



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

**Case Reference** : CHI/00HB/LVT/2018/0004

**Property** : 58 & 60 Bell Hill Road, St George, Bristol, BS5  
7LU

**Applicants** : 1. Richard & Wendy Loxton  
2. 58 & 60 Bell Hill Management Company  
Ltd

**Respondent** : Claire Louise Flurry

**Representatives** : Applicant 1 - Mr Richard Loxton  
Applicant 2 - BLB Solicitors  
Respondent – Thrings LLP

**Type of Application** : Variation of a lease by a party to the lease,  
Landlord & Tenant Act 1987, section 35.

**Tribunal Member** : Judge Professor David Clarke

**Date of Hearing** : 1 July 2019

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**DETERMINATION**

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## **DETERMINATION**

**The Tribunal determines that the Lease of the flat known as 60b Bell Hill Road is varied by the preparation and execution of a Deed of Variation in the form agreed by the parties which continues to provide for a percentage contribution of one sixth to the service charge.**

**By virtue of section 38(9) of the Landlord and Tenant Act 1987, the two Joint Applicant parties are ordered and directed to ensure that that the Deed of Variation is recorded on the leasehold registered title BL 69541; and the Respondent is ordered and directed to ensure that a note of the Deed of Variation is recorded on the freehold title BL21858.**

**The Tribunal makes no order as to costs.**

## **STATEMENT OF REASONS**

### **Background**

1. This is an application made under section 35 of the Landlord and Tenant Act 1987 (“the Act”) to vary the lease of the leasehold flat known as 60b Bell Hill Road, Bristol BS5 7LU (“the Property”). It is made by Mr Richard Loxton, who with Ms Wendy Loxton, are the current leaseholders of the Property. The Respondent is the landlord and freeholder of the end of terraced house known as 60 Bell Hill Road which is divided into two flats of roughly equal size. She is also the registered proprietor of the neighbouring property known as 58 Bell Hill Road. The lease of the Property is dated 2 November 2001 and grants a term of 999 years from 1 September 2001 (“the Lease”). It is amended by a Deed of Variation dated 13 January 2010 entered into by the Respondent with the original leaseholder, Ms Kelly Park, but done so at the request of Mr and Mrs Loxton who were negotiating to buy the Property. Mr and Mrs Loxton (“the Applicants”) became the leaseholders of the Property shortly thereafter.

2. The Second Applicant is 58 and 60 Bell Hill Management Company Ltd (“Man Co”). The sole director is Mr Richard Loxton, one of the two Applicants. The Application was originally made by Mr Loxton ‘on behalf of’ Man Co. Man Co does not appear to be a party to the original lease of 2001 but was a party to the Deed of Variation in 2010. Man Co and the Respondent are represented by solicitors who have made submissions on their behalf. The Applicants have conducted their case through Mr Loxton. In this statement of reasons, the phrase “Joint Applicants” refers to both the Applicants and Man Co jointly.

3. Directions have been made on 18 July, 13 August, 11 September, 28 November and 19 December 2018 and again on 7 May 2019. Given the agreement of the parties on the way the Lease should now be varied, it is not necessary to recount the issues dealt with by

those directions in detail except where relevant in the Tribunal's statement of reasons relating to costs (below). It is sufficient to record at this stage that it is not necessary for the Tribunal to determine whether or not Man Co is indeed a party to the Lease since, in the Directions issued on 19 December 2018, Man Co was confirmed as a party to these proceedings, the Respondent having indicated that it did not object to that decision. It was only by virtue of the Directions of 28 November and 19 December that it was firmly clarified that there were two parties to the Application – Mr and Mrs Loxton, for whom Mr Loxton acted, and Man Co, represented since 31 August 2018 by BLB Solicitors.

4. The application was due to be determined on the papers on 7 May 2019. From the papers before the Tribunal, however it was clear that the parties had by then agreed to vary the lease and had already agreed on the method that the lease should be varied and most of the provisions of the necessary Deed of Variation.

5. The Tribunal was supplied on 7 May with a travelling draft (containing deletions and amendments) of a Deed of Variation passing between the representatives of the Man Co and the Respondent. However, there were no submissions from any party to set out in detail for the Tribunal the nature of the matters still in dispute, let alone submissions on those matters. It was clear that there were outstanding issues relating to the percentage division of the service charge and as to whether compensation should be paid for the changes already agreed or to be determined by the Tribunal, and potentially issues relating to costs.

6. On the date (7 May) listed for a paper determination, an email from the Respondent's solicitor to the Second Applicant's solicitor, copied to the Tribunal office, made reference to some of those ongoing issues apparently in ignorance of the fact that a determination was due the same day.

7. The Tribunal therefore considered that it was unable to make a determination without further information and made Directions with the aim of identifying what terms of the draft Deed of Variation were not yet agreed; and what each party's proposals for resolution of the matters still to be agreed and the reasons for those proposals.

8. These Directions have been complied with and, since no party has requested an oral hearing, the matter is determined on the papers submitted to the Tribunal.

### **Variation of the Lease**

9. It is now clear that the parties have agreed the terms of a Deed of Variation. A copy has been supplied to the Tribunal.

10. There was one principal outstanding matter which was not agreed until the Respondent filed her Statement of Case in response to the Directions made on 7 May. That matter relates to the percentage of service charge payable by the Applicants once the Deed of Variation is implemented.

11. In the Lease at present, the Applicants are required to pay one sixth of the total charge. The two flats in 60 Bell Hill Road are, the Tribunal is told, of roughly equal size. Consequently, it was proposed, and was at one stage accepted by the Applicants, that the service charge should be varied to require a payment of half the total service charge falling due. However, if that was to be the case, the Applicants wished to reserve the right to claim compensation under the Act in these proceedings. The Respondent sought to adopt a position that she would agree the change to an equal share if the Tribunal did not order compensation; but if the Tribunal decided compensation would be payable then she wished to retain the present provision whereby the Applicants only paid a one sixth share. Since that was not acceptable to the Applicants, they withdrew their agreement to an equal division and sought to retain the present provision.

12. In her Statement of Case, submitted on her behalf by Thrings LLP, Solicitors, the Respondent says:

“Whilst it appears that the service charge contributions should be altered to a 50-50 basis as a natural and just consequence of the removal of the reference to 58 Bell Hill Road from the Lease, the Respondent does not desire to incur additional substantive costs and Tribunal time in considering whether she has statutory grounds to effect such an alteration and/or considering the liability and quantum of any compensation payable. In order to resolve this matter now, both minimising legal costs and Tribunal time going forward, the Respondent confirms that the draft lease is now in agreed form retaining the original 1/6<sup>th</sup> – 5/6<sup>th</sup> service charge contribution. There are no substantive issues for the Tribunal to consider. The only remaining issue is costs.”

13. This part of the Respondent’s submission is set out in full because, but for the clarity it provides, the Tribunal would have had significant reservations about agreeing a form of a variation that left a position where a property of two flats of roughly equal size were contributing to the service charge in such an unequal way. There is a clear argument that the percentage division should remain as it is, an argument set out in the documentation supplied by the solicitors for Man Co and adopted by the Applicant. The Tribunal would only be able to vary the percentage division under a relevant provision within section 35 of the Act. The only relevant provision would appear to be s35(2)(f), namely the computation of the service charge under the lease. In that regard, *Morgan v Fletcher* [2009] UKUT 186 indicates that a variation is not possible if the contributions of the flats combined to equal 100%. There is the additional factor that the Lease of 2 November 2001 was drafted on behalf of the Respondent.

14. On the other hand, this case might differ from *Morgan v Fletcher* in a number of respects. First, there are (as yet) no other long leases in either 58 or 60 Bell Hill Road so the service charge total does not add up to 100%. More significantly, there appears to the Tribunal to be an argument that the Lease of 2 November 2001 intended the one sixth contribution to the service charge to be one sixth of the total charge for the two adjoining properties together, namely 58 Bell Hill Road combined with 60 Bell Hill Road. The ‘Building’ is defined in the Lease of 2001 supplied to the Tribunal as “the building and grounds known as Bell Hill Road, St George, Bristol” so it is an open question of whether that definition should refer to 58 and 60 or just to 60 Bell Hill Road. Other aspects of that Lease might suggest that there was an intent to refer to both properties. Thus, the management company, of which the leaseholder is required to become a member under

the terms of the Lease, is 58 and 60 Bell Hill Management Company Ltd. Unless it was intended to include both properties, the name is inappropriate. The plan attached to the Lease shows a plan that includes the first floor of 58 Bell Hill Road as well as the demised premises in number 60. Finally, it may be (though the Tribunal has not inspected) that 58 Bell Hill Road is a larger property since the plan shows a staircase in that property to a second floor. A one sixth share for the Property would make much more sense if the intention was to include within the service charge a larger house next door. But it clear from the paperwork that the Respondent and her solicitors consider that the definition of the Building in the Lease refers only to number 60 Bell Hill Road.

15. The Tribunal does not have to decide these issues. The Respondent does not wish to incur costs to litigate the issues that might arise. The form of Deed of Variation is agreed by all the parties, retaining a service charge contribution for 60b Bell Hill Road of one sixth. The Tribunal accordingly determines that the Deed of Variation should be in that form agreed between the parties.

16. The only outstanding issue between the parties is the issue of costs.

### **Costs**

17. The Second Applicant, Man Co, applied to the Tribunal for an order that the Respondent pay its reasonable legal costs incurred in dealing with this Application. The request was supported by a detailed submission on costs in a sealed envelope to the Tribunal but served openly on the Respondent. Man Co estimates its total legal costs at £16,000 plus VAT.

18. The Respondent applied to the Tribunal for an order that the Applicants and Second Applicant, Man Co, pay her reasonable legal costs incurred in dealing with this Application. A full written submission on costs was made to the Tribunal. The Respondent does not provide any quantification of the total costs incurred or indicate a total amount that is sought.

19. The Applicant does not make any request for an order for costs – the Applicants are not legally represented as such. However, the submission on costs by BLB Solicitors on behalf of Man Co concedes that their client, as a management company, is dependent for its solvency on receiving financial contributions from its members. Whether the Respondent is a member of the company is unclear to the Tribunal but the litigation by Man Co has, it is stated, so far been funded entirely by financial advances from Mr Loxton. Consequently, any order in favour of Man Co will benefit Mr Loxton as sole director; and any order in favour of the Respondent against Man Co is not likely to be met as Man Co has no assets. The Tribunal is not told why Mr Loxton sought legal advice and representation for Man Co but chose to continue to represent himself and Mrs Loxton personally. That is entirely a matter for them. However, the position does mean that, in effect, the Applicants seek their costs incurred through Man Co from the Respondent and the Respondent seeks full payment of her costs from the Applicants.

20. In considering any application for costs, the Tribunal, being a statutory body, does not have any inherent power to award costs. On the contrary, the basic position is that costs are not generally recoverable in Tribunal proceedings. Its power is limited to awarding costs under and by virtue of section 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (“the Rules”). There are only three circumstances where an award of costs can be made. Since this is not a land registration case, and no application is made in respect of wasted costs, the only ground available to the Tribunal is section 13(1)(b):

“if a person has acted unreasonably in bringing, defending or conducting proceedings”

21. In deciding whether any party has acting unreasonably, the Tribunal must consider the matter objectively and consider whether there is a reasonable explanation for the conduct complained of; if there is no reasonable explanation, then the Tribunal has a discretion whether or not to order costs to be paid, taking into account the nature, seriousness and effect of the conduct concerned. If an order for costs is made, then it must be proportionate in all the circumstances of the case.

22. Now it may be, in any given case where (as here) both parties are seeking a costs order against the other, that both have acted, in whole or in part, unreasonably. It is incumbent on the Tribunal therefore to examine the case put forward by each party in turn. It will be necessary, in so doing, to make reference to events and correspondence during these proceedings. It will be convenient to consider the claims made at various times chronologically rather than look at all the submissions of one party and then the other.

#### *Prior to the issue of the Application*

23. Man Co submits that the Respondent acted unreasonably even before the Application was submitted by Richard Loxton on behalf of Man Co on 6 July 2018. It is said that Mr Loxton invited discussions as early as September 2016 but no response was received and proposals were put forward at other times. Now, even assuming paragraph 13(1)(b) of the Rules permit reference to acting unreasonably even before proceedings are commenced (which the Tribunal doubts), no unreasonable conduct has been shown. There might be an arguable case (assuming paragraph 13 does apply) if there had been (prior to any application) a very full submission of the reasons that a variation was needed, a clear suggestion of the variations put forward and a draft of the changes required showing how each party might benefit – but that is not the case here.

#### *Between 5 July 2018 and 19 December 2018*

24. The Application was dated 5 July 2018 and received by the Tribunal office the following day. It was only on 19 December that the Procedural member, Mr D Banfield FRICS, determined in Directions dated that day that the case for the Applicants was now sufficiently set out to justify requiring the Respondent to prepare her response.

25. The Respondent’s main basis for a costs order is based on the conduct of Mr Loxton, acting for the Applicants, during this period. The Application dated 5 July was said to be made under section 35 of the Act, but the grounds of the claim was that the Respondent did not act on a special resolution of 2009 which stated that the objective of the company was to acquire the freehold of both 58 and 60 Bell Hill Road. The relevant terms of the

Lease and the nature of the variation sought were not clear from the Application and it appeared to be largely devoted to matters beyond the jurisdiction of the Tribunal. The nature of the Application was certainly unclear to Procedural Judge Whitney who issued Directions on 18 July seeking a position statement from each party.

26. Mr Loxton then stated the application was under section 37 of the Act not section 35. His position statement was sent on 25 July, with a further letter on 29 July. These are long documents and it is difficult to follow the reasoning – it is certainly clear that the documents included a lot of material which could not be relevant to the Application and there is still not very much which is included to indicate what variations were required to the Lease (and those matters that might be relevant were largely concerned with whether Man Co had an obligation to maintain the Property and ability to recover service charges). Directions by Mr Banfield on 13 August had to remind Mr Loxton that the Tribunal could not determine matters of company law, could not order cessation of ground rent and could not consider the amount and payability of service charges unless an Application was made under section 27A of the Landlord and Tenant Act 1985. The Directions required the Applicant to set out how he satisfied the requirements of section 37 of the Act.

27. The Respondent's position was set out in a letter from her solicitor on 8 August 2018 which opposed the variations proposed by Mr Loxton and submitted that the service charge provisions were adequate; but would agree a change to the service charge contribution percentage.

28. The Directions of 18 July reminded the parties that the Tribunal could not advise them and that they should obtain independent legal advice. It was only at the end of August that BLB were instructed to act for Man Co. They wrote on Man Co's behalf on 31 August 2018 to the Tribunal with a copy to the Respondent's solicitors. This letter clarified that the Application was under section 35, not section 37, and for the first time set out some reasons why the Lease was defective and makes the first clear proposals for some ways variation might be effected.

29. Directions issued by Procedural Judge Morrison on 11 September 2018 repeated the offer of mediation in the light of the fact that it appeared that some measure of agreement had been achieved and considered that the matter may be capable of resolution through further discussion or negotiation. The parties agreed a two month stay and the Applicants and Man Co accepted the offer of mediation. The Respondent put forward what they submit is a reasonable offer to settle the matter in a letter of 12 November 2018 but that was rejected by Man Co and by Mr Loxton on behalf of the Applicants.

30. The Respondent refused the offer of mediation. This was explained in her submission relating to costs on the basis that there were still issues being raised that were entirely different to the Tribunal proceedings and because Mr Loxton was refusing to engage in reasonable dialogue. In the absence of alternative proposals it was felt that there was no reasonable prospect of resolution by mediation. The Respondent also considered that the Applicant had still not satisfied the earlier Direction that he set out a statement showing how he satisfied the grounds for the application under section 35; and she was concerned to see if Man Co had locus standi as a party to the Lease.

31. In the Directions issued on 28 November, noting that no settlement had been reached, Mr Banfield considered there remained a lack of clarity on the issues and required information from all three parties, but mostly from Mr Loxton and Man Co including the requirement for them both to provide a Notice of Application under section 35 as required by section 35(5). It was only by Directions on 19 December that Mr Banfield was satisfied by the information then presented that the Respondent was in a position to respond.

32. It is the Respondent's case that all costs incurred on her behalf until this point should be recoverable as against the Applicants due to the unreasonable manner that Mr Loxton had conducted proceedings. Thrings, the Respondent's solicitors, do not quantify their costs up to that point though in earlier correspondence in August 2018 they indicated that their costs even at that time were £2,000 plus VAT. They do not make a case for a costs order against Man Co. They stress that the case appeared to be originally brought to secure the freehold which they submit is an abuse of process; that there was a vast amount of confused and largely irrelevant material to be reviewed; that some directions were not complied with that prevented meaningful negotiations; and that the final position bore little relation to the original application.

33. The position of Man Co is that the Respondent behaved unreasonably in the period after 27 September, by unreasonably delaying engaging in dialogue, and by not responding to a proposal put forward on 2 October until 12 November when her 'Without Prejudice' counter-proposal, though on similar terms, introduced some unrealistic conditions. It was also submitted that there was an unreasonable refusal to accept mediation and that the 'technical points' about the section 35 notice which was required could be unreasonable in the light of Rule 3(c) of the 2013 Rules – where the Tribunal is to avoid unnecessary formality to ensure it deals with a case fairly and justly. The use of 'without prejudice' correspondence is also cited.

34. In the view of the Tribunal, Mr Loxton did act unreasonably in bringing this case in the way that he chose, using the procedure to introduce matters of concern that were quite beyond the jurisdiction of the Tribunal. He was advised to seek legal advice and did so eventually by instructing BLB to act on behalf of Man Co. The conduct of proceedings by the Joint Applicants after that date, though some matters might have been done more swiftly, do not amount to unreasonable conduct after that date.

35. It is also the view of the Tribunal that the Respondent did not act unreasonably during this period. The delay of seven weeks to respond to a proposal to settle was no doubt frustrating but not so long as to be incapable of a reasonable explanation. The offer made by the Respondent in the letter of 12 November did not contain matters which were inherently unreasonable – just some matters that were unacceptable to the Applicants and Man Co. Moreover, it cannot be the case that it is always unreasonable to refuse an offer of mediation. At the time that the refusal was given, it was not unreasonable for the Respondent to want to have clarity on the case being put forward and Mr Banfield, the Procedural Judge, accepted that there were matters still to be resolved in his Directions of 28 November. Finally, the Tribunal does not consider that the reference to Rule 3(c) is of assistance to the submission of Man Co. That Rule is directed to the Tribunal in its duty



to act fairly and justly and not to the parties. In any event, a notice under section 35(5) was required.

*Between 19 December 2019 and 7 May 2019*

36. The Respondent puts forward a case for payment of all her legal costs, on the basis that the matter should not have been litigated and could have been avoided had Mr Loxton set out a proposed replacement lease in a clear manner before issuing proceedings.

37. Man Co argues that litigation has been prolonged in this period by the Respondent failing to respond to reasonable requests for clarification prior to 7 May 2019. It claims that the Respondent's statement of case dated 28 February 2019 caused considerable confusion. In particular, the stance of applying for a variation to the service charge percentage but attempting to keep open the option of declining to accept the determination of the Tribunal on that issue unreasonably added to Man Co's costs. Finally, it argues that the additional Directions on 7 May were necessitated by the Respondent's failure to set out her position coherently.

38. One consistent thread to Man Co's submissions is the inconsistency of the Respondent's approach. Thus it is contended that the Respondent maintained, and to be fair, still maintains that the provisions of the Lease were acceptable, yet it agreed to variations; that it questioned whether Man Co had locus standi to maintain a role in these proceedings yet then accepted it being made a party; that it applied for its own variation – to alter the percentage contribution - but then withdrew and conceded the provision should remain unchanged. The Respondent's answer to these points is that she has consistently tried to act reasonably and that her agreement to Man Co being joined and her agreement to the draft lease and the retention of the existing percentage for the service charge provision is to avoid further costs and Tribunal time in considering complex legal arguments.

39. The Tribunal considers that neither party prepared properly for the scheduled hearing on 7 May since most of the paperwork dealt with matters now only relevant to the costs issue and the travelling draft supplied had no colouring or any other mechanism to indicate which party was making amendments and for what reason. If the Respondent was at fault here, so were the Applicants and Man Co. There is no basis for making a costs order in relation to that matter.

40. The Tribunal can understand that the Applicants might consider that they have seen the Respondent raise issues and then later concede on the point raised. But the Tribunal is reluctant to find a party has acted unreasonably when they have quite properly raised very valid points in response but after careful consideration have decided that the risk of losing a tenable argument at a full hearing and paying more in legal costs is too great a risk to bear. The Joint Applicants have succeeded in their objectives, after beginning the process in a very haphazard manner, without the cost of a full hearing on issues that were eminently justiciable. The Tribunal considers that a costs order should not be made in those circumstances.

41. However, the Respondent did act unreasonably in trying to ‘have her cake and eat it’ in trying to get a determination on the percentage service charge but withdrawing from that result if a compensation order was made in consequence.

*Overall conclusion on costs*

42. The Tribunal considers that neither Mr Loxton, as acting for himself and his wife, and as the only Director of Man Co, nor the Respondent, can look back over the way that they have acted in these proceedings and claim that they have always acted beyond any reproach. Both have acted, in the view of the Tribunal, unreasonably in part, Mr Loxton at the outset, in the way he commenced and dealt with the proceedings until the end of August, and the Respondent in her attempts to get an alteration to the service charge percentage but ensure she was not liable for compensation.

43. The Respondent back in August quantified the legal costs of dealing with the Application to that date at £2,000 plus VAT. The Tribunal considers that sum to be excessive and a figure about half that amount would be reasonable. With regard to the Respondent’s stance of applying for a variation but attempting to keep open the option of declining to accept the determination of the Tribunal added, in the submissions of Man Co’s solicitors, an estimated £750 to £1,000 to the costs of Man Co. In effect, therefore, these aspects of unreasonable conduct cancel each other out.

44. The Tribunal therefore determines that it makes no order for costs on both of the applications made to it. The Tribunal considers, looking at the whole matter objectively, that this result is a fair and just outcome.

**Right of Appeal**

45. 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.

46. 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.

47. 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.

48. 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 that the party who is making the application for permission to appeal is seeking.

Judge Professor David Clarke  
1 July 2019