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

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| **Case Reference** | : | **LON/00BH/LVL/2019/0005; CVP REMOTE** |
| **Property** | : | **Bridge Court, Lea Bridge Road, London E10 7JS** |
| **Applicant** | : | **(1) Holly Bowles (Flat 32)**<br>**(2) R Hall (2)**<br>**(3) Ping Gardner (3)**<br>**(4) Madeline Webb (8)**<br>**(5) Makeda Matheson & Stephanie Thomas (9)**<br>**(6) Ben Budding (14)**<br>**(7) Nicholas Watson (16)**<br>**(8) Charles Lobo & Cira Lobo (17)**<br>**(9) Gareth Phillips (19)**<br>**(10) Thomas Newick (22)**<br>**(11) Jessica Love (24)**<br>**(12) Rosemarie O'Donnell (26)**<br>**(13) Ben Edwards (30)**<br>**(14) Michael Hynes (34)**<br>**(15) Dalbaen Depots Ltd (42)**<br>**Marzio Guidice (43)** |
| **Representative** | : | **In person by Mr and Mrs Bowles** |
| **Respondents** | : | **Triplerose Limited** |
| **Representative** | : | **Mr Justin Bates of Counsel** |
| **Type of Application** | : | **To vary leases (Part IV Landlord and Tenant Act 1987)** |
| **Tribunal Members** | : | **Judge Professor Robert M Abbey**<br>**Mr Stephen Mason FRICS** |
| **Date of Video Hearing** | : | **1 March 2021** |

**Date of Decision** : **8 March 2021**

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**DECISION**

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## Decisions of the Tribunal

(1) The Tribunal declines to grant the application for the variation of leases at the property under sections 35 and 38 of the Landlord and Tenant Act 1987, ("the Act"). The relevant legislation is set out in an appendix to this decision.

(2) The reasons for the decision are set out below.

## The background to the application

1. The applicant seeks to vary leases at **Bridge Court, Lea Bridge Road, London E10 7JS** ("the property") under the provisions of Part IV**,** (Variation of Leases), of the Landlord and Tenant Act 1987. The original applicant is the leaseholder of flat 32 in the property. On 6th June 2019 the Tribunal received an application from the First Applicant, Ms Holly Bowles, to vary her lease at Flat 32, Bridge Court. This flat is in a development consisting of two blocks, known as Bridge Court North and Bridge Court South, containing 24 flats each (there are also commercial premises on the ground floor of the north block). A number of the other tenants support Ms Bowles's application and have now joined in as Applicants.

2. On the morning of the hearing the tribunal were able to carry out a site visit and inspection and were able to safely view the area in dispute that is fully in the open air. The morning was dry and cloudy when the Tribunal members saw the extent of the disputed land being a tarmacked area between the two blocks. There were individual car parking spaces marked on the tarmac and some had cars parked on them and some did not. Access is via a narrow roadway to the side of the block that fronts to the road. Between the two blocks is the disputed area which used to be a communal garden but is now a car park. Mrs Bowles's lease and, presumably, the leases of the other Applicants contain no acknowledgment or indeed any provisions regarding the change.

3. The Applicant seeks to vary Schedule 1, Part 2, paragraph 4 of her lease. That part confers certain easements on her, including:

> "The right in common with the lessor and the other lessees in the Building to use any communal gardens included in the title above mentioned and the pathways leading thereto whilst the same shall remain as such" .

4. The applicant seeks to vary this easement to read:

"The right in common with the Lessor and the Lessees in the Building to use any communal gardens parking zones and yards in the title above mentioned and designated vehicular accesses and pathways leading thereto"

5. The essence of what the applicant wants is a right to park a car in the area marked in red at page 92 of the trial bundle. The reason why she wants this is because she says it would assist with remedying anti-social behaviour at the development and would enable residents to secure the parking area by various means including a gate at the entrance.

6. On 7 February 2020 Judge Nicoll made a decision on a preliminary issue. He decided that The Tribunal has jurisdiction to entertain this application having regard to the provisions of s.35(2) of the Landlord and Tenant Act 1987. There was an appeal on this decision. The Upper Tribunal stayed its decision pending the outcome of these proceedings.

7. The main provisions of section 35 of the 1987 Act state: -

*"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); ...."*

8. Accordingly, there must be something in the lease that according to stature means that the lease fails to make satisfactory provision with regard in this case to the gardens/car park area. Judge Nicol wrote in his decision: -

*"The Tribunal must bear in mind the limited nature of the exercise being undertaken here. The Tribunal has yet to hear any evidence. The question is whether, assuming the facts to be as the Applicants allege, they are capable of coming within section 35(2).*

*In the Tribunal's opinion, they are so capable:*

*(a) The lease makes no provision of any kind, whether about the maintenance or use of the car park. That is arguably unsatisfactory.*

*(b) The governance of the use of a car park may be relevant to its maintenance.*

*(c) It is a proper use of English to talk of "installing" a car park and so a car park is capable of being an "installation".*

*(d) The governance of the use of a car park would normally be regarded as a "service".*

*(e) Depending on the circumstances, a car park and its use are capable of being reasonably necessary for occupiers to enjoy a reasonable standard of accommodation."*

9. So the purpose of this preliminary decision was simply to see whether, assuming the facts to be as the Applicants allege, they are capable of coming within section 35(2). Judge Nicol found that to be so.

10. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was coded as CVP with all participants joining from outside the court. A face-to-face hearing was not held because it was not possible due to the COVID-19 pandemic restrictions and regulations and because all issues could be determined in a remote hearing. The documents that were referred to are in a bundle of many pages, the contents of which we have recorded and which were accessible by all the parties. Therefore, the tribunal had before it an electronic/digital trial bundle of documents prepared by the parties, in accordance with previous directions. The bundle was

supplemented by some additional documents submitted in the week prior to the hearing.

## The determination

11. By directions of the Tribunal, it was decided that the application be determined with an oral hearing. At the hearing held on 1 March 2021 the applicant represented herself and the respondent was represented by Mr Bates of Counsel.

12. There was one issue for the Tribunal to decide. The applicant's lease is silent about the granting of any easement in respect of parking. The area in dispute belongs to the respondent as part of the landlord's retained land. This disputed land is subject to easements as more particularly set out in the lease in Schedule 2. In particular the now out of date easement allows the tenant to use any communal gardens included in the title and the pathways leading thereto whilst the same shall remain as such. No mention of parking of course because at the time of drafting the lease the disputed area were gardens and only later turned into a parking area.

13. The Applicant asserts that the current open access to the car park space has resulted in a "constant and pervasive vulnerability of lessees to anti-social and criminal behaviour … including but not limited to:"

    (a) Noise
    (b) Threatening behaviour
    (c) Litter
    (d) Dumped cars
    (e) Fly tipping
    (f) Vandalism
    (g) Graffiti
    (h) Security breaches
    (i) Drug's paraphernalia
    (j) People urinating and defecating
    (k) Feeling intimidated
    (l) A cycle of degradation

14. Consequently, The Applicant further asserts that, within the terms of section 35(2)(c) and (d) of the Landlord and Tenant Act 1987, the lease fails to make satisfactory provision with respect to the repair or maintenance of installations or the provision or maintenance of services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation. They seek therefore to vary their leases so that she might have a right to use any communal gardens parking zones and yards in the title and designated vehicular accesses and pathways leading thereto.

15. Before Judge Nicol the respondent asserted that this application does not come within section 35(2)(c) or (d) because there is nothing

"unsatisfactory" about the present arrangement. The proposed right to use the car park cannot be said to relate to the "repair or maintenance" of an "installation" which is "reasonably necessary" to ensure that the occupiers enjoy a "reasonable standard of accommodation". Similarly, the right is not a "service" which is "reasonably necessary" to ensure that the occupiers enjoy a "reasonable standard of accommodation".

16. The starting point is that there must be something unsatisfactory. Is there an objective problem? The Tribunal was mindful of the recent decision of the Upper Tribunal in the case of *Triplerose Limited v Ms Bronwen Stride* [2019] UKUT 0099 (LC) where Judge Behrens made it clear that if a variation is sought then there must be evidence of a problem or difficulty arising from the term that is subject to the possible variation.

17. The question of what is satisfactory provision was reviewed by Judge Cooke in the case of *London Borough of Camden v Morath* [2019] UKUT 193 (LC); [2020] L. & T.R. 4 where she wrote (Bold made by this Tribunal): -

> *The word "satisfactory" is not defined in the statute. I have been referred to the Tribunal's decision in Triplerose Ltd v Stride [2019] UKUT 99 (LC). That was an appeal from the FTT's decision, on an application under s.35, to vary the lease of a basement flat in a building divided into four flats. The other three leases required the tenants to contribute towards the cost of the repair and renewal of the building and the management of the building, whereas the lease of the basement flat required the tenant only to contribute to the cost of external painting. The tenant's appeal succeeded. At [39] the Tribunal observed that the terms of the four leases:*
>
> *"... demonstrate an astonishing lack of care and illustrate the dangers of cutting and pasting parts of a lease to another lease without checking the details. ... The result is a mess. We ... agree that a layman unversed in the jurisprudence surrounding section 35 of the 1987 Act might describe it as 'unsatisfactory.'*
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> *40. However, in our view ... the fact that the proposed variations are common or standard does not make the original terms unsatisfactory. Equally the fact that different tenants make different contributions does not make the lease unsatisfactory. There is a repairing covenant so this is not a case where there is no obligation to repair. ... We accept that there might be circumstances where the lack of adequate contributions from Triplerose could render the lease unsatisfactory. However, that can only be established by evidence. If, for example, the building required a major roof or other structural repair beyond the means of [the other tenants]*

*that might constitute the necessary evidence. But there is no such evidence at present."*

*15 The Tribunal in Triplerose referred to and quoted from the decision of the President of the Lands Tribunal in Cleary v Lakeside Developments Ltd [2011] UKUT 264 (LC). This was another case where the various leases in a building did not match, with the result that the management fees were paid for by the landlord and only two of the six leaseholders. The President said:*

*"27. … at present the cost[s] 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. … 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. …*

*30 … 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."*

*16 What I take from those decisions is that* ***the Tribunal will consider whether the wording of the lease as it stands is clear, and whether the term sought to be varied is workable. If it is clear and workable then it is not unsatisfactory****. Obviously the question whether the bargain as it stands works in practice has to be considered on the basis of the evidence in each case. But s.35 does not enable the Tribunal to vary a lease on the basis that it imposes unequal burdens, or is expensive or inconvenient. It would be very strange if it did, in view of the law's general resistance to the temptation to interfere in or improve contractual arrangements freely made.*

18. To summarise Judge Cooke requires a Tribunal to decide if the wording of the lease is clear and workable. "If it is clear and workable it is not

unsatisfactory." S.35 does not enable the Tribunal to vary a lease if it is inconvenient or expensive.

19. Accordingly, having heard and read the evidence and submissions from the Applicant and having considered all of the copy deeds and documents emails and letters provided by the applicant, and the written submissions from the respondent, the Tribunal determines the variation issue as follows.

20. There is, in the opinion of the Tribunal, nothing in the leases that is at present unclear and unworkable. The applicant has an easement to use any communal gardens included in the title and the pathways leading thereto whilst the same shall remain as such. It is perhaps unkind to gardens to call the tarmacked land a garden but on a strict interpretation of the lease the applicant remains entitled to use the disputed area in accordance with the lease terms. This includes any pathways leading thereto. The lease does say "whilst the same shall remain as such". The Tribunal takes this to refer only to the existence of pathways leading to the garden area. This being so the lessor must deal with the disputed land in the light of the applicants pre-existing rights. If the respondent fails to do so then the applicant may resort to the protection of the law such as an action for breach of covenant for quiet enjoyment or derogation from grant, but these are matters for another time and jurisdiction and not this Tribunal. There is no express right to park conferred on this Applicant. Other leaseholders do have such a right, but this is because they have purchased such a right and a deed of variation was disclosed to the Tribunal to confirm such an arrangement. The Tribunal also noted that there is only space for 23 cars to be parked within the disputed land and so it would raise new problems should each leaseholder (48) claim they have a right to park and then inevitably there would be too many cars for too little space.

21. One main element of the applicant's argument is about anti-social behaviour. It is clear that this is a very real problem for the residents. The Tribunal has sympathy for the applicant in this regard. However, the Tribunal cannot make a link between the anti-social behaviour complained of and whether or not the Applicant can park a car within the disputed area. As Counsel for the respondent observed, "The complaints are not affected by whether she has an easement of parking". To that end the Tribunal cannot find that the lease fails to make satisfactory provision and therefore declines to make the Order to vary the lease.

22. Finally, within 21 days of this decision the respondent shall file stamped addressed envelopes addressed to each leaseholder, (all 48), to enable the Tribunal to serve a copy of this decision on the lease variation (as is now required following the Upper Tribunal decision in *Hyslop v 38/41 CHG Residents Co Ltd* [2017] UKUT 0398 (LC)).

23. Rights of appeal made available to parties to this dispute are set out in an Annex to this decision.

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| **Name:** | Judge Professor Robert M. Abbey | **Date:** | 8 March 2021 |

## 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 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.

# Appendix

## Relevant legislation

### Landlord and Tenant Act 1987

**Part IV** Variation of Leases

*Applications relating to flats*

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 the whole of any such expenditure.
(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002and 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.
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.

36 Application by respondent for variation of other leases.

(1)Where an application ("the original application") is made under section 35 by any party to a lease, any other party to the lease may make an application to the tribunal asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application.
(2)Any lease so specified—
(a)must be a long lease of a flat under which the landlord is the same person as the landlord under the lease specified in the original application; but
(b)need not be a lease of a flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease.
(3)The grounds on which an application may be made under this section are—

(a)that each of the leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application; and
(b)that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons who are parties to the leases specified in that application, to have all of the leases in question (that is to say, the ones specified in that application together with the one specified in the original application) varied to the same effect.

37 Application by majority of parties for variation of leases.

(1)Subject to the following provisions of this section, an application may be made to the appropriate tribunal in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.
(2)Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.
(3)The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.
(4)An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.
(5)Any such application shall only be made if—
(a)in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or
(b)in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.
(6)For the purposes of subsection (5)—
(a)in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and
(b)the landlord shall also constitute one of the parties concerned.

*Orders varying leases*

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 tribunalwith 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) 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.