



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

Case Reference : CHI/29UN/LVT/2018/0005

Property : St Mildreds Court, Beach Road, Westgate-on-Sea, Kent CT8 8AE

Applicant : St Mildreds Court Residents Association Limited

Representative : Mr. R. Bowker (counsel)

Respondent : Mr. J. P. Simon

Representative :

Type of Application : Landlord & Tenant Act 1987 Section 35- Variation of a lease by a party to the lease and Section 37 - Variation of a lease by a majority

Tribunal Member(s) : Judge D. R. Whitney
Judge R. Cohen
Mr N. I. Robinson FRICS

Date and venue of Hearing : 21st January 2019 and 13th May 2019 The Courthouse, Margate

Date of Determination : 27th June 2019

DECISION

Background

1. The Applicant seeks to vary the residential flat leases at St Mildreds Court, Westgate-on-Sea, Kent (“the Property”) under Section 37 of the Landlord & Tenant Act 1987 (“the 1987 Act”) or in the alternative under Section 35 of the 1987 Act.
2. The variation sought by the Applicant relates to the calculation of the service charge provisions. The Applicant is a company whose members are the leaseholders. The company has different share classes as not all members contributed towards the costs of the purchase of the freehold.
3. The Applicant contends that the leases as drawn are defective. It seeks a variation so that each flat at the Property will contribute equally to the service charge. A copy of the relevant service charge provisions by way of example being the service charge provisions from the lease of Flat 2 are annexed hereto marked “A”. These provisions are clauses 3 (13) of the lease.
4. Mr Simon (the owner of the leasehold interest in Flat 1 at the Property) objects to the variation on various grounds as set out within his statements.
5. Mr Simon also seeks an order for the limitation of the landlord’s costs in the proceedings under Section 20C of the Landlord and Tenant Act 1985.
6. Directions were issued on the 9th October 2018. A bundle of documents was supplied to the tribunal containing each party’s statements, a sample lease (being the lease of Flat 2) and other documents each party invited the tribunal to take account of.
7. The tribunal heard submissions from counsel for the Applicant and Mr Simon as to their respective cases for and against variation. During the course of the first days hearing it became apparent that additional documents would be required by the tribunal.
8. In consultation with the parties, further directions were made. These necessitated further bundles being supplied to the tribunal in advance of the second day of the hearing. References in [] are to pages within the hearing bundles.
9. The differences between the Applicant and the Respondent have given rise to proceedings both in the County Court and also in the First-tier Tribunal. In 2013, the Applicant applied under Section 35 to vary the leases to deal with the service charge issue which is the subject of this decision. That application was granted by the First-tier Tribunal. Mr Simon’s appeal against that determination to the Upper Tribunal was allowed; see [2015] UKUT 0508(LC). The issue for the Upper Tribunal concerned the process followed by the Applicant rather than the substantive merits (or otherwise) of the variation requested.

10. This decision will address the substance of what, if anything, can be done to deal with the issue identified.

THE LAW

11. The relevant law is set out in sections 35 and 37 of the Landlord and Tenant Act 1987 (“the Act”) copies of which are annexed hereto marked “B”.

HEARING

12. The below sets out a synopsis of the matters raised by the parties and evidence given. It is not a verbatim record of everything that took place over the two days of evidence and submissions heard by the tribunal. On both days the Applicant was represented by Mr Bowker of counsel. Various leaseholders and directors also attended. Mr Simon ably acted in person in presenting his case.
13. Mr Bowker submitted to the tribunal that the Applicant sought to vary the lease relying upon section 37 of the Act. He submitted that more than 75% of the interested parties had consented to the variation sought and only Mr Simon objected. In the alternative he relied upon section 35 of the Act.
14. He contended that the leases required the service charge proportions to be calculated by reference to the Rateable Values of the flats. It was common ground between Mr Bowker and Mr Simon that no one had details of the rateable values for all of the flats. As a result the mechanism for demanding service charges was unworkable in Mr Bowker’s submissions and so the leases needed to be varied.
15. The Applicant sought a variation so that all the flats contributed equally to the service charges.
16. Mr Bowker referred the tribunal to the Land Registry entries for the freehold title [84-9], the decision of the Upper Tribunal (Lands Chamber) decision [147-157] which recorded at paragraph 1 [149] that the subject premises, St Mildreds Court, Beach Road, Westgate-on-Sea, Kent (“St Mildreds”) was a block of flats containing 29 flats. He was instructed that the variation sought was that each flat would pay 1/29th of the service charge expenses.
17. A large part of the first day was spent endeavouring to determine the exact structure and number of flats who contributed to the Applicant in respect of service charges. On the first day of the hearing the tribunal did not have copies of all leases and it was far from clear. The further directions were given requiring the Applicant to clarify this position.
18. Mr Bowker took the tribunal through the letters of consent upon which he relied [50-76]. Only Mr Simon had objected to the proposed variations. Mr Bowker explained that the member of staff who sent out the letters requesting consent was no longer in the employment of the managing agent and so there was no witness statement from him. Instead they relied upon the witness statement of Richard Davidoff, director of Aldermartin Baines & Cuthbert [77&78]. Mr Bowker referred to the previous tribunal decision [163-176]. Further he stated

that he was not aware of any case law or statute in respect of the requirements for consent in relation to an application under section 37 of the Act. In his submission the tribunal should determine whether or not it is satisfied that there is consent on the balance of probabilities.

19. Mr Bowker confirmed that none of the mortgagees of any of the flats had been contacted by his client. He relied upon Chapter 33 of Tanfield Chambers on Service Charges and Management [128-146]. He confirmed that whilst he was a member of Tanfield Chambers he was not the author of this Chapter. In his submission there was no need for mortgagees to be placed on notice or to be asked whether or not they consent to the variation sought.
20. Mr Bowker relied on the decision in Brickfield Properties v. Botten [2013] UKUT 0133 (LC). He stated he was seeking for the variation to be back dated until the date of commencement of the term of the leases.
21. Mr Bowker accepted that Mr Simon could seek compensation if a variation was ordered. It would however be for Mr Simon to show prejudice.
22. Turning to section 35 of the Act Mr Bowker submitted that if we did not accept his application under section 37 of the Act the tribunal had powers to vary the lease under this section. He submitted that the lease does not make satisfactory provision for the recovery of service charges. He submitted that the test is both objective and subjective.
23. Mr Bowker invited the tribunal to make the variation on the terms as set out in the bundle [127]. He submitted that 27 parties had positively consented to the proposal. The issue had been raised at AGMs of the Applicant company and in his submission the less that is changed under the lease the better and the proposed amendment achieved this.
24. Mr Simon was not satisfied that all the leases were in an identical form. He submitted the Applicant had not shown this, it was not for him to obtain copies of all the leases and review the same but for the Applicant to do this if that was their case.
25. Further Mr Simon contended that the Applicant was estopped from seeking to vary the leases in the way it proposed given it would seem that certain leases had been extended without the terms relating to service charges having been varied. It was his submission that given the Applicant contended that the provisions relating to recovery of service charges were defective it should not have extended leases on the same terms without remedying the defect.
26. Mr Simon referred to the fact that Flat 28 appears to have two leases. He believes that this is due to the fact that Flat 28 was extended into what were originally part of the common areas.
27. Mr Simon confirmed he has no mortgage on his flat. He submitted that the mortgage lenders of flats should be made aware as mortgage lenders may not agree the variation given it proposes to change the recovery of service charges from a proportion of the rateable value relating to each flat compared with the

total for the building to an equal amount for each flat. He contended that leaseholders did not understand the implications. The original draftsman of the leases could have divided the service charges equally but choose a different method.

28. Mr Simon disputed that the consents were valid and relied upon his statement of case [107-124]. He relied on various discrepancies he had identified by way of example [113]. He submitted it is for the Applicant to obtain the correct consents and they should do this prior to the bringing of the application. It is not something they can resolve after the application was issued and the Applicants should have been well aware of his concerns as these are identical to those he expressed as part of the earlier, previous proceedings. He submitted it is not for him to tell the Applicants how to put their house in order.
29. Mr Simon suggested that no alternative solutions were presented to the leaseholders. In his submission if they were and people were giving proper informed consent then there may be a variation in the views expressed by leaseholders.
30. Mr Simon referred to the letter sent by the managing agents inviting consent to the proposed variation [80]. The letter made no mention of the variation being back dated to the commencement of the lease term.
31. In his submission it is not appropriate to back date any variation. Mr Simon referred to the fact there had been many intervening events including court judgements and so it would not be practical to unravel matters if the tribunal was minded to vary the leases and back date the same.
32. Further in his submission the Applicant has not been demanding service charges properly or in accordance with the lease and hence he has not paid for some years. In any event he had not received any demands for some time and was not aware as to his supposed arrears until he received the statement within the bundle [180].
33. As to the question of equal payment, in his submission not every lessee received equal benefits. Further he was still not sure as to how many flats are required to contribute towards the service charges. In his submission it was vital to understand how many flats are required to contribute towards the service charges. It is not for him to search this out but for the Applicant to make this plain within their application. He would suggest they had failed to do so.
34. The first day's hearing concluded at this point with the further directions being made [1546-1549].
35. Between the two hearing dates the parties complied with the direction and further bundles adding pages 181-1608 were added. The majority of the pages comprised copies of a number of leases of the flats within the Property and Land Registry entries. Mr Simon also made an application that the proceedings were res judicata given the previous tribunal application.

36. The Applicants had filed a further statement of case [1553-1584] explaining the leasehold structure and a hand written diagram of the same prepared by Mr Bowker [1552].
37. Mr Simon confirmed he invited the tribunal to determine that the application was res judicata on the basis that it was fundamentally the same as the previous application which had been unsuccessful following an appeal. He invited the tribunal to dismiss the application on this basis.
38. Mr Bowker then explained the structure to the tribunal. What was previously known as flat 21 was now known as St Mildred's Mews ("Mews"). Out of this 5 underleases had been granted, although only 4 were registered against the leasehold title. The original lease to flat 21 had been varied [232-234] which required Flat 21 to contribute 1/15th of the cost of insuring the Property, including Mews. Mr Bowker advised the tribunal that as a matter of fact no contribution is sought from Mews. He suggested there was no need to vary this lease.
39. Mr Bowker then took the tribunal through the various Land Registry entries for Flat 23 which was an underlease granted out of the title of Flat 29. Mr Bowker suggested that both Flat 23 and Flat 29 should be treated as individual flats.
40. In respect of Flat 28 there were two leases. The two leases together comprise Flat 28.
41. Mr Bowker next turned to the question of consents. He referred to his additional statement of case [1559]. Shortly before the application was made to the tribunal, a Mr Tim Randall was registered as proprietor of flat 5. A consent was provided on behalf of the previous owner Mr Clark. The consent had been signed by his son as his personal representative. The Applicants accepted that the consent should have been given by Mr Randall who by the date of application was the owner of the leasehold interest in flat 5. The Applicants had written to Mr Randall telling him of the application and inviting his consent but no response had been received and so for the purposes of this application Mr Bowker accepted the tribunal treat this as a "no" vote.
42. It was explained that the then registered proprietor of Flat 25 had consented. Since the application had been made, the ownership of the leasehold interest had been transferred.
43. Flats 26 and 30 had not replied to the letter inviting their consent to the application. Mr Bowker explained no reply had been received from the head leaseholder of Mews but in his submission they were not included.
44. The head leaseholder of Flat 22 had not replied but the under leaseholder had indicated they consented to the variation.
45. In Mr Bowker's submission he had sufficient consents to exceed the statutory test and the numbers of leaseholders objecting were not such as to lead to the rejection of the application.

46. Mr Bowker then set out his alternative case that a variation may be made by the tribunal under section 35 of the Act.
47. He suggested that any party to the leasehold structure could make application. He suggested here it was not possible to make an accurate calculation of the service charge provisions as it was not possible to readily ascertain the rateable values attributable to all the flats in the building. He suggested the tribunal has a high degree of discretion.
48. He submitted that there are various ways of calculating service charges and no one method is prescribed. He suggested there is nothing fundamentally unfair in splitting the service charge equally. In his submission the consents received are also of relevance under section 35 as being a factor the tribunal should weigh in making its determination.
49. The tribunal referred the parties to the recent decision in the case of Triplerose Limited v. Stride [2019] UKUT 99 (LC). The tribunal provided copies to the parties. At this point the tribunal adjourned for lunch and to allow Mr Simon an opportunity to review the decision.
50. After the adjournment Mr Bowker confirmed that he was instructed nothing at all was charged to Mews. He confirmed that currently 29 demands for service charge are sent out to Flats 1-30 excluding Number 27 (it is common ground that there is no Flat 27) each on a 1/29th basis.
51. Mr Bowker submitted that he could and did rely upon section 35 (2) (e) and (f) of the Act. Currently given 2 rateable values cannot be ascertained, Mr Simon refuses to pay as he says the service charge is not calculated in accordance with the lease and this leads to a shortfall. In his submission the method of computation cannot stand the test of time. He confirmed both flats 23 and 29 receive a demand. He does not know to whom the demand for flat 22 is sent but only one demand is issued. Mews is not billed and he does not know why but the insurance cover taken out covers the whole building including Mews.
52. Mr Simon now presented his case and referred to his reply [1585]. The tribunal confirmed that they had read and understood this was in addition to the submissions he made at the first hearing.
53. Mr Simon suggested that the application should be dismissed. It was still not clear which flats and which leases contribute and there is a conflict as to who actually does and who should pay. He suggested the application was not sufficiently clear to make the calculation as to who contributes what.
54. Further what is the Building within the leases? Does this include Mews? He further submitted that there is no mention of the houses which originally formed part of the scheme but which are now each owned under individual freehold titles. He said that, as a result, there remains uncertainty and the application must fail.
55. Mr Simon suggested it was unclear what checks have been undertaken on all of the leases. He submits it is not for him to go through each and every lease to

point out areas in which they differ from one another but this is for the Applicant to do in making its application to satisfy the tribunal.

56. Further he suggested in respect of Flat 22 and Flat 23 there are sub leases. Each of the owners of these leases should pay service charges to their immediate landlord and who then will have to pay the Applicant.
57. In respect of Mews he suggested it was unacceptable that Mews did not pay towards insurance and reimburse the part of the cost it should pay under its lease. Further he suggested the Applicants should have fully addressed this point.
58. Mr Simon suggested it was still unclear as to the number of bedrooms in each flat.
59. Mr Simon suggested it is too late now for the Applicants to rely on section 35 (2) (e). This was not their original case. The statute should not interfere to change contracts freely entered into by parties. He did not believe that currently there is a problem. He accepted that currently he pays nothing on the basis that the service charge provisions within his lease are not adhered to. He suggested that others will choose to make payments to maintain the Property and this is their prerogative. In his opinion the Application is still unclear and should be dismissed and the Applicant should start again.
60. In closing Mr Bowker invited the tribunal to grant the proposed deed of variation [127]. He suggested the use of the word "Flats" in the proposed deed depends upon the number of flats that actually exist from time to time. He suggests the tribunal do not need to determine the number of flats. He discouraged the tribunal from making any such finding. He accepted under section 37 of the Act the tribunal did not have power to re-draft the variation proposed.
61. He submitted that as a matter of fact there are 29 flats of which 26 had positively consented. In respect of Mews he suggested they are not a party but if they should be there is no return from them. In respect of Flat 22 the under leaseholder consented and there was no return from the head leaseholder. In respect of flat 28, whilst there are two leases, there is only one vote. He suggested even if include all possible parties including Mews and the Applicant this gives a maximum number of 32 parties.
62. Mr Bowker suggested in the alternative as pleaded he could rely upon section 35 of the Act. He suggests section 35 (2) (e) can be considered in the facts of this case. Mr Simon accepts there are missing rateable values as did the previous tribunal and Upper Tribunal. Currently it is only Mr Simon who refuses to contribute. Further he suggested that as the tribunal is an inquisitorial tribunal the tribunal could and should consider all facts which are put before it at the hearing to make its determination. This is consistent with the tribunal's overriding objective.
63. The tribunal gave Mr Simon an opportunity at the end of the hearing to make any final points.

64. Mr Simon suggested he does not like the idea of leaving the number of Flats open. He believes this point must be resolved. Further he suggested the position relating to sub-leases is far from clear given contractually they have no requirement to pay the Applicant directly. As to the date of any variation if the tribunal was minded to vary the leases he says this should not be from any point prior to the date of determination.

DETERMINATION

65. The tribunal wishes to express its thanks to counsel and Mr Simon for their helpful presentation of their respective cases. In making its determination the tribunal has had regard to all of the various documents submitted including the bundles and skeleton arguments as well as the various oral submissions made over the two days of the hearing.

66. The tribunal deals firstly with Mr Simon's submission that the application is res judicata. The tribunal rejects this submission.

67. The tribunal notes that such submission is at odds with other submissions made by Mr Simon when he accepts that the Applicant can make further applications to vary the leases. Whilst a previous application had been made essentially seeking to vary the leases in a similar way this was rejected on the basis that section 37 of the Act had not been properly complied with. This is a fresh application which relies on a completely new set of consents and proposed variation. This tribunal accepts simply because an earlier application has failed does not prevent an Applicant applying again. The Application should, and in this tribunal's opinion must, rely on fresh consents but this is what has happened. The Applicant contends the fundamental issue with the leases still exists and must be resolved.

68. The tribunal was concerned over the structure that exists at the Property. It is clear that the title structure is far from straightforward. Various leases appear to have originally granted and then sub-leases. The original leases all appear to have a similar form which calculates service charge by reference to rateable values. All parties accept that certain rateable values are missing and so it is not possible to determine the service charge accurately.

69. The tribunal finds as a fact that the service charge mechanism prescribed in each lease cannot be utilised successfully today. Mr Simon appears to accept this but objects to Parliament passing statutes which interfere with the freely entered into contractual position. He suggests the tribunal should be slow to interfere.

70. The tribunal does have powers under the Act to vary leases. The Act is there to resolve problems with residential leases and to give business efficacy to the terms of the leases and the benefit of the relevant leasehold scheme as a whole.

71. The tribunal thought that the original presentation of the application was unfortunate, lacking the documentary and evidential background which was

addressed by compliance with our further directions. As Mr Simon stated the Applicant was well aware of his position. His arguments are in the main similar to those made in the previous application.

72. At the first day of the hearing the whole structure was unclear. Even after the presentation of nearly a further 1500 pages of documents and counsel's explanation, not everything was clear.
73. The variation sought seeks to refer to "Flats". It is critical to understand exactly how many flats exist and how many flats contractually are obliged to contribute towards the service charge. Many questions on this arose. Not all could be answered satisfactorily such as to why Mews did not contribute towards building insurance despite contractually being required to do so and having the benefit of such insurance.
74. Whilst Mr Bowker invited the tribunal to not determine what are flats the tribunal feels compelled to do so. The tribunal records that in its opinion flats 1-20 inclusive are flats required to contribute towards the service charge. Likewise so are Flats 24, 25, 26 and 30 so required. The flat known as Flat 21 is required to contribute but the area originally called Flat 21 and now known as Mews is not required to contribute towards service charges but is required to contribute towards insurance of the Property (including Mews) by way of paying 1/15th of the cost.
75. As an aside no explanation was given as to why no demands are sent to Mews. Clearly under the leases as presented to the tribunal they should contribute towards insurance. This seems fair and equitable given the Mews and its underlessees benefit from the insurance taken out for the building as a whole.
76. In respect of Flat 22 we find it is the head leasehold interest which is required to contribute towards the services and is owned by Robert George Cole [1136-1138]. The underlease, now owned by Mr Castaldi and Ms Reynolds [1139-1141], pay service charge to Mr Cole and not to the Applicant. Here after references to payment of service charge to the Applicant are to payments made by Mr Cole.
77. Flat 28 consists of two leasehold titles. Both leasehold interests are in the same ownership. This tribunal determines that these two leases together constitute one flat known as Flat 28.
78. All parties accept there is no Flat number 27. This then leaves Flats 23 and Flat 29. The lease of Flat 29 is owned by Brenda Joyce Addison [1465-1468]. Out of this lease has been granted the lease of what is known as Flat 23 which is now owned by Michael Wayne Selman [1222-1265]. The tribunal finds that it is the lease of Flat 29 owned by Ms Addison which is required to contribute service charges to the Applicant. Flat 23 may be required to make contributions to the owner of Flat 29.
79. What follows is that the tribunal finds that there are 28 Flats which contribute towards service charges. All of these 28 Flats contribute towards insurance save that Mews also should contribute 1/15th of the cost.

80. This tribunal is satisfied on the basis of the evidence put to it that the service charge provisions within all of the leases required to contribute to the Applicant (save Mews) are in effectively similar terms as set out in Annex "A". Both parties accepted that not all of the rateable values are known. Both parties in different ways accepted that the service charge mechanism was defective. For the Applicants it was that without evidence of the rateable values they could not calculate in accordance with the leases. Mr Simon for his part appeared to accept this and said this was why he did not make payment.
81. Turning now to the substantive applications. The tribunal is invited to vary the lease in accordance with the draft [127]. It was accepted by Mr Bowker that under section 37 we have no power to amend substantively this draft which is the proposal for which consents were given.
82. Mr Bowker invited the tribunal to accept the draft and said the use of the word "Flat" within the variation would be sufficiently clear to allow an equal apportionment of the service charge. Further Mr Bowker suggested even with the concessions he makes over consents he still has more than the statutory required numbers. He states that there is no real guidance as to what "consent" means and he suggests that the forms provided within the bundle [48-75] are adequate to satisfy the statutory test.
83. Mr Simon suggests the proposal is unreasonable. He submits that the original draftsman clearly contemplated flats making payments in unequal contributions, no doubt to reflect the size and value of the flats hence the reference to bedroom numbers and rateable values. In his submission the suggested draft is too simplistic. Further he challenges it on the basis it is unclear which flats will and should contribute. Finally as to the question of consents he raises various arguments similar to those he raised in the earlier proceedings that the consents are invalid and do not amount to informed consent.
84. This tribunal does not accept that it can make the variation proposed under section 37 of the Act. We agree with Mr Simon that the variation proposed is not sufficiently clear. As we have determined above the structure is such that not all of the physical flats contribute directly to the Applicant. Further Mews should also be contributing to the insurance. Without any variation clearly defining these matters it is only likely to lead to further litigation between the various parties.
85. We comment on the question of consents for completeness. We prefer the arguments of Mr Bowker. The Act does not require any prescriptive process. This tribunal is satisfied that the consents given amount to informed consent. We do not believe there is any need for the Applicant to have spelt out every single option. The option spelt out is viewed by the Applicant to be a straightforward method of apportionment i.e. equally. Leaseholders themselves should be aware of the terms of their lease and each and every one of them could have taken advice. Whilst it is unfortunate that the Applicant did not take greater care over the consents we are satisfied that the signatories to each were entitled to give consent. Simply because there are joint owners does

not in this tribunal's opinion prevent one of the joint owners giving consent and that being binding on all. Mr Simon has produced no evidence that any one subsequently objected, his points are technical ones. The Act prescribes no strict rules and on a balance of probabilities we are satisfied that the consents as relied upon by Mr Bowker were given and are valid for the purposes of section 37 of the Act.

86. Mr Simon also took issue with the fact that the mortgagees had not been served with the application. Between the two days of the hearing the Applicant did give notice of the application to all mortgagees. Each was given an opportunity under the directions to seek to be joined. None did. Whilst this tribunal does not accept that there is any strict requirement to notify mortgage lenders, they were all notified prior to the second day of the hearing and given an opportunity to take part.
87. Mr Simon also sought to raise an estoppel point. He suggests that since the Applicant has granted lease extensions at a time when it was aware of the issue relating to the service charge mechanism on similar terms to the original leases it cannot now say they are unworkable. This tribunal does not accept that argument. Whilst it agrees the Applicant could have then amended those leases it did not do so. This tribunal accepts that the Applicant (and potentially any party to these leases) could make applications to vary the leases where it was able to show that the mechanism was defective. The extension of the leases by the Applicants at a time when it knew the original leases were defective does not give rise to an estoppel.
88. Further Mr Simon suggests that the tribunal should be slow to interfere in the leases. He stated that he opposes legislation such as the Act which interferes with a party's freedom to contract. This may be his position but the Act is law. This tribunal suggests it contains appropriate checks and balances. A mechanism which would have worked when the leases were first drafted no longer works due to rateable values no longer applying to residential properties and no one party was able to ascertain what the last rateable values for all the properties were.
89. In this application the Applicant expressly sought to rely upon section 35 of the Act; in particular on section 35 (2) (f). This is in contrast to the previous application. This section provides that any party may make application to vary the lease on the basis that the lease "fails to make satisfactory provision" for the computation of a service charge payable under each lease.
90. In the case of Triplerose, see paragraph 49 above, the Upper Tribunal said at paragraph 40

"The fact that the proposed variations are common or standard does not make the original terms unsatisfactory. Equally the fact that different tenants make different contributions does not make the lease unsatisfactory... we accept that there might be circumstances where the lack of adequate contributions from (the Lessee) could render the lease unsatisfactory. However, that can only be established by evidence."

As to the evidence, Mr Bowker submitted, and the tribunal accepts, that each case turns on its own facts. Mr Bowker pointed to two principal matters in support of his case that the service charge provisions in the leases are not satisfactory. First, they provide for a method of computation that has not stood the test of time, namely the use of rateable values which are not available for 3 flats. Secondly, the absence of these rateable values has been used by Mr Simon as a basis for refusing to pay his service charges.

91. This section is drawn in broad terms. This tribunal is satisfied having heard two days of evidence and submissions and having considered the hearing bundle that there is not satisfactory provision for the computation of service charges. Both the Applicant and Mr Simon accept that not all rateable values are known and so it is not possible to calculate the service charge in accordance with the clauses within the lease relating to apportionment being clause 3(13).
92. The tribunal is satisfied that it should look to vary the leases pursuant to its powers under section 38 of the Act. The majority of leaseholders plainly support some change as evidenced by their consent to the application made under section 37 of the Act. The only person who positively resisted the application was Mr Simon who agrees that the current regime does not work and hence he has not made any payments for some considerable period of time.
93. Mr Bowker invited the tribunal to backdate any variation until the commencement of the leases. We do not accept in this instance that such back dating would be reasonable or satisfactory. As Mr Simon referred to previous court cases and the like may need unravelling and on the facts of this instance case the variation should in this tribunals view apply from the date of this determination.
94. Turning now to the variation the relevant terms of the lease are those contained within clause 3(13) of the original leases as granted [23]. This tribunal accepts Mr Simon's submission that it is not appropriate to vary clause 3(13) (b) and to leave clause 3(13) (a) if the service charge is to be recovered on an equal basis. The tribunal does accept that there is no method for collecting service charges set down by law. Whilst the original draftsman may have envisaged an unequal division between the contributing flats this does not mean that is the only method. The tribunal accepts that a broad brush approach may be applied and that the service charge may be split equally by those contributing. The greater majority of leaseholders accepted this was reasonable for the purposes of the application under section 37 of the Act. This tribunal agrees that this is in this instance, having heard all the submissions, a reasonable way to proceed.
95. Whilst Mr Simon was asked at the hearing to identify any prejudice nothing he said indicated to the tribunal that he would suffer any prejudice. He has always been aware that there would be an expectation he would contribute towards service charge expenditure and in fact as we understood for many years had so contributed. He has relied upon the fact that rateable values could not be ascertained to not make payment for some years, as was his right.

96. The above being said it is appropriate that all leaseholders are afforded the opportunity to make submissions as to whether they are entitled to compensation under section 38 of the Act if the leases are to be varied.
97. The tribunal determines that it should vary the leases of the Flats of which the Applicant is the Immediate Landlord. For the avoidance of doubt the leases to be varied are: 1-20 inclusive, Flat 21, the head lease of flat 22, 24, 25, 26, 28, 29 and 30. The lease of Mews is not varied but the Applicant is reminded that the owner of this lease should be contributing 1/15 of the cost of insuring the Property.
98. The tribunal determines that each of the flats as set out in paragraph 97 above and totalling 28 flats shall each contribute equally to all service charge items as contained within clause 5(5) of the lease save for insurance as provided within clause 5(5)(c) of the lease. This means each flat shall pay 1/28th towards such costs. In respect of the costs of providing insurance the 28 flats will pay an equal share of 14/15ths of the costs, the balance being recoverable from the headleaseholder of Mews.
99. The lease will be varied to provide that the landlord from time to time acting reasonably will produce an annual budget for the year commencing on 25th December and that each of the Flats will contribute by way of two equal payments in advance payable on the 25th December and 24th June in each year. The landlord will as soon as reasonably practicable after the year end prepare service charge accounts and upon service of these upon each Flat owner any shortfall shall be paid within 21 days and any surplus shall be applied to the following year's service charges.
100. Upon final order being made as to the variation the Applicant will as soon as reasonably practicable and in any event within 28 days lodge a copy of the order at the Land Registry so that all relevant titles are noted.
101. **The Applicants shall within 28 days supply to the tribunal and send to all the leaseholders identified in the original application a draft order reflecting the above variation for approval by the tribunal.**
102. A copy of this decision will be sent to all leaseholders listed in the application [12a&12b]. **Any leaseholder who wishes to make representations as to any prejudice they would suffer and their right to compensation, including whether they wish to be heard at an oral hearing will do so by sending the same to the tribunal and the Applicant by 1st August 2019.** If no representations are made the tribunal will confirm that the order is made, in the alternative it will issue further directions.
103. Finally Mr Simon seeks an Order limiting the Applicants right to recover its costs as a service charge item pursuant to section 20C. The tribunal has carefully weighed up the various arguments advanced. Whilst it may be said that the Applicant was not completely successful, success is only one factor for

a tribunal to consider in whether or not to exercise its discretion in making an order. This tribunal takes the view that it was plain the Applicant had no choice but to make an application as agreement could not be reached with 100% of its members and the current mechanism for computing service charges cannot be properly ascertained. We are satisfied that the application was a reasonable one and weighing up the various factors decline to make an order pursuant to section 20C.

Judge D. R. Whitney

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking

