



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

Case reference : LON/00BK/LVT/2015/0010

Property : 63 Edbrooke Road, London,
W9 2DE

Applicant : Ms Frances Bridget Smith

Representative : In person

Respondent : James Njuguna Kariuki (Flat C);
Sumita Passi (Flat B)
Zahra Moloudi (Flat A)

Representative : No appearance

Type of application : Variation of a lease by a party to the
lease

Tribunal member : Judge Robert Latham
Mr Trevor Sennett MA FCIEH

**Date and venue of
hearing** : 13 January 2016 at 10 Alfred Place,
London WC1E 7LR

Date of decision : 19 January 2016

DECISION

The Tribunal declines to make an Order pursuant to section 35 of the Landlord and Tenant Act 1987 varying the leases.

The Application

1. On 13 October 2015, Ms Francis Smith (“the Lessor”) issued three applications pursuant to Section 35 of the Landlord and Tenant Act 1987 (“the Act”) to vary the leases in respect of three properties, namely 63 Edbrooke Road W9 2DE, 47 Aberdeen Road N5 2XD and 66 Hillfield Avenue N8 7DN. Because each of these applications related to different properties, with different leases, in different boroughs, the Tribunal allocated them to different Case Officers. This Tribunal has been required to determine the application relating to the leases at 63 Edbrooke Road. The other applications have yet to be determined.
2. By Clause 4(ii) of their leases, the three lessees at 63 Edbrooke Road (“the property”) are required to:

“Contribute and pay on demand a rateable proportion of the costs and expenses incurred by the Lessor in carrying out the works mentioned in Clause 5(c) hereof and in lighting the hall basement and landings and in insuring the building.
3. By Clause 5(c), the lessor covenants to:

“to maintain repair and renew where necessary the gas and water pipes and repair renew and keep in good and substantial repair and condition and where necessary cleanse the roof roof void foundations and main structure and load bearing walls and the parts of the building not demised by the Lessor of the flat and of the ground floor and first floor flats and the drains sewers watercourses gutters paths and cable pipes and wires in under or upon the building and enjoyed or used by the lessees in common with the owner or Lessees of the ground floor flat and the first floor flat”.
4. In her application, the Lessor seeks a variation to add the additional words to Clause 4(ii):

“... TOGETHER with an additional sum in respect of the administration charges incurred by the Lessor including employees wages surveyors and managing agents.”
5. On 3 November, the Tribunal gave Directions. The Procedural Judge identified the issues that this Tribunal would be required to determine, namely:
 - (i) Should the Tribunal order the proposed variation to be made to the leases?
 - (ii) Does the proposed variation fall within the grounds set out in section 35(2) of the Act, that is to say, does the lease fail to make satisfactory provision for one of the matters set out in that section? A copy of the section was annexed to the Directions.
 - (iii) If it does make an order varying the leases, should the Tribunal order any person to pay compensation to any other person? Reference was made to Section 38(10) to the Act.

6. The Procedural Judge was satisfied that the application could be fairly and conveniently determined on the basis of written representations. However, any party had the right to request an oral hearing.
7. By 11 December, any lessee who opposed the application was required to send the lessor a statement in reply to the application and any other document upon which the lessee sought to rely. No lessee has filed a statement in response.
8. On 11 December, Ms Sunita Passi, the lessee of Flat B, wrote to the Tribunal seeking a 28 day extension for the response date and subsequent directions. She complained that there had been a delay in obtaining the case documents as the lessor had not given her current address. She stated that she was seeking legal advice. On 16 December, the Tribunal refused this application. However, the Procedural Judge extended the date by which a lessee could request an oral hearing. On 23 December, Ms Passi requested an oral hearing.
9. On 5 January, the lessor served the Tribunal and the lessees with a Bundle of Documents. In a covering letter, the lessor notified the lessees of the amended version of the variation that was being sought. The lessor now seeks Clause 4(ii) to be varied as follows (variation underlined):

“4(ii) Contribute and pay on demand a rateable proportion of:

(a) the costs and expenses incurred by the Lessor in carrying out the works mentioned in Clause 5(c) hereof and in lighting the hall basement and landings and in insuring the building and

(b) The costs fees and disbursements reasonably and properly incurred of:

a. Managing agents employed by the Lessor for the carrying out and provision of the services referred to above; and

b. Accountants employed by the Lessor to prepare and audit the service charge accounts; and

c. Any other person, firm, business or company reasonably and properly retained by the Lessor to act on behalf of the Lessor in connection with the Building or the provision of the services referred to above

(c) Any VAT payable by the Lessor in respect of any of the items mentioned above except to the extent that the Lessor is able to recover such VAT.

The Hearing

10. The Hearing was listed for 10am. Ms Smith, the lessor was present. None of the lessees attended. The Case Officer telephoned Ms Passi to ascertain whether she intended to attend. She responded that her daughter was ill and that she had a doctor's appointment. The Tribunal was satisfied that it was appropriate to proceed with the hearing. None of the lessees had filed

any response to the application. Ms Smith confirmed that the address that she had given in the application form for Ms Passi was the address that the lessee had given her in 2008. She had been unaware that Ms Passi was now living at the property. Further, she had sent the application to Ms Passi by recorded delivery and this had been collected from the Post Office by Ms Passi or her agent on 20 October. Ms Moloudi had contacted her within two days of receipt of the application.

11. Ms Passi subsequently e-mailed the Tribunal stating that she had been unable to obtain legal advice. The e-mail was received after the Tribunal had completed the hearing. Ms Passi had no objection to the application proceeding if it meant that the building would be better managed and she was not charged for everything that she does. She complained about the manner in which the property was being managed. On 14 January, Ms Smith responded disputing these allegations. These allegations are not relevant to this determination, albeit that they suggest that there may be a need for the property to be managed more proactively by the lessor.
12. The Tribunal therefore looked to the lessor to prove her case and satisfy us that the variation that she now sought was within the scope permitted by Section 35 of the Act. Ms Smith informed the Tribunal that she had amended the variation that she sought in the light of legal advice that she had obtained. In her application in respect of Aberdeen Road, a Procedural Judge had required her to seek legal advice to draft the substance of the variation that she was seeking in more precise terms.
13. The variation now sought is substantially wider than that sought in her application. Given that none of the lessees has opposed the original application and have had a limited opportunity to address the substance of the variation now sought, this Tribunal would have been extremely reluctant to consider any variation wider than that in the original application. In particular, Ms Smith has not sought permission to amend her application and none of the lessees have been directed by the Tribunal to apply their minds to the effect of the amended variation.
14. Prior to commencing the hearing, we provided Ms Smith with a copy of the decision of the Upper Tribunal in *Cleary v Lakeside Developments Ltd [2011] UKUT 264 (LC)*. We summarised the decision. We granted a short adjournment to permit her to review how she wished to put her case. When we resumed, Ms Smith confirmed that she was not seeking an adjournment. She had not had the opportunity to contact her solicitor.

The Law

15. Sections 35 and 38 of the Act are appended to this decision. *Cleary v Lakeside Developments Ltd* related to 44 Oakley Street, a terraced property which had been divided into 6 flats, one on each floor. The leases of two of the flats had been varied by deed to permit the landlord to employ managing agents. The landlord now sought to vary the remaining leases to include the additional clause:

“(25) to pay on demand as part of the service charges hereunder any reasonable management fee of any Managing Agents, Surveyors or agents duly appointed by the lessor in connection with the performance of the lessor’s covenants under this lease together with value added tax thereon at the appropriate rate.”

16. A Leasehold Valuation Tribunal (“LVT”) had approved the variation accepting that it fell within section 35(2)(e) (recovery of expenditure incurred by one party for the benefit of the other party) and section 35(2)(f) (computation of service charges). The LVT had regard to the fact that two of the flats 2 and 6 were liable to pay the charges.

17. The Upper Tribunal allowed the tenant’s appeal and refused the variation. At the appeal hearing, the landlord’s Counsel, Mr Justin Bates, conceded that the application could not be brought within the scope of section 35(2)(f). The President, George Bartlett QC, stated (at [18]) his reason for this conclusion:

“For (f) to apply the requirements of section 35(4) must be met. The first requirement, (a), is that the lease provides for a service charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord. None of the leases the subject of the application, however, provides for a proportion of the management fees to be payable as a service charge.”

18. The Upper Tribunal therefore considered whether the application could be brought within the scope of section 35(2)(e). It is important to note how the parties put their respective cases. The tenants’ case is summarised at ([21])

“21. Mr Cleary’s case, as before the LVT, was that there was nothing before the LVT to show that the new covenant would be of benefit to the lessees. It mattered not to the lessees whether the functions of management were performed by the lessor itself or by a managing agent. The fact that the lessor was a corporate body was irrelevant. The cost of delegating management functions to an agent should fall on the lessor. Neither of the cases relied on by the lessor in support of its case justified the LVT in reaching the decision that it did, and a substantial part of the functions listed in the lessor’s statement of case were for its benefit and not for the benefit of the tenants. Miss Robertson’s case was that she had purchased her flat in full knowledge that the lease did not include provision for management charges. She had paid a premium for the lease with this in mind. Mr Christiansen said that the application was simply an attempt to transfer value from the lessees to the lessor. Each lessee bought his or her lease knowing what the lease provided for. To change this position created a transfer of value between the parties.”

19. The landlord’s case is summarised at [22] – [23]:

“22. Mr Bates submitted that the lack of limiting words in section 35(2)(e) showed that it was not a limited power. It was for the LVT to determine as it saw fit whether a variation should be made on this ground having regard to all material circumstances. The relevant circumstances in the present case were (i) that the leases of flats 1, 3, 4 and 5 make no provision for the recovery of the costs of management; (ii) that flats 2 and 6 are liable to contribute

towards those costs; and (iii) that the landlord does in fact employ a manager, at a cost of £200 a year per unit, who carries out a wide range of tasks. It was open to the LVT having regard to these circumstances to conclude that the variation should be made.

23. Mr Bates said that it was not an irrelevant consideration that the landlord was a body corporate. The fact was that a body corporate can only discharge management functions through agents or employees, and he referred by way of example to *London Borough of Brent v Hamilton* LRX/51/2005.”

20. The President concluded that the variation sought could not be brought within the scope of section 35(2)(e) (emphasis added):

“26. What the LVT had to be satisfied about was that that each of the four leases failed to make satisfactory provision with respect to the recovery by the lessor of expenditure incurred by it for the benefit of the lessee. The case for the lessor was that at present the cost to the lessor of employing a manager are borne by the lessor, with contributions from two of the lessees. It is this which is said to be unsatisfactory and the new provision is designed to change. It is important to note that it was not part of the lessor’s case that the lessor was entitled by implication to include the management fees as part of the tenant’s one-sixth share of the insurance and repair costs or the 20% share of the cleaning and lighting costs. Had that been the case, there would have been an argument, in my view, that, by leaving it to implication, about which there could be disagreement, the lease was unsatisfactory and an explicit provision was appropriate. But it was not part of the lessor’s case that the management fees reflected what the lessor was entitled to charge in any event. The list of tasks produced went far beyond those associated with the performance of the covenants in respect of which the lessor was entitled to charge.”

27. The case for the lessor, as I have said, was that at present the cost to the lessor of employing a manager are borne by the lessor, with contributions from two of the lessees. There is, however, nothing unsatisfactory about that in itself. It is the result of the contractual arrangements freely entered into between lessor and lessees. In the case of two flats the lessor and the lessees have agreed, in provisions expressed slightly differently, that the lessee should be obliged to pay a contribution towards the cost of management. But it is notable that in the most recent lease modification, that contained in the surrender and lease of flat 1, no such provision was included despite the fact that the lease provisions were substantially altered in other respects. If the absence of a management fee provision was unsatisfactory Lakeside could have ensured that it was included. The surrender and lease was entered into on 31 August 2006, two years only before the application was made to vary its terms and the terms of the other three leases. There is, in my judgment, nothing arguably “unsatisfactory” in the fact that two lessees pay a contribution to the lessor’s costs of management and four do not. It simply reflects different contractual provisions that do not appear to cause any difficulty in interpretation or application.

28. The effect of the variation would be to require each of the four tenants to pay £200 a year, whereas nothing is now payable under the lease. The lessor’s obligations under the lease would remain the same. Contractually the lessees would be paying £200 without any entitlement in return. Not surprisingly they are not in favour of being obliged to do so. Mr Bates suggested that if the lessees made the contribution sought there would be a greater incentive to the

lessor to ensure that a qualified and appropriate manager was appointed. But there was no evidence that this would happen, and as a theoretical possibility it is obviously not sufficient to show that the leases currently do not make satisfactory provision.

29. I should add that there is nothing in the Lands Tribunal case of *Mahmood v Sinclair Gardens Investments (Kensington) Ltd*, referred to by the LVT and relied on by the lessor, to suggest that the variation sought in the present case could or should be made. The facts in that case were that the lease contained a repairing covenant on the part of the lessor but it was made "subject to the lessee paying his proper proportion of the costs thereof". However, there was no provision in the lease whereby the lessee was made liable to pay this proper proportion of the costs – so that it was manifestly unsatisfactory in this respect, and the Tribunal (HH Judge Huskinson) directed a variation to be made to correct this defect. In contrast there is not in the leases that are the subject of the present application anything to suggest that the management costs to which the proposed variation relates were intended to fall on the tenants, and there is no reason why they should do so.

30. I note also that in the LVT *Bath* case the tribunal varied leases so as to provide for the payment by the lessees of an annual sum for the costs and expenses of management. It concluded that it was in the interests of the lessees for management of the building to ensure that the tasks associated with its insurance and maintenance should be carried out properly and that this should be done in order to maintain the value of the lessees' investments as well as the amenities of the property. The level of income generated was such that it presented a risk of future neglect. That was a fully reasoned decision based on the evidence that the LVT had before it. I can see that there may be circumstances where the financial position of the lessor may make the absence of a lessee's covenant to pay for the cost of management unsatisfactory. This could be the case, for instance, where there was an RTM company with no other source of income. But evidence would be needed to show that there was a particular need in the circumstances of the case. In the present case, in my judgment, there was no evidence on which the LVT could conclude that the absence of such a provision was unsatisfactory.

31. The LVT determined that no compensation should be paid under section 38(1) of the Act (under which it had power, if it thought fit, to make an order for the provision of compensation in respect of any loss or disadvantage that any lessee was likely to suffer as a result of the variation). It said (see above) that "no proper evidence" had been advanced by the lessees to show that the new clause "would necessarily result" in the diminution in value of their leases or as to the extent of such diminution in value. It is not, of course, the case that a loss or disadvantage is only to be measured in terms of the diminution in value of a party's interest in the property, and it is on the face of it hard to see how a requirement that the lessees should have to pay £200 a year for something for which they at present pay nothing would not be a loss or disadvantage requiring the payment of compensation. However, as I am satisfied that the LVT was wrong to direct the variation, this matter does not arise for determination".

The Background

21. The three leases at 63 Edbrooke Road were granted in 1986 for terms of 99 years. This area in Maida Vale was an up and coming area, where a

developer would see the commercial opportunity from converting a terraced house into three flats with a view to disposing not only of the leasehold, but also the freehold interests. The long term management of the property would not have been the primary concern of such a developer.

22. Ms Smith acquired the freehold interest on 14 February 1989 (p.35 of the Bundle). The Lessees acquired their interests between 2004 and 2006:

(i) Flat A: First Floor. The lease is dated 31 July 1986 (p.82). Ms Moloudi acquired the leasehold interest on 16 March 2004 (p.44). She does not reside at the flat.

(ii) Flat B: Ground Floor. The lease is dated 25 July 1986 (p.67). Ms Passi acquired the leasehold interest on 19 January 2006 (p.41). She did not reside at the flat. On 11 December, Ms Passi notified the Tribunal that she was now living at the flat.

(iii) Flat C: Lower Ground Floor. The lease is dated 19 May 1988 (p.47). The lease was varied on 19 May 1988 as the wrong lease plan had been attached to the lease (p.60). Mr Kariuki acquired the leasehold interest on 4 June 2004 (p.39). He does not reside at the flat.

23. Each lessee pays a ground rent of £100 pa for the first 33 years; it then increases to £200 pa. Under their leases, the lessees are responsible for the external decorations to their flats. The lessor's obligations to repair and maintain the property are specified in Clause 5(c). The lessor is further required to insure the property (Clause 5(f)). The lessor is entitled to pass on the cost of providing these services to the lessees, their respective contributions being defined by Clause 4(ii).

24. Ms Smith owns some ten properties. She used to manage them with her husband who died in April 2015. She has discovered that the leases in respect of three properties in her portfolio have no clause expressly providing for the employment of managing agents and for this cost to be passed on to her tenants through the service charge account. She wishes to employ managing agents. She feels unable to carry out the management functions herself. In respect of the other properties that she owns, managing agents charge some £300 to £350 per annum for each flat.

25. In her application form, she specifies the grounds for her application in these terms:

“There is no provision in the lease for the lessees to pay any administration charges, managing agents or surveyors fees incurred in the proper management of the building. Management to date has been on an ad hoc basis by the freeholder who now wishes to place the management on a proper footing and to instruct managing agents to deal with the same.”

26. Ms Smith informed the Tribunal that the grounds specified by Section 35(2) upon which she contends that the lease fails to make satisfactory provision are:

(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)”; and

(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”.

27. She stated that she is not a body corporate. She does not have the experience to manage the property. She would need to instruct agents, including a surveyor, to inspect the property. She is not up to date with the responsibilities of a landlord. Whilst in 1986, the leases were perfectly adequate, problems have now arisen that were not foreseen. The leases when granted would not have been considered to be defective. However, there is now a need to bring the leases in line with modern practice.

Our Determination

28. Woodfall “Landlord and Tenant” at [7.170] sets out the current state of the law in these terms:

“As a general rule the cost of employing managing agents will not be recoverable by way of service charge unless the lease expressly so provides”.

29. The substance of Ms Smith’s complaint is that the leases do not make satisfactory provision for the lessor to engage managing agents to assist her in carrying out her responsibilities to repair and maintain the property. She wishes to engage managing agents to enable her to discharge her responsibilities as lessor. The leases, as currently drafted, fail to make adequate provision to enable her to pass on these costs to the lessees.

30. We are satisfied that the leases themselves do make adequate provision for the following: (i) the repair and maintenance of the property; (ii) for the lessor to pass on the service charge costs to the three lessees; and (iii) as to how these costs are to be apportioned between the lessees. The complaint is that the lessor is not able to pass on the cost of managing agents, should the lessor decide to engage the same. Lessor and lessees freely acquired their respective interests in the full knowledge of the legal estates that they were acquiring and of the rights and obligations arising from those interests.

31. Ms Smith acquired the freehold more than 25 years ago; the lessees acquired their interests more than 10 years ago. No problems initially arose. The property was converted some 30 years ago. The time may now be approaching where more significant and costly repairs are required to the roof and structure of the property. The lease itself makes adequate provision as to who is responsible for such repairs and how the costs are to be apportioned.

32. Ms Smith now wishes to engage managing agents and pass on the cost to the lessees. The cost would be some £300 to £350 pa for each lessee. She considers that she currently is unable to pass on the cost and would have to bear it herself. If she is correct on this, the situation reflects the terms of the bargain into which she willingly entered more than 25 years ago.
33. Were the Tribunal to make the variation sought, the question of compensation under section 38(10) would arise. Section 38(6) of the Act precludes this Tribunal from varying a lease if it appears that a variation is likely to substantially prejudice any party and that an award under subsection (10) would not afford him adequate compensation. The lessees would be entitled to be compensated for the additional financial burden that they would bear as a result of the variation. Ms Smith has not suggested how they could be afforded adequate compensation.
34. The issue of compensation would only arise were Ms Smith to satisfy us that the variation sought falls within the scope of section 35(2). We would need to be satisfied that the variations sought, whether in the original application or as amended, fall within the scope of the Act in that the leases fail to make satisfactory provision with respect to one or more of the following matters, namely:
- (i) Sub-paragraph (d) (the provision or maintenance of any services): We are satisfied that the leases make “satisfactory provision” with respect to the “provision or maintenance of any services”. The leases provide for the respective responsibilities of lessor and lessee for the repair and maintenance of the property. The responsibilities of the lessor are adequately defined. The complaint is rather that, were the lessor to engage managing agents to enable her to discharge her current obligations under the lease, she would have to bear the cost herself.
- (ii) Sub-paragraph (e) (the recovery of expenditure incurred by one party for the benefit of the other): This issue was addressed by the President in *Cleary v Lakeside Developments Ltd*. The complaint of Ms Smith is that she must bear the cost of employing managing agents. We agree that there is nothing unsatisfactory about this in itself. This is the result of the contractual arrangements freely entered into between lessor and lessees.
35. In her amended draft, Ms Smith seeks an additional variation in respect of the preparation and audit of service charge accounts. Whilst many leases make provision for annual service charge accounts to be certified by an accountant, a lease that fails to make provision for this cannot be said to be unsatisfactory. Such a clause provides greater transparency between lessor and lessee. If such a clause were thought to be desirable, it would be open to the parties to agree to a variation. However, it is not open to a lessor to impose this unilaterally on her lessees and then require them to pay for the service. The Tribunal would therefore not have been minded to approve the variation sought in the new Clause 4(ii)(b) b., even had the lessees had an adequate opportunity to deal with it. Neither are we satisfied that the variation sought in Clause 4(ii)(b) c. is within the scope of the Act. It is

unduly wide in scope: not only does it relate to costs arising with “the provision of services”, but also “in connection with the Building”.

36. We therefore decline to make the variations sought. We are not satisfied that they fall within the scope of section 35(2) of the Act. Even were we to be satisfied that they were, the lessees would be entitled to compensation under section 38(10). Ms Smith has failed to address what compensation would be appropriate to compensate the lessees for the additional costs that they would incur as a result of the variations sought.
37. The variation sought by Ms Smith could prove to be in the common interests of both lessor and lessees were they to lead to the more effective management of the property and a higher quality of repair and maintenance. The problem is that Ms Smith is not seeking to introduce these changes with the agreement of her lessees, who would have to pay higher service charges. She is seeking to impose them unilaterally.
38. We remind ourselves of the observations of the President at [26] of his decision in *Cleary v Lakeside Developments Ltd.* We note that in the current application, as in *Cleary*, it is not Ms Smith’s case that the lessor is entitled, by implication, to recover the cost of employing managing agents under the lease as currently granted. We suspect that the President had in mind the decision of the Court of Appeal in *Embassy Court Residents’ Association v Lipman* (1984) 271 EG 545, in which it was held, on the facts of that case involving a tripartite lease and a freehold acquired by a tenants’ management company, that it was necessary to imply a term that the administrative expenses incurred by a management company could be recovered from individual lessees. These expenses included the cost of employing managing agents. On the particular facts of that case, the term was implied to give business efficacy to the transaction. The tenants’ management company had no funds of its own.
39. Under the current leases, Ms Smith, as lessor, is obliged to maintain, repair and renew parts of the property, including the roof and the main structure. If the roof is in disrepair, it is not necessary for Ms Smith to carry out the repairs herself. By implication, she would be entitled to employ a builder and pass on the cost through the service charge. Were she to require expert advice as to the extent of the works required, she would be entitled to instruct a surveyor and pass on the costs to the lessee. Again, there is no need for the lease to make express provision for this; it can be implied to give business efficacy to the agreement. Whether this principle would extend to engaging managing agents is a point which we have not been asked to determine; it is not the basis of Ms Smith’s application. Were a Tribunal to be required to determine this question, it would be entitled to have regard to the fact that the task of repairing and maintaining a terraced property converted into three flats is quite different from repairing and maintaining a traditional block containing a much larger number of flats with more extensive common parts. Ms Smith is in a quite different position from the tenants’ management company in *Embassy Court Residents’ Association*.

40. Finally, we highlight the recent decision of the Supreme Court in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619. The interpretation of a contractual provision, including one as to service charges, involves identifying what the parties had meant through the eyes of a reasonable reader, and, save in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Although the less clear the relevant words are, the more the tribunal could properly depart from their natural meaning, it is not to embark on an exercise of searching for drafting infelicities in order to facilitate a departure from the natural meaning. Commercial common sense is relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date on which the contract was made. The purpose of contractual interpretation is to identify what the parties had agreed, not what the tribunal thinks that they should have agreed. It is not the function of a tribunal to relieve a party from the consequences of imprudence or poor advice.

Robert Latham
Tribunal Judge

19 January 2016

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Annexe: Sections 35 & 38 of the Landlord and Tenant Act 1987

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 the appropriate 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 ;
- (g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—

- (a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and
- (b) other factors relating to the condition of any such common parts.

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

- (a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

- (b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and
 - (c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than 3 the whole of any such expenditure.
- (5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 and Tribunal Procedure Rules shall make provision—
- (a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and
 - (b) for enabling persons served with any such notice to be joined as parties to the proceedings.
- (6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—
- (a) the demised premises consist of or include three or more flats contained in the same building; or
 - (b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.
- (8) In this section “service charge” has the meaning given by section 18(1) of the 1985 Act.
- (9) For the purposes of this section and sections 36 to 39, “appropriate tribunal” means—
- (a) if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
 - (b) if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.

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 tribunal 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 tribunal 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 tribunal —

- (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.