarded as an "improvement". Whilst it greatly improves or enhances the landlords' position, it can not properly be regarded as an improvement for the tenants. It is more likely, as Miss Zographos submitted, to worsen the tenants' position because it shifts all financial risk from landlord to tenant, the landlord (and its agents) now having an incentive (or no disincentive) to enforce, rather than reach a consensual agreement or otherwise, knowing full well, as they would, that all costs would be contractually recoverable from the tenants *via* the service charge whose flats would be at risk of forfeiture for non payment.

97. Whilst the reasonableness of the decision to enforce, the costs of enforcement and any settlement would be open to challenge under sections 19 and 20C of the Landlord and Tenant Act 1985 ("the 1985 Act") in the LVT, that is a recipe for litigation and for the landlord to run up further costs which would themselves be recoverable under the new provisions unless challenged under the said sections. As is well known, the section 20C jurisdiction is not intended to displace the contractual right of the landlord to recover his costs of enforcement and the discretion of the LVT under that section may only be exercised where it is "just and equitable in the circumstances" which is not a results-driven jurisdiction: see for example *Schilling v Canary Riverside Development PTE Limited* LRX/26/2005 (Lands Tribunal). It frequently results in tenants having to pay the landlords' and their own costs because the landlord can not be shown to have acted unreasonably. Indeed, sections 19 and 20C were in part introduced to ameliorate the rigours of the contractual right of a landlord to recover its costs *via* the service charge.

98. The present contractual certainty of the landlords not being able to recover their costs from tenants through the service charge would be replaced by a certainty that they would be recoverable from all tenants subject to successful challenge under the 1985 Act. It follows, as again submitted by Ms Zographos and also Mr Barnett and Mr Clyne, that this would fundamentally alter the relationship between landlord and tenant, particularly where neither landlord is owned nor controlled by the tenants. As Mr Lederman acknowledged, the new provisions go beyond what the appellants intended or thought they had agreed with the majority tenants. The proposed variations may well be appropriate where the landlord is a single asset company owned and controlled by the tenants with no source of revenue other than the service charge and rent. But there was no evidence to justify this here.

99. In our view, the fact that the proposed variations go beyond what the appellants wanted or thought they had agreed with the majority tenants of itself indicates that the landlords do not regard these provisions as being required to achieve the object otherwise they would actually have asked for them. Weight should of course be given to the fact that the majority of tenants support these new provisions. However, for the reasons already stated, there is certainly a doubt in our minds as to whether or not they properly understood the full nature and extent of the new provisions when casting their ballots. Whilst there are only three active respondents, there were 17 opponents, 48 unreturned and 1 neutral. Even if they did understand what they were asking for, there is no explanation or evidence as to why they are requesting more than the landlords want.

100. We can not help but observe that the progress of these applications and the appeals offer a vivid illustration of why *in this case* the variations should not be permitted. In fact, the applications are the second attempt to vary the Leases, the first attempt having been aborted after issuance. These applications however have been most unfortunate: whilst strongly based in respect of replacing the communal heating and hot water systems, in our judgment they have been poorly based and ill thought out in respect of the non-consequential variations. If the variations were already in place, the landlords would have a contractual right to recover all of its costs from the tenants. That right, we consider, would be of substantial value to the landlords. The tenants (or the minority tenant respondents) would then only be able to challenge those costs under sections 19 or 20C of the 1985 Act. The success of such a challenge may well be

difficult and would trigger more litigation. It was also unfortunate that Mr Goldreich referred to the wrong clause numbers in the Leases, and that the wrong clauses were reproduced in the annexures to the applications.

101. *Conclusions on the first and second questions:* In our judgment the appellants failed before the LVT and, had we been deciding the matter by review, would have failed before this Tribunal to discharge their burden of proving the object or objects to be achieved by the non-consequential variations; that the variations achieve such object or objects; or that whatever the object or objects are they can only be satisfactorily achieved by varying all of the leases.

102. On analysis, and in reality, it was apparent to the LVT and is apparent to this Tribunal that the only real object of the non-consequential variations was to get the communal heating and hot water systems replaced. In that respect, we respectfully agree with the observations of the LVT that the non-consequential variations went far beyond what was justified by, or necessary to achieve, replacement of the communal heating and hot water system. We also agree with the observations of the LVT that it is "inappropriate" for landlords to use such circumstances as an opportunity to substantially improve its contractual position – *i.e.* to demand new covenants unrelated to and not consequent upon achieving the object. In the rest of paragraph 47, the LVT was properly considering the thinking or reasoning behind that state of affairs, and concluded that replacing the communal system was not just in the tenants' but also in the landlords' interests, a sentiment from which Mr Lederman did not dissent save to say that it was up to the parties what compromise deal was reached, and a sentiment which on the basis of the evidence before the LVT is well founded.

103. As we have said, Mr Lederman urged upon us that great weight should be placed on the will of the majority, and the view of the minority should not be able to thwart that will unless there were truly exceptional circumstances. Once, as here, the applicants have proved that they have the requisite section 37(5) majorities, it is for them to adduce evidence to prove that the variations satisfy section 37(3). Merely saying they agree to them is insufficient: the jurisdiction does not provide a statutory framework for implementing majority decisions or compromises with landlords but to vary leases in order to satisfactorily achieve a given object or objects. If the applicants fail to make a case out under section 37(3), their will has not been defeated by the minority: the majority (and landlords) has failed to bring itself within the statutory jurisdiction.

104. For the sake of completeness, we will briefly state what our decision would have been had we found that the applicants, or appellants, had satisfied the requirements of section 37(3) in relation to the non-consequential amendments. There would then be three further questions to determine.

105. <u>The third question</u>: would the proposed variations be likely substantially to prejudice the respondents to the applications (all non-supportive tenants) such that it can not be adequately compensated by an award under section 38(10) (section 38(6)(a))?

106. In our judgment, they would. Sight must not be lost of the fact that variations to leases interfere with the contractual bargain which the original parties reached and form the basis upon which their successors (landlords and tenants) acquired and will continue to acquire their respective interests. One of the singular aspects of these Leases is that the landlords have covenanted to repair and maintain the Etons but at the cost of the tenants. How, when, by whom and at what cost the work is done is decided by the landlords over whom the tenants have no control as (so far as we are aware) the tenants do not own them. The landlords decide how to spend the tenants' money. At common law there is little control or basis for complaint by the tenants. As already observed, statute has intervened to fill the gap *to some extent* by, principally, sections 19, 20 and 20C of the 1985 Act. We say "to some extent" because whilst the 1985 Act ameliorates the rigours of the law of contract, the source of the rigour is the landlord's contractual right to recover costs from the tenants and that base-line right is not altered by the Act.

107. It is in our judgment a quite exceptional, and substantially prejudicial, thing to enable the landlords to recover its costs not only of recovering the service charge but also of enforcement of all of its covenants from all tenants through the service charge, particularly where the landlords are not owned or controlled by the tenants and there is no evidence that the landlords can not afford to do so or that the absence of such covenants has caused any difficulties in the past or will or is likely to in the future. It would enable the landlords to decide how, when, by whom and at what cost they should enforce covenants. That would shift all the financial risk and liability from the landlords to the tenants whose only control would be proceedings *via* the LVT and all the time, trouble, cost and uncertainty that that involves. The appellants have put forward no justification for such a major risk and liability transfer and all that that entails. In our view the proposed variation would significantly affect the way in which the landlords, given virtual financial impunity (subject to any 1985 Act challenge), make future decisions about whether to enforce and pursue breaches of covenants.

108. If new clauses 5(ii) and paragraph 12/13 were allowed, it is difficult to see why new clause 6(8)(b) would be required. In any event, enabling tenants to require the landlords to institute proceedings without the tenants taking personal financial liability as envisaged would, we agree with the respondents, serve to shift the risk from the complainant tenant to all other tenants even where the complaint had nothing to do with them and was specific to the complainant. The landlords would have little incentive to refuse.

109. If the object or objects of the non-consequential variations is or are separate and distinct from the replacement of the communal heating and hot water system, they must be considered separately and the fact of substantial prejudice prevents these variations being granted, the language of section 38(6) being mandatory. If their object is the replacement of the communal heating and hot water systems, the result is the same as there is substantial prejudice. We doubt whether that prejudice should be weighed or balanced against the undoubted and substantial benefit of providing individual heating and hot water systems because section 37(3) is not directed at endorsing essentially commercial agreements or compromises between landlord and majority tenants, but even if it were to be so weighed or balanced the non-consequential variations should still not be allowed because they are not required to achieve that object and their prejudice,

long term and wide ranging as it is, outweighs the benefits of individualisation of the communal heating and hot water systems.

110. Either way, in our judgment an award of compensation would not afford adequate compensation. Whilst there was no evidence (valuation or otherwise) on the point, we are of the view that this sort of prejudice is not capable of financial compensation, affecting as it does the most important aspect of leasehold property and the attendant costs not just on a one off basis but for the remainder of the unexpired Lease terms, many of which exceed 950 years.

111. We should say that we have been concerned by, and given thought to, the absolute and now somewhat modified position of the landlords. As we ventilated at the hearing in discussions with Mr Lederman, it seems to us that if the landlords were now to refuse to go forward with the proposal to provide the tenants with individual boilers, which we understand would be cheaper and save the tenants a large amount of money in the future, that would afford the tenants the grounds to apply to the LVT for a pre-emptive order under sections 19 *et seq* of the 1985 Act that abandoning the proposals and simply replacing the communal system was unreasonable so that any costs over and above those incurred in providing individual boilers would be unrecoverable. Alternatively the tenants could make a similar application after the works had been completed. We simply mention this for completeness, without making any further observations.

112. The fourth question: is there any other reason it would not be reasonable in the circumstances for the variations to be effected (section 38(6)(b)? On the evidence before the LVT, it was unnecessary to make any finding under this sub-section. Mr Lederman submitted that the sort of things this provision was addressed to was a situation where there were grounds for serious concern that say the ballot had been procured by fraud, undue pressure or the tenants had otherwise been misled.

113. Were we making our own decision by review, the fact that the evidence to the LVT and, initially, to this Tribunal, described the nature and extent of the non-consequential variations inaccurately, whether wittingly or unwittingly, we would have found that it would not have been reasonable in the circumstances to allow these variations. We would make this finding because such inaccuracy casts doubt upon the reliability of the ballot and precisely what it was the majority tenants in fact thought they were agreeing to. This conclusion is buttressed by the landlords' apparent shift in intention from not proceeding with the provision of individual boilers at all if they did not get the non-consequential variations they demanded to possibly doing so: had the majority tenants so realised and been balloted accordingly, perhaps they would not have voted for the non-consequential variations, remembering, of course, that there was no separate vote for them because all the variations were put to them as a "take it or leave it" package. We would therefore refuse to exercise the discretion on this ground alone. In making these findings we bear in mind that any such decision would be by review only, which does not permit the adduction of new evidence. However, in our judgment that does not prevent us from taking cognisance of the landlords' misunderstanding and change of position.

114. The fifth question: in all the circumstances, should the Tribunal exercise its discretion and make an order varying the Leases? The only point we make here is that even if a tribunal is not prohibited from making an order by a section 38(6) finding, it must still exercise its discretion. If there are no section 38(6) factors, it may well conclude that the variations should be allowed. But not necessarily so. Given our previous conclusions this question does not arise in this appeal.

Conclusion

115. For the reasons we have given above we are not satisfied that the object to be achieved by the non-consequential variations can not be satisfactorily achieved unless all the Leases are varied to the same effect. If we are wrong in that conclusion we would not make an order varying the Leases because it appears to us that the non-consequential variations would be likely to substantially prejudice the respondents and other persons who are not parties to the application and that an award under section 38(10) would not afford them adequate compensation and in any event it would not be reasonable in the circumstances for the variations to be effected. In our opinion the LVT's Decision was sufficient and correct and we dismiss the appeal.

Reasons for refusal of application to amend the Application

116. On the second day of the hearing, Mr Lederman applied for permission to amend the applications so that if the Decision was set aside this Tribunal should reach its own decision but based upon the non-consequential variations limited to recovery of the appellant landlords' legal costs of recovering the service charge and of enforcing covenants pursuant to the new clause 6(8)(b) through the service charge.

117. We refused this application for the following reasons. Firstly, it would in our judgment be grossly unfair to the respondents to have to now deal with what in effect was a completely new application especially where they as, albeit sophisticated, lay persons had prepared evidence for and addressed their minds to the applications in their original form. Secondly, the respondents should have time to take legal advice on the nature and effect of the new non-consequential variations. Thirdly, the majority tenants would need to be informed of developments: they may now seek to adopt a different position now the landlords may not require the non-consequential variations as the price of replacing the communal systems; or they may wish to support the non-consequential variations in their current form in which case it would be important for their reasons to be before the tribunal. Fourthly, there comes a time in litigation where it really is too late for a party to amend its pleadings. And this is just such a case. It is in our judgment an unacceptable position for the landlords to have made applications to the LVT and then appealed its refusal to grant variations which the landlords neither understood nor wanted. All of the evidence and submissions had been addressed and prepared on the basis of the original variations. It is neither appropriate nor fair to allow the appeal to be heard on a new basis or indeed to adjourn to allow further evidence to be put forward. If the appellants wish to obtain the non-consequential variations in a reduced form, they will have to start again.

Dated 8 October 2012

His Honour Judge Nigel Gerald

A J Trott FRICS