



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

**Case Reference** : LON/OOAK/LVA/2016/0013

**Property** : Flats 7A, 7B, 9A and 9B Aberdeen Parade, Angel Road, London N18 2EB

**Applicant** : Rabbi Yisroel Pinter, Flat 9A  
David Campalans, Flat 7A  
Ourris Properties, Flats 7B and 9B

**Representative** : Mr B R Maunder-Taylor FRICS MAE

**Respondent** : Sai Investments Limited (1)  
Aberdeen Parade Management Co Limited (2)

**Representative** : Mr S Madge-Wyld of Counsel

**Type of Application** : Application for the variation of a lease under Part IV of the Landlord and Tenant Act 1987

**Tribunal Members** : Tribunal Judge Dutton  
Mr P M J Casey MRICS

**Date and venue of Hearing** : 10 Alfred Place, London WC1E 7LR on 6<sup>th</sup> April 2017

**Date of Decision** : 27<sup>th</sup> April 2017

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**DECISION**

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## DECISION

**The Tribunal declines to amend the terms of the Applicants' leases as sought, for the reasons set out below.**

### BACKGROUND

1. On 21<sup>st</sup> November 2016 the Applicants applied to the Tribunal to vary the terms of their leases to reduce the percentage contribution that they were required to make and that such variation should be sought retrospectively for six years.
2. The basis of the application is set out in a report from Mr Maunder-Taylor dated 24<sup>th</sup> February 2015, which was included within the bundle of papers before us. The nub of the concern of the Applicants was that the flats, which had now been formed from the original ground floor shops, were not contributing towards the service charge liabilities nor it seems were the garages to the rear, notwithstanding that it was said all benefitted from such services.
3. In Mr Maunder-Taylor's report he dealt with the terms of the flat leases confirming that presently the Applicants had to contribute one eighteenth of the service charge costs. Whilst the shops and garages were apparently specifically mentioned in what was called the management lease, the shops were not so mentioned in the individual flat leases.
4. It was said that this apparent unfairness was recognised by previous Tribunal decisions relating to service charges.
5. The report confirmed that the Management Company, the second Respondent was in the control of the lessor by virtue of the lessor retaining possession of all the ground floor premises and a significant number of flats on the first and second floor. There was, therefore, no means by which the flat lessees could seek to rectify these problems through the Management Company or under other provisions of the Landlord and Tenant Act 1987 other than section 35. It was confirmed that the application to vary is made on the basis of section 35(2)(f), that is to say that the lease failed to make satisfactory provision for the computation of service charges payable under it.
6. Mr Maunder-Taylor also suggested that another way forward was to apply to the Tribunal pursuant to section 24 of the Landlord and Tenant Act 1987 for the appointment of a manager, but that has not been done and that is not an application before us.
7. Within the bundle, we had copies of the directions, the reply on behalf of the first and second Respondents, a copy of the tenants' leases, a reply made by the Applicants to the Respondents' response, a draft order and other documentation evidencing the letting of what are now flats to the ground floor.
8. In the Respondent's written reply, they oppose the application confirming that around 21<sup>st</sup> March 1985 the freeholder granted the Management Company a lease of what was described as the common parts and at that time the building consisted of shops to the ground floor and 18 flats on the first and second floors. The

management lease demised the main structure of the building and common parts but not the individual shops, flats and interiors of the garages. It appears that in sometime after, certainly from 1988, long leases were granted in respect of 11 of the 18 flats but 7 were let on shorter leases including a regulated tenancy under the 1977 Rent Act.

9. It appears that in 1998, planning permission was granted to convert the shops into flats of which there are 13. As we have indicated, within the papers before us was a schedule of tenancies in respect of these flats, which are generally short term lettings or emergency accommodation for local authorities. There appeared to be two three-year leases to Lambeth Council. On the first and second floors are 11 long leases, the others being short term or emergency lets.
10. It appears to be common ground that the long leases are on identical terms and are tri-partite being between the Landlord, the Tenant and the Management Company. It is relevant to note the provisions of clause 5(c) of the long lease, in this case Flat 7A is the copy quoted from (the Lease), and it is said that the terms of the long leases are the same, which says as follows

*"(c) Whilst any of the other flats in the building shall not for the time being be let under a lease on the same terms (mutatis mutandis) as this lease, the lessor shall be liable to make such payments and so far as the lessor is able observe and perform such obligations as the lessee of such flat will be liable to make, observe and perform if such flats were so let."* Much is made of this clause by the Applicants.

11. The Respondents' response makes the point that other than the 18 flats contributing on the first and second floors, a number of the tenancies and agreements reached require no contribution towards the costs incurred by the Management Company in performing its obligations.
12. The reply then went on to address the present application in which the four flats seek a variation presumably from one eighteenth to one 31st being the number of flats now in the building. It is said that to seek such a variation it is to be concluded that section 35(2)(f) is relied upon and to consider the meaning of satisfactory provision one needs to review section 35 (4). We will set out the wording to that section later but we were drawn to the case of *Morgan v Fletcher*, an Upper Tribunal case under reference [2009]UKUT186(LC). Again, we will refer to that in due course. The response sets out at paragraph 31 two paragraphs from the judgment of HHJ Jarman which are noted. It is said by the Respondents that the long leases do provide a 100% contribution towards the service charges. Eleven eighteenths of those costs are paid by the lessees, which includes the Applicants, and the remaining seven eighteenths are paid by the first Respondents as required under the provisions of clause 5(c) of the Lease referred to above. It is said that in the circumstances of the case the application should be dismissed. In further support of this, it is said that the creation of new leases to the ground floor is irrelevant because firstly there was no evidence that the lessees of the shops were required to contribute to the management company's costs and the fact that there are more flats now in the building does not alter the situation that the long leases provide for 100% recovery. The submission then went on to address the question of any discretion and why that should not be exercised.

13. A response to this was made by Mr Maunder-Taylor on the 1<sup>st</sup> February 2017 and relied on clause 5(c) of the Lease and in particular reference to *any other flat* meaning that this should include the flats created in the shop area. Mr Maunder-Taylor sought to draw differences in this case between the judgment of HHJ Jarman in the Morgan case and the facts of this application as set out in paragraphs 7 and 8 of his reply and we noted all that was said.
14. At the hearing, Mr Maunder-Taylor confirmed that he was not aware whether or not the shops had a full repairing and contributory obligation. He accepted that there are now 13 flats on the ground floor with 18 above and that the freeholder owns those 13 flats for which he receives rent but pays no service charges. Owning the majority of the 18 flats, of course, said Mr Maunder-Taylor, gives the Landlord control of the Management Company. He referred us to previous decisions of the LVT which were included within the bundles and which related to service charge demands.
15. The basis of the Applicant's case was that the ground floor flats should now be included within the term "*flats*" under the Lease at clause 5(c) and that therefore the Respondent should be liable for those. The Applicant relies on the case of *Wickfield Properties Limited and Paul Botten [2013]UKUT0133(LC)*. We will refer to that in due course. He was unable to help us with what had prevailed in respect of the payment of service charges between 1999 and 2010. He did, however, accept that the present situation was unchanged and there was no suggestion that there had been any apportionment between the shops and the flats. No evidence was put to us of any impact on the service charges since the conversion of the shops, although Mr Maunder-Taylor did point out that the structure was in need of repair, particularly the flat roofs to the rear of the property and the garages, which would require contributions from the lessees but not from the ground floor flats. On the question of jurisdiction, he considered that we were entitled to deal with the matter. This was a fundamental change not limited to the conversion of the shops to flats. It extends to the management company's costs for the building being charged exclusively to the 18 flats with no contribution coming from the ground floor flats. He was of the view that section 35 enabled this defect to be cured and that we should exercise our discretion so to do. A suggestion was made as to whether floor areas needed to be considered and he accepted that a proportion might be appropriate and was only seeking what was fair and reasonable.
16. In response, Mr Madge-Wyld for the Respondents, confirmed that if there was justification then changes could be made. However, he reminded us that we had to rely on section 35(4) and the definition of this contained in the Morgan v Fletcher case. As he said, if all 31 were obliged to contribute then there would be over 100% recovery. However, he pointed out that this was not the case and the landlord was not profiting nor is he out of pocket on the service charges.
17. On the Brickfield and Botten case, he pointed out the facts here were different. The problem arose after enfranchisement of one block which was contributing to the overall service charge accounts. This was not the case in this matter.

18. The question of clause 5(c) it was Mr Madge-Wyld's submission that this related to the existing building as it was at the time of the Lease. The Lease had to be construed at the time that it was made and relates obviously to the 18 flats then in existence. The definition of flats within the Lease clearly relates to those 18 flats only and furthermore the management lease was entered into before the residential leases and those definitions are contained at page 3 of the management lease which is itself dated 21<sup>st</sup> March 1985 and appeared at page 118 onwards in the bundle before us.
19. Mr Madge-Wyld said that if we were not with him on the ability to grant the amendment under section 35(4), we needed to consider the provisions of section 38 and in this regard, were referred to the Upper Tribunal case of *Shellpoint Trustees Limited v Barnet [2012]UKUT375(LC)*.
20. Mr Madge-Wyld reminded us that there was no evidence that anything had changed since the leases were originally granted and no evidence that the shops had contributed in the past, or indeed were required so to do. As a matter of comment at this point, a schedule of floor areas was introduced which Mr Maunder-Taylor accepted were accurate.

## **THE LAW**

21. The law applicable to this case is set out in the appendix attached.

## **DECISION**

22. The ability to vary the terms of the lease is quite confined insofar as section 35 is concerned. It is common ground that the application is under section 35(2)(f) dealing with the computation of service charges. However, for the purposes of this decision we have to consider section 35(4)(a) to (c). It is of importance in considering that section to also take note of the decision of the Upper Tribunal in *Morgan v Fletcher* as referred to above. The decision of His Honour Judge Jarman QC was "*that section 35(4) of the 1987 Act must be construed as if the word if read only if. There was an ambiguity in section 35 and so regard could be had to the assistance which might be derived from the report on which the statutory provisions were based and to ministerial statements made during the passage of provisions through Parliament. The authors of the report and the promoters of the Bill had in mind two situations which it was intended to avoid. The first was that the aggregate of service charges payable in respect of a block of flats amounted to more than 100% of expenditure, giving the lessor a surplus over money expended. The second was where the aggregate was less than 100%, producing a shortfall in so failing to promote the proper maintenance of the block. The avoidance of a situation where contributions were unfairly disproportionate was a mischief of a different nature to that contemplated by the report and the promoters of the statutory provision and whether such intervention could be justified was a major policy decision.*"
23. Accordingly, we have to consider section 35(4) in the light of that judgment. Mention is made of the provision of clause 5(c) of the Lease. The Lease clearly provides for a service charge payable to be one eighteenth of the amount certified in accordance with the provisions of paragraph 10 of the 8<sup>th</sup> schedule. We were

not helped greatly in determining the extent of what was meant by the word 'building' or 'property' because the plan attached to the Lease had not been coloured. However, we agree with Mr Madge-Wyld that paragraph 5(c) and indeed 5(b) must be taken to be read as to what was the case in point at the time of the grant of the Lease in 1988. 5(b) says as follows "*The other flats in the building have been or will be demised on terms similar to those contained in this lease and will reserve covenants on the part of the lessee in a form similar to the covenants hereof.*"

24. It seems to us to imply, within the terms of a lease granted some ten years or more before the flats had been created from the shops, that the creation of flats in 1998 or thereabouts is caught by the wording of 5(c), is not sustainable.
25. At no point in the terms of the Lease could we find reference to the shops. The flats are defined as meaning the flats forming part of the building at the time of the demise. In those circumstances, therefore, we must reject Mr Maunder-Taylor's argument that clause 5(c) somehow enables the landlord to be responsible for service charges in respect of units that were not in existence, possibly not even envisaged at the time that the residential leases was granted. We made the point to him at the hearing that if it is considered that clause 5(c) has the impact which he says, then an alternative route might be to bring proceedings against the landlord for not complying with that clause.
26. The case of Brickfield and Botten does not really help us. What it did establish is that the variation can be retrospective but that case was based on completely different facts to the present matter before us.
27. We do understand the Applicant's concern at the position at which they find themselves, but as set out in paragraph 18 of HHJ Morgan QC's decision, the mischief being sought to be corrected in this case is not that contemplated by the report and the promoters of the provision, it is, as said by the Judge, relating "*to fairness as between tenants rather than to whether the lessor makes a profit or has an incentive to maintain the blocks* and is not cured by s35 of the Act. It is also to be noted that at paragraph 11 in Morgan and Fletcher, an example is given which is not dissimilar to the circumstances of this case yet the Judge concluded that a variation could not be made.
28. We remind ourselves also that there was no evidence to show that anything had changed since the shops were converted to flats. There is no evidence that the shops contributed under the terms of the existing leases and accordingly it cannot be said that the Applicant's position has changed. In those circumstances, therefore, although we have some sympathy with the applicants we must find that the variation cannot be made and dismiss the application.

Judge: Andrew Dutton  
A A Dutton

Date: 27th April 2017

## **ANNEX – 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 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 to 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 (ie 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.

### **Relevant Law**

#### **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 court 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 the whole of any such expenditure.

(5) Rules of court 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.