

9534



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

Case Reference : **CAM/11UB/LVT/2013/0001**

Property : **Ripon House and Winchester House,
Bishops Walk, Aylesbury,
Bucks, HP21 7LD**

Applicant : **Kingley Properties Limited**

**Represented by Mr. D. Moore
(Rodgers & Burton Solicitors)**

Respondent : **Ripon House**

(1) **Ann-Marie, Courtney,
& Naomi Broome**

(2) **Jessica Michael**

(3) **Sarah Pollock-Dines**

(4) **Christopher Rollison &
Samantha Dorrell**

(5) **Timothy Rickhard**

(6) **Christopher Grinyer**

(7) **Roger & Tracy George**

(8) **Amjad Mahmood**

(9) **Norah Moyo**

(10) **Martin & Tracey Irving**

(11) **Katie Harrison**

(12) **Mr. D. Ridgway**

Winchester House

(1) **Roger Picot**

(2) **Anthony & Helen Ready**

(3) **David & Catherine Gordon**

(4) **Mr. R. Billyard**

(5) **Berton Sutton**

(6) **Tracey & Deborah Edmunds**

(7) **Leslie & Winifred James**

(8) **Kingley Properties Limited**

(9) **Katie Granger**

(10) **Daphne Williams**

(11) **Russell Talmer**

(12) **Barry Castele**

(13) **Paul Sissons & Jane Gillett**

(14) **Edward Humphrey**

(15) **Kingley Properties Limited**

(16) **Gary Billingham**

Date of Application : **25th March 2013**

Type of Application : **Section 35 of the Landlord and Tenant Act 1987 for variations of the leases of the flats in the premises (“the 1987 Act”)**

Tribunal : **Judge J. Oxlade
J. Sims
M. Krisko BSc (EST MAN) FRICS**

Date and venue of Hearing : **11th September 2013
Holiday Inn Garden Court, Aylesbury**

AMENDED DECISION

Issued pursuant to regulation 50 of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013

Pursuant to section 35 of the 1987 Act the Tribunal:

- (i) varies the leases of flats 1-12 Ripon House and 1-16 Winchester House by substituting the wording of the leases at paragraphs 1 of the recital and paragraph 1 of the Second Schedule, for the wording contained within page 7 of the amended statement of case re-dated 16 May 2013, set out in Appendix B of the Reasons, and
- (ii) directs that the Applicant do notify the Land Registry, in order to annex the decision to the freehold and leasehold titles.

REASONS

Background

1. In the 1970's a development consisting of three blocks of flats - Ripon House, Winchester House, and Lichfield House – took place, providing a total of 39 flats (respectively 11, 12, and 16 flats).

¹ The Decision recorded in this document was made by the First-tier Tribunal (Property Chamber) rather than the leasehold valuation tribunal, to whom the application had been made, because by virtue of The Transfer of Tribunals Function Order (2013 No1036) ('the Transfer Order') the functions of leasehold valuation tribunals were, on 1st July 2013, transferred to the First-tier Tribunal (Property Chamber). In this decision the expression 'the Tribunal' means the First-tier Tribunal (Property Chamber).

2. The leases of each flat contained similar covenants, including the requirement that each flat contribute by way of service charges to the costs of maintaining the three blocks of flats and a private road serving the three blocks, and which service charges the lessor was entitled to demand.

3. In 2010 the lessees of Lichfield House created a company called Lichfield House Limited (“the company”), and claimed the right to collectively enfranchise their leases. The principle of enfranchisement was not opposed, but the parties could not settle the terms of acquisition.

4. In a decision dated 20th May 2011 the Tribunal set the premium, assessed statutory costs, and held that land referred to as “the blue land” should be transferred to the company. Further, that the transfer should make adequate provision for the company to have a right of way across part of the private access (“the yellow land”). The company did not need access across all of the private road, but only that which enabled it to travel from Wendover Road to the main entrance of Lichfield House. Accordingly, the right of way does not include the service road running outside Ripon House.

5. The parties could not settle the terms of transfer, nor the plan to be attached to the transfer, and so the application was returned to the Tribunal for determination on those points. By the date of the hearing on 14th May 2012 the issue had narrowed considerably. The Tribunal issued a decision dated 6th June 2012 which provided that the company should have a right of way across the yellow land and contribute to the costs of keeping it in repair. The Tribunal approved a form of transfer (TP/1) which included the following term at 12(c) “subject to the transferee paying a proper proportion of the costs of keeping the said area shaded yellow in repair, such cost and proportion to be determined by an independent surveyor ...”.

6. On 22nd January 2013 the acquisition of the freehold by the company was completed, although the transfer has not yet been registered at the land registry because of practical problems concerning a charge.

Current Application

7. The freeholder’s position is that although it is no longer obliged to maintain Lichfield House, it continues to be liable to maintain Ripon House and Winchester House. However, because of the way that the leases are drafted, it can not recover 100% of the service charges expended. This is because each of the remaining lessees is obliged only to contribute a proportionate part of costs expended, where the proportionate part is assessed by reference to the rateable value of all three blocks of flats.

8. Accordingly, the Applicant freeholder now applies to vary the leases, so that the lessees of the remaining flats in Ripon House and Winchester House collectively contribute 100% of the costs of maintaining those blocks. This is achieved though a simple amendment to the leases, which defines “the buildings” as including only Ripon House and Winchester House (and not Lichfield House).

9. On 25th March 2013 an application was issued, and all of the lessees of Ripon House and Winchester House were Respondents to the application. On 12th April 2013 Directions were made for the filing of evidence.

10. The application was listed for hearing on the papers, until Mr. George, lessee of flat 7 Ripon House wrote to the Tribunal on 19th June 2013. He wrote to outline his objections to the application to vary, on the following grounds:

- (i) he was concerned that the costs of the maintenance and repair of the private road should be shared between all three blocks, and should continue to be split in accordance with the terms of the existing leases,
- (ii) Winchester House was in the worst condition, and so the shouldering of responsibility for it would be disproportionately higher if the costs were split between just Ripon House and Winchester House,
- (iii) the blocks had not been managed well for very many years and there were major arrears owed to the freeholder from some of the flats in Lichfield House; he considered that it was correct only to vary when the outstanding service charges were paid.

11. He then requested an oral hearing, so that he could advance these points in person.

Hearing and Inspection

Inspection

12. The application was listed for hearing on 11th September 2013, prior to which an inspection took place in the presence of Mr. Moore (representing the Applicant), Mr. George and Mr. Picot, respectively of flats 7 Ripon House and 1 Winchester House.

13. Mr. George asked that the Tribunal note:

- the general condition of Winchester House, in comparison to Ripon House, and particularly the boarded up windows on the ground floor of 8 Winchester House,
- there was a wooden external fire escape serving the top floor of each building,
- there was a line of conifer trees along the Wendover Road, some 30 feet from Winchester House and higher than the building, as well as evidence of removal of other trees from tree stumps,
- the evidence of recent repairs to that part of the service road for vehicles leaving or entering Wendover Road.

Hearing

14. At the hearing of the application, two additional Respondents attended: Mr. Sutton (flat 5 Winchester) and Mr. Mahmood (8 Ripon House) who was assisted by a friend. Mr. Ejaz.

15. At the commencement of the hearing for the benefit of the Respondents the Tribunal fully set out the background of the case as set out above.

16. Mr. Moore was invited to set out the reasons for the application.

The Applicant's Case

17. The Applicant's case was that since completion of the sale of the freehold of Lichfield House and because of the way the leases were drafted, the Applicant freeholder has not been able to recover 100% of the costs spent on Ripon and Winchester Houses. This was because the calculation of liability for service charges depended on the aggregate of the rateable value of all of the 39 flats of the three buildings, but since the completion of the sale of Lichfield House, could recover only 28/39^{ths} of costs and could not recover 11/39^{ths} of costs. Whilst there was no longer an obligation to maintain Lichfield House, this did not solve the problem. Accordingly, to enable the freeholder to recover all costs, the leases needed to be varied. The simplest way to do so was to alter the definition of "buildings" from the three blocks to read Lichfield and Ripon Houses, as Ms. Krisko had commented at the previous hearing.

18. Mr. Moore said that the statutory threshold was established, and so it was a question of the Tribunals' discretion. The question is whether the variation "would be likely substantially to prejudice any lessee".

19. He anticipated Mr. George's argument and conceded that whilst Winchester House may not be in a good state of repair – indeed was rather tatty, including flat 8, which was unsightly - Lichfield House was also not in a good state of repair, which had affected the Tribunal's assessment of value and so the premium payable. Further, there was no expert evidence as to the comparative states of repairs and cost of repairs to the three blocks, and so insufficient evidence to establish a risk of prejudice.

20. He referred to repairs done to the roof of Winchester House in the past six months/ year: whilst the section 20 consultation procedure had been followed, the contractor did not finish the job, and other contractors had come in to do the job. However this was unfinished business as Aylesbury Vale D.C. had required further works to the parapet. He understood that Lichfield House had its own plans for works to its roof.

21. He addressed the question of costs of the maintenance and repair of the private road, and said that it was just the way that it panned out that Lichfield did not have a right of way outside Ripon House and made no contribution to the costs of the length of road.

22. As for the suggestion of unpaid service charges by lessees in Lichfield House, this was not accurate: there were some who had underpaid and some who had overpaid; at the date of transfer the deficit of £200 was made up. He personally oversaw this part of the transaction. Therefore, there was no deficit to the service charge fund by Lichfield House default.

The Respondents positions

Mr. George

23. Mr. George was concerned that the freeholder had neglected its responsibilities to maintain all blocks for years. Ripon House had the benefit of an insurance claim, which meant that it was in a better condition than Winchester, which was in a poor state. He referred to considerable problems in the past, and felt that the freeholder's past neglect had exacerbated the problems. He completely understood why Lichfield House had collectively enfranchised, and wished them luck.

24. Last week he had visited LMS, the current managing agent, who gave him a list of the service charges unpaid by flats in Lichfield House, which amounted to over £9,000. He produced a list showing the flats and the sums. Two had overpaid, most had not, because they felt that nothing was done by the freeholder. He understood the point made - that any loss to the freeholder by a failure to collect charges from Lichfield House was a loss to the freeholder and so the freeholder could not recover service charges not paid by Lichfield from the lessees of the Ripon and Winchester – but considered that the knock-on effect would be to further disincline the freeholder to do work. There was no collection for service charges towards a sinking fund.

25. Further, having accepted that the TP/1 required the lessees of Lichfield House to contribute to the costs of maintaining the private road to the extent of the yellow land, this let them out of responsibility for the remainder of the private road leading to Ripon House.

Mr. Sutton

26. Mr. Sutton referred to long-term damp problems within his flat. Though he was on the ground and first floors of Winchester House, he had thought that the long-standing problems with the roof had given rise to this, or had some impact. He had water pouring through the ceiling wiring, and did not accept the suggestion made by Mr. George that this came from poor plumbing in the flat above.

Mr. Mahmood and Mr. Picot

27. Both lessees attended to observe the proceedings, and Mr. Mahmood had thought that there was some prospect of compulsory purchase of the premises. We were able to reassure him that this was not the case, and could not identify where this misunderstanding arose.

The Applicant in reply

28. In reply, Mr. Moore was adamant that the Applicant was not owed funds by lessees of Lichfield, and even were this the case, this would be a debt borne by the freeholder, which would not be passed onto the lessees of flats in Ripon and Winchester. Further, none of the service charges were gathered in as reserves.

29. Mr. Moore understood that the lessees would want reassurance that the variation taking place would not result in the costs of any further roof works falling outside the original specification being passed onto the lessees of Ripon and Winchester, save in the proportions 28/39th. He could not consent to this, and did not accept that the Tribunal had power to make a variation order conditional on this. However, he accepted that this should be noted in the decision, in the event that this became an issue and any section 27A application issued by any lessee who wished the Tribunal to consider the reasonableness and payability of service charges relating to the works to the roof.

30. The Tribunal set out the powers contained in section 24 of the 1987 Act (power to appoint a manager) and the provisions which entitled the lessees to set up and take over management of the building/s.

31. It was noted from the evidence of Mr. Sutton that flat 8 had not been occupied for 15 years. This evidence the Tribunal accepted as reliable, Mr Sutton living next door to the flat, and so being in a good position to say so. The Tribunal noted that the Applicant was the freeholder and lessee of that flat, and that the Local Authority would have powers in respect of it as an empty dwelling.

32. At the end of the hearing the Tribunal reserved its determination.

The Relevant Law

33. The relevant statutory provisions are set out in Appendix A.

Findings

34. The first question for the Tribunal to determine is whether it has power to vary the leases of the flats in Ripon and Winchester Houses, as asked or at all.

35. The basis of the application is that the freeholder could not recover 100% of any service charge spent from the date of variation onwards, and would fall considerably short.

36. The Tribunal finds that the Applicant has established that the leases fail to make satisfactory provision for the computation of service charges payable under the leases. This arises from the following two points: (i) the lease provides that an individual lessee is obliged to contribute in the proportions referable to the size of the rateable value of his flat, as against the aggregate of all three blocks and (ii) on completion of the sale of the freehold to the company the lessees of Lichfield House ceased to be obliged to make a contribution to the

costs of maintaining Ripon and Winchester Houses. Hitherto the respective contributions have been operated by simply dividing by the number of flats in all three buildings (i.e. 39), and this would indeed leave the freeholder short. In the absence of recovering very far short of 100% of costs, the freeholder's ability (and inclination) to do the works would diminish, and the buildings would fall further into disrepair. The Tribunal finds that the threshold condition is made out, and there is no challenge to the proposed wording.

37. The major challenge is on the question of prejudice. The lessees say that the variation would be likely to substantially prejudice some/all remaining lessees, in three discrete respects, and so the Tribunal ought not exercise its discretion. The issues can be summarised as (a) maintenance of the road, (b) loss of outstanding service charges owed by some lessees of Lichfield House, and (c) costs of roof works.

38. The Tribunal accepts that if the proposed variations are granted there is a risk of potential prejudice to the lessees of Ripon House and Winchester House as identified by Mr. George. However, the Tribunal does not find that the variation would be likely substantially to prejudice the lessees for the following reasons.

Maintenance of the Road

39. The terms of the TP/1 mean that the lessees of Lichfield must contribute a proportionate part of the costs of repairing and maintaining access over the yellow land. This goes hand in hand with the right of access over it. It is the most heavily used part of the private land, being access for all blocks from Wendover Road and access used directly to Lichfield and Winchester Houses.

40. The part to which lessees of Lichfield House do not contribute is the road outside Ripon House. This was in reasonable condition on the day of inspection and without any defect drawn to our attention. There are no works planned to that part of the road, and there is no evidence of what costs are forecast. If the variation proceeds in accordance with the application, the costs of works to the road outside Ripon House, would be met by 28 flats, with an equal division, and there would be a loss of 11/39th contribution. Whilst this is a loss, the quid pro quo is that the lessees of Lichfield House have no right of way over it (and so are not diminishing it through usage).

41. Though there are maintenance obligations which will arise, none are in immediate prospect, the costs were not known by the Tribunal, nor the timescale, and so neither quantifiable. The Tribunal do not find that the variation would be likely substantially to prejudice the lessees.

Outstanding Service charges

42. There was a factual dispute about whether or not such service charges were outstanding, the parties were £10,000 apart. It was common ground, though, that there was no reserve fund, and that any non-recovery of service charges

from Lichfield House could not be visited on the lessees of Ripon and Winchester in the form of higher service charges or a higher proportion.

43. The Tribunal does understand Mr. George's point to be that the freeholder will be further disinclined to do works. Whilst the Tribunal sees the psychology of the point, the covenants under the lease oblige the lessor to do works, and can be enforced. This prospective risk does not lead the Tribunal to find that the variation would be likely substantially to prejudice the lessees – indeed any prejudice arises from the collective enfranchisement.

Roof Works

44. The Tribunal heard limited evidence about the roof works, though the parties appeared to agree that there may be further works needed – either because the original works were done badly, or did not follow the specification. There was evidence from Mr. George that there was a failure to comply with section 20 in several respects. It appears that some of the costs were incurred a year or so ago, and as they were prior to any variation, the costs will be spread between the lessees of all three buildings (i.e. 39 ways), and if not recovered against Lichfield, will be a loss that the freeholder will have to bear (as to 11/39th).

45. The worry for the lessees of Ripon and Winchester is whether there may be future costs arising from works not completed or works which have to be re-done. This is where a risk of prejudice arises. It is not possible for the Tribunal to make orders for compensation in respect of this, as the matter is entirely speculative and orders for compensation require an amount to be quantified. This is a subject better resolved on an application under section 27A of the Landlord and Tenant Act 1985, once all of the facts and costs are known. The parties must be alive to the proper apportionment of costs incurred to date, and whether any additional works should have been done within the original specification (and so shared between 39 lessees). The parties can expect that any application made to the Tribunal in respect of this will be subject to close scrutiny.

46. However, as the matter is speculative, it falls short of a finding that the variation would be likely substantially to prejudice the lessees or that for any other reason it would not be reasonable for a variation to be effected.

47. Accordingly, the Tribunal grants the application for a variation of the leases of Ripon and Winchester Houses, in the terms sought at page 7 of the amended statement of case re-dated 16th May 2013 (page 18 of the trial bundle). This is attached to these reasons at Appendix B. For the avoidance of doubt the parties are reminded that until the transfer takes place, all service charges incurred to that point can only be visited on the lessees of flats in Ripon and Winchester Houses as to 1/39th per flat.

48. The buildings had previously been referred to in the leases, the lease maps, and land registry documents variously as "Litchfield House" and "Lichfield House". In accordance with the request made by the Tribunal for the Applicant to ensure clarity in the matter, the Applicant's Solicitors have correspondence from the Land Registry to the effect that the building shall be known as

“Lichfield House”. The decision and reasons originally issued on 21st September 2013 are hereby re-issued, with necessary amendments.

.....

Joanne Oxlade, Judge of the First Tier, Property Chamber
(Residential Property)

21st September 2013
re-issued on 9th December 2013

APPENDIX A

Landlord and Tenant Act 1985

Section 35

“(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 a manner as it specified in the application.

(2) The grounds on which any such a application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely –

.....

(f) the computation of a service charge payable under the lease”.

Section 38

“(1) If, on an application under section 35 , the ground son 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 it specified in the Order.

.....

(6) A Tribunal shall not make an order under this section effecting any variation of a lease if it appear to the Tribunal –

(a) that the variation would be likely substantially to prejudice –

(i) any Respondent to the application, or

..... Or,

(b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected

(10) Where a Tribunal makes an order under this section varying a lease the Tribunal may is 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”.

APPENDIX B

To re-write paragraph 1 of the leases of the property (making suitable adjustment to reflect the address, the location of the flat in the building, the sum paid and the dates from payment of ground rent) to read:

“In consideration of the sum of now paid by the Lessee to the Lessor (the receipt of which is hereby acknowledged) and of the rent and covenants hereinafter reserved and contained the Lessor **HEREBY DEMISES** unto the Lessee **ALL THAT** the flat (hereinafter called “the Flat”) numbered... and being on the ... and ... floors of the Buildings (hereinafter called “the said Buildings”) consisting of the Blocks of flats known as Ripon House and Winchester House Wendover Road Aylesbury in the County of Buckingham the position and the area of the Flat being shown (for the purpose of identification only) on the plan annexed hereto and thereon coloured red **TOGETHER** with the Landlord’s fixtures and fittings installed therein **AND TOGETHER ALSO** with the easements rights and privileges mentioned in the First Schedule hereto subject as therein mentioned **EXCEPT AND RESERVING** as mentioned in the Second Schedule hereto

TO HOLD the flat unto the Lessee for the term of computed from the twenty-fifth day of December One thousand nine hundred and seventy-four **YIELDING AND PAYING** therefor to the Lessor from until twenty-fifth day of December Two thousand and seven **THIRTY POUNDS** thereafter and for the next succeeding **THIRTY THREE YEARS** of the said term the yearly rent of **FORTY –FIVE POUNDS** and thereafter and for the residue of the said term the yearly rent of **SIXTY POUNDS** such rent to be paid by equal quarterly payments in advance on the twenty-fifth day of March and the twenty-fourth day of June the 29th September and the twenty-fifth day of December in each year of the first whereof (to be if necessary a proportionate part of a quarter calculated from the date hereof) is to be paid on the execution hereof”

To re-write in the Second Schedule of the leases of the property, under paragraph 1 so the same shall read:

“To the Lessor and the owners and the lessees of the other flats comprised in the same Buildings and the owners and lessees of Lichfield House, Wendover, Aylesbury in the County of Buckinghamshire:

- (i) Easements rights and privileges over and along and through the Flat equivalent to those set out in paragraphs 2 and 3 of the First Schedule hereto.
- (ii) Power for the Lessor and its surveyors or agents with or without workmen and others at all reasonable times on notice (except in the case of emergency) to enter the Flat for the purpose of carrying out its obligations under Clause of this lease”

To re-write in the Second Schedule of the leases of the property, under paragraph 2 so the same shall read:

“All other rights and easements (if any) now existing in or over the said Buildings or any part or parts thereof and to all rights and privileges in the nature of easements or quasi easements which are or have heretofore been used or enjoyed over or in respect of the said Buildings for the benefit or any adjoining or neighbouring property of the Lessor or Lichfield House aforesaid or the occupiers thereof”.