



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

Case Reference: CHI/00HB/LVT/2021/0005

Property: 1-8 Cedar Court, 1-8 Maple Court, 1-8 Raven Court
Westover Gardens, Bristol BS9 3LB, 3LD and 3LA

Applicant: Falconside Management Ltd
Representative: Harris & Harris, Solicitors

First Respondents: The Twenty-four Lessees

Second Respondent: Fairhold (Huddersfield) Limited

Type of Application: Landlord and Tenant Act 1987, section 37
Application by a majority of parties for variation of leases

Tribunal: Judge Professor David Clarke, Solicitor

Date of Hearing: 17 March 2022

Venue of hearing: Paper Determination

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DECISION, ORDER and STATEMENT OF REASONS

Determination and Order

An order under Section 37 of the Landlord and Tenant Act 1987 (“the Act”) for a variation of the underleases of a total of 24 apartments contained in Cedar Court, Maple Court and Raven Court, Westover Gardens, Bristol BS9 is appropriate as the Tribunal is satisfied that the provisions of Section 37 have been met and in particular that the objects to be achieved by the variations proposed cannot be satisfactorily achieved unless all the underleases are varied to the same effect. The Applicant, Falconside Management Limited, and 20 of the 24 persons, who together constitute the First Respondents, and who are Lessees of apartments at Cedar Court, Maple Court and Raven Court, have consented to the variations proposed and the other 4 persons who are Lessees have not objected to those variations.

It is ordered that:

- 1. Pursuant to section 38(3) of the Act, the underleases of the 24 apartments listed in Schedule 1 to this determination set out below be varied from the date of this order in accordance with the provisions of Schedule 2, save that the variation at paragraph 19 of the Seventh Schedule shall not apply to the underleases for the apartments numbered 4 Cedar Court and 1 Raven Court.**
- 2. The deed of variation dated 21st May 1987 rectifying the description in the underlease dated 23rd July 1971 of the premises comprising 2 Cedar Court shall be further varied in accordance with paragraph 6 of Schedule 2 to this order.**
- 3. Any clause not shown to be deleted or varied remains as per the original lease.**
- 4. In every case, the Land Registry shall be notified of this Order by the Applicant. Pursuant to section 38(9) of the Act, the Chief Land Registrar shall make such entries on the registers of the titles affected for the purpose of recording and giving effect to the terms of this order so that the variations are recorded in the registered leasehold titles of each of the underleases.**
- 5. A copy of this Order, determination and statement of reasons shall be sent by the Applicant to each of the 24 underlessees and to the Second Respondent.**

Schedules to this Determination

SCHEDULE 1

Property	Lease Date	Registered Number	Title
1 Cedar Court	28 September 1971	BL26963	
2 Cedar Court	23 July 1971	BL25971	
3 Cedar Court	4 December 1970	BL21714	
4 Cedar Court	18 June 1971	BL25108	
5 Cedar Court	16 July 1971	BL26112	
6 Cedar Court	10 September 1971	BL26550	
7 Cedar Court	23 December 1970	BL22107	
8 Cedar Court	5 May 1971	BL24438	
1 Maple Court	29 July 1970	BL19817	
2 Maple Court	2 July 1971	BL26551	
3 Maple Court	11 September 1970	BL20585	
4 Maple Court	30 June 1970	BL19678	
5 Maple Court	10 June 1970	BL18601	
6 Maple Court	6 August 1970	BL19586	
7 Maple Court	17 July 1970	BL19241	
8 Maple Court	26 June 1970	BL19092	
1 Raven Court	23 August 1971	BL26712	
2 Raven Court	28 June 1971	BL27351	
3 Raven Court	9 July 1971	BL25629	
4 Raven Court	7 May 1971	BL24193	
5 Raven Court	27 August 1971	BL26665	
6 Raven Court	15 June 1971	BL25045	
7 Raven Court	21 June 1971	BL25270	
8 Raven Court	27 April 1971	BL24821	

SCHEDULE 2

Variations to the underleases

1. Amendment of definitions in Recital (1)

1.1. The definitions identified by the letters (h) and (i) in Recital (1) of the original lease shall be re-lettered (l) and (m) in the varied lease.

1.2. The following definitions shall be added to Recital (1):

(h) *"Code of Practice" means the relevant codes of practice published by the Royal Institution of Chartered Surveyors (RICS) from time to time.*

(i) *"the Reserve Fund" means the sum of £32,161.94 accumulated to date together with such other sums reasonably and properly levied as part of the Service Charge pursuant to the Planned Maintenance Programme.*

(j) *"the Planned Maintenance Programme" means a rolling five-year programme of cyclical works for the Reserved Property produced by an appropriately qualified professional.*

(k) *"the Services" means all the services set out in the Seventh Schedule.*

(n) *the Service Charge" means a service charge equal to one twenty fourth part of the expenditure reasonably and properly incurred or proposed to be incurred by the Lessor in complying with the obligations on its part contained in the Seventh Schedule to be paid in accordance with the provisions of the Eighth Schedule*

(o) *"Financial Year" means every successive period of one year ending on 30 September commencing from and inclusive of the 1 October or such other Financial Year as the Lessor shall substitute therefor acting reasonably and properly*

(p) *"Interest" means interest at the rate of two per cent per annum above the base lending rate of Barclays Bank*

2. Amendment to Recital (4)

The words *"and the Eighth Schedule"* shall be added after the words *"Sixth Schedule"* in Recital (4).

3. Amendment to Clause 2

The words *"and the Eighth Schedule"* be added after the words *"the Sixth Schedule"* in Clause 2.

4. Amendment to Clause 3

The words “*and the Eighth Schedule*” be added after the words “*the Seventh Schedule*” in Clause 3.

5. Amendment of the description of The Reserved Property in the Second Schedule

5.1. The words “*including the balconies terraces railings and walls*” shall be inserted after the words “*external parts thereof*” in the Second Part of the description of The Reserved Property.

5.2. The words “*glass of the windows*” shall be deleted and replaced with “*windows and patio doors*” in the Second Part of the description of The Reserved Property.

6. Amendment to the exception and reservation to the demise in the description of The Premises in the Third Schedule

6.1. The words “*including the balconies terraces railings and walls*” shall be inserted after the words “*external parts thereof*” in the Exception and Reservation to the description of The Premises.

6.2. The words “*(but not the glass in the windows of the Flat nor the interior faces of such walls as bound the flat)*” shall be varied to: “*(but not the windows and patio doors of the Flat nor the interior faces of such walls as bound the Flat)*”

6.3. The words “*roof or*” shall be inserted before the word “*terrace*” in the Second Part of the description of the Premises.

7. Addition of new paragraphs to The Fourth Schedule (Rights included in the Demise)

The following new paragraphs 7 and 8 shall be added to The Fourth Schedule:

7. *The right to attach fixtures and fittings to the internal faces of those parts of the Reserved Property as encloses the Premises and subject to the Tenant obtaining the prior consent in writing of the Lessor and the Head Lessors the right to attach fittings and fixtures to the external faces of those parts of the Reserved Property as enclose the Premises such consent not to be unreasonably withheld.*

8. *The exclusive right to use in connection with the use and enjoyment of the Premises any balcony or terrace that serves the Premises.*

8. Amendment, replacement, deletion and addition of paragraphs in the Sixth Schedule (Covenants by the Tenant with the Lessor)

8.1. The following proviso shall be added at the end of paragraph 9:

“provided always that no such costs shall be payable in regard to the installation of any new windows or doors in the Premises and no such consent shall be required for

replacement windows or doors where they are similar in all material respects including design and colour to those they replace”.

8.2. The word “consistently” in the second line of paragraph 16 shall be replaced with the word “consistent”.

8.3. The words at the end of paragraph 16 “*under Clause 19 of the Schedule accordingly*” shall be deleted and replaced with the words: “*reasonably and properly incurred in accordance with the Eighth Schedule*”.

8.4. In paragraph 17 the words “*and in the case of a document send it to the Lessor's Solicitors for the time being The Tenant shall pay to the Lessor in respect of any such notice a registration fee of Three pounds*” shall be deleted.

8.5. In paragraph 18 the words “*one twenty fourth of all costs charges and expenses incurred by the Lessor in carrying out its obligations under the Seventh Schedule*” shall be replaced with: “*the Service Charge*”.

8.6. Paragraph 19 shall be deleted and replaced with: “*The Tenant shall observe and perform the obligations on the part of the Tenant contained in the Eighth Schedule*”

8.7. Paragraph 20 shall be deleted.

8.8 Paragraphs 21 to 26 shall be renumbered paragraphs 20 to 25 respectively.

6.7 The following new paragraph 26 shall be added to the Sixth Schedule:

26. *The Tenant shall pay on demand the costs and expenses of the Lessor including any solicitors' surveyors' or other professionals' fees costs and expenses and any VAT on them reasonably and properly incurred by the Lessor in connection with or in contemplation of any of the following:*

26.1. *the enforcement of any of the Covenants by the Tenant set out in the Sixth Schedule and the Eighth Schedule;*

26.2 *preparing and serving any notice in connection with this lease under section 146 or 147 of the Law of Property Act 1925 or taking any proceedings under either of those sections, notwithstanding that forfeiture is avoided otherwise than by relief granted by the court.*

9. Amendment, replacement, deletion and addition of paragraphs to the Seventh Schedule (Covenants on the part of the Lessor):

9.1 The following paragraphs shall be added to the Seventh Schedule:

1. *The Lessor shall provide all the Services properly and reasonably required in a cost effective and efficient manner in accordance with the Code of Practice all expenditure being reasonably and properly incurred.*

2. *The Lessor covenants that the Tenant shall have quiet use and enjoyment of the Flat and the rights set out in the Fourth Schedule*

7. *The Lessor shall set up and maintain such signs security and emergency systems as shall from time to time appear to the Lessor to be necessary or desirable by the Lessor acting reasonably for the proper management of the Reserved Property or any part of it and for the safety of Owners and occupiers of and visitors to the Property*

8. *To ensure value for money the Lessor shall every three years automatically undertake a full and proper test of the market in relation to any services (or group of services undertaken by a single supplier or related suppliers) which account for or are likely to account for ten percent or more of the annual Service Charge by value excluding for the purposes of such calculation any contributions made to the Reserve Fund*

9. *The Lessor shall appoint employ and equip on reasonable and cost effective terms such appropriately qualified properly and reasonably required staff or outside contractors professional firms and managing agents able to meet the requirements of the Codes of Practice or other persons for the purposes of carrying out any matter or matters set out in this Schedule and to pay or make provision for such persons as may be reasonable or required in law and to pay any compensatory payment that may become payable in respect of any such staff as the Lessor shall determine acting reasonably and properly*

10. *The Lessor shall appoint and pay such professional firms managing agents and other appropriately qualified properly and reasonably required persons in connection with the preparation of service charge accounts and company accounts of the Lessor including the preparation and lodgement of all returns to the Inland Revenue and Companies House and reasonably and properly administering the Lessor's operations and in connection with obtaining any advice employing any specialist conducting any litigation in any Court or Tribunal including any proceedings relating to the reasonable and proper management of the Property of whatsoever nature in which the Lessor may be involved in any Court or Tribunal but not any costs arising out of a claim for breach of covenant by any tenant that are recovered from the tenant in default*

11. *To formulate manage and operate the Planned Maintenance Programme and Reserve Fund in accordance with the Code of Practice*

9.2 *Save for the leases for Flat 4 Cedar Court and Flat 1 Raven Court the following paragraph shall be added to the Seventh Schedule:*

19. *Subject to the Tenant indemnifying the Lessor against the costs thereof (and providing the Lessor with such security for costs as the Lessor shall reasonably require) at the request of the Tenant the Lessor shall enforce all or any of the covenants*

contained in the leases of the other flats comprised in the Property similar to those covenants contained in the Sixth Schedule of the Lease

9.3 Paragraphs numbered 1 to 4 of the Seventh Schedule in the original lease shall be renumbered paragraphs 3 to 6 in the varied lease.

9.4 The words “*and improvement where like for like replacement is not possible*” shall be inserted at clause 4 of the original lease (clause 6 of the varied lease) after the words “*all worn or damaged parts*”.

9.5 Paragraphs 5 to 8 of the Seventh Schedule in the original lease shall be renumbered paragraphs 12 to 15 in the varied lease.

9.6 Paragraph 9 of the Seventh Schedule in the original lease shall be renumbered paragraph 16 and shall be deleted and replaced with the following:

16. *The Lessor shall keep proper books of account of all costs charges and expenses incurred by it in carrying out the matters contained in this Schedule and to have an account taken at the end of each Financial Year of the amount of the costs charges and expenses including the costs of preparing such account incurred during the Financial Year*

9.7 Paragraph 10 of the Seventh Schedule in the original lease shall be renumbered paragraph 17 and shall be deleted and replaced with the following:

17. *The account taken pursuant to Clause 16 shall be prepared by a Chartered or Certified Accountant whom the Lessor shall call upon to issue the Certificate referred to in paragraph 2(b) of the Eighth Schedule*

9.8 Paragraph 11 of the Seventh Schedule in the original lease shall be deleted.

9.9 Paragraph 12 of the Seventh Schedule in the original lease shall be renumbered paragraph 18 in the varied lease.

10. Addition of a new Schedule.

The following schedule shall be added to the lease as the Eighth Schedule:

THE EIGHTH SCHEDULE

The Service Charge Provisions

1. *The Tenant shall pay to the Lessor in the manner hereinafter described the Service Charge*

2.(a) *the Lessor shall not less than one month before the commencement of a new Financial Year provide the Tenant with a budget estimate of the likely service charge for that year based upon costs reasonably and properly assessed which shall be the initial basis for the Service Charge for the new financial year*

(b) The amount of the Lessor's expenditure in providing and supplying the services and complying with the obligations contain in the Seventh Schedule shall be ascertained and certified annually by a certificate (hereinafter called "the Certificate") signed by a Chartered or Certified Accountant so soon after each Financial Year as may be practical but no later than six months after the end of the Financial Year and which shall relate to the immediately preceding Financial Year

(c) The Certificate shall contain a fair and proper summary of the Lessor's said costs and expenditure during the Financial Year to which it relates

(d) A copy of the Certificate shall be supplied by the Lessor to the Tenant so soon after it shall have been signed as is practical and without charge but no later than six months after the end of the Financial Year to which it applies

(e) The Tenant shall make two equal payments in each Financial Year on account of the Service Charge such payments to be made in advance on the 1st day of October (or if later at the expiration of 14 days after service of the notice hereinafter mentioned) and the 1st day of April the amount of such payments to be such as shall be specified in a notice in writing served by the Lessor upon the Tenant as representing one twenty fourth of the Lessor's likely expenditure in complying with its obligations pursuant to the Seventh Schedule regard being had to the anticipated expenditure for the Financial Year being the subject of the notice

(f) After the end of each Financial Year the Lessor shall send the Tenant an account of the Service Charge payable for that year due credit being given so soon as is practicable for advance payments received on account thereof and the Tenant shall within 14 days of the same being sent pay to the Lessor the Service Charge or any balance thereof found payable PROVIDED that if the advance payments received by the Lessor during such Financial Year exceed the Service Charge then the Lessor shall credit the difference against the Tenant's next instalment of the Service Charge (and where the difference exceeds the next instalment then the balance of the difference shall be credited against each succeeding instalment until it is fully credited) but only in relation to that Financial Year

(g) In addition to the payments to be made pursuant to paragraph (e) of this Schedule to pay to the Lessor one twenty fourth of any expenditure to be reasonably and properly incurred in carrying out the works or providing the services (or any of them) referred to in the Seventh Schedule to the extent that the amount of such proper and reasonable expenditure exceeds the funds from time to time held by the Lessor or its managing agents for such purpose and where a reasonable and proper explanation has been given as to why these extra costs have been or are likely to be incurred any such payment to be made within 14 days of written demand therefor

3. If any payments due to be made by the Tenant hereunder shall be in arrears for a period in excess of 14 days then to pay to the Lessor Interest thereon from the date when the monies first became due for payment to the date of actual payment

Statement of Reasons

The Application

1. The Applicant is the head lessee of a residential site at Westover Gardens, Bristol. This development consists of three blocks of flats known as Cedar Court, Maple Court and Raven Court constructed in about 1970. Each block contains eight flats. The twenty-four lessees of those flats are the First Respondents to this Application. The Applicant has been the head lessee since receiving an assignment of the 999-year head lease of the site in 1972. The leaseholders for the time being of the flats are the shareholders and directors of the Applicant company.
2. The Application is made under section 37 of the Landlord and Tenant Act 1987 (“the Act”) for variations in the underleases of the twenty-four flats on the grounds that the objects to be achieved by the variations that are proposed cannot be satisfactorily achieved unless all the leases are varied to the same effect. The proposed variations are set out below (paragraph 12). Twenty of the First Respondents consent to this Application; the other four have not objected. The Second Respondent is the freeholder of the site, Fairhold (Huddersfield) Ltd.
3. Part of the background to this Application is the First-tier Tribunal decision in *Durbin v Falconside Management Ltd* (2015) CHI/00HB/LSC/2014/0118. It was determined in that case that the head lessee, the Applicant in this case, could not establish a reserve fund; and that the windows and patio doors of the flats were not included in the demise of the flats notwithstanding the fact that for 35 years the leaseholders had repaired their windows at their own expense. That Tribunal also pointed to other possible significant defects in the terms of the underleases.
4. The Application aims to achieve variations to the underleases that will remedy the deficiencies that have become apparent and thereby to provide for good management in the future.
5. The Tribunal made Directions on 26 October 2021 indicating that the application was likely to be suitable for determination on the papers alone without an oral hearing in accordance with rule 31 of the Tribunal Procedure Rules 2013 unless a party objected in writing to the Tribunal within 28 days of the date of receipt of the directions. No such objections have been received and the application is therefore determined on the papers.
6. On receipt of the hearing bundle the Tribunal considered whether it had sufficient information to make its decision without an oral hearing and decided that it did. There

were no disputes as to the facts of the case that could be illuminated by the receipt of oral evidence.

The Law

7. The relevant law relating to this application is contained in sections 37 and 38 of the Act. Section 37 of the Act states:

- (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 leases are varied to the same effect.*
- (4) An application under this section in respect of any leases may be made by the landlord of any of the tenants under the leases.*
- (5) Any such application may 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.*

Section 38 provides that:

- (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 subsection (6) and (7) make an order varying each of the leases in such manner as its specified in the order.*
- (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 any variation would be likely to 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.

(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 thinks he is likely to suffer as a result of the variation.

The Issues

8. The case raises the following issues:

1. Whether the Applicant satisfied the formal requirements of section 37 of the Act to enable the Application to be considered by the Tribunal.
2. Whether the proposed variations to the leases fall within the grounds on which an application may be made under section 37, namely, that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.
3. If the Tribunal does make an order varying the leases, whether any compensation is payable under section 38(10) of the Act.

Each of these issues will be considered in turn.

9. The evidence on which the Tribunal bases its decision is the bundle of documents supplied by the Applicant.

10. On the first issue, the Applicant has satisfied the formal requirements of section 37 above. By virtue of that section, there are 25 'parties concerned', namely the 24 leaseholders and the Applicant as immediate landlord. There are some leaseholders who own more than one flat; by virtue of section 37(6) such leaseholders are 'persons concerned' for each of the flats for which they are leaseholders. This Application falls within section 37(5)(b) so the Application must not be opposed by more than 10 per cent of the total number of parties concerned. In this case, no party concerned has opposed the Application. At least 75 per cent of the parties concerned must consent to the Application. In this case, the Applicant and 20 of the leaseholders have consented, meaning that 84 per cent of the persons concerned consent to the Application. The bundle of papers includes the relevant signed consent forms by those parties who consent and evidence by way of Certificates of Service of this Application dated 10 September 2021 on all the persons concerned, namely the first Respondents, and on all persons likely to be affected by the claim, including the Second Respondent as freeholder and mortgagees of some of the flats. The Tribunal is therefore satisfied that the formal requirements of s 37 have been satisfied.

11. No objections or expressions of concern have been received from the persons served by the Applicant as a person likely to be affected by the claim. In relation to the Second Respondent, as freeholder, it appears from the papers that the matter was delayed while

the solicitors for the Second Respondent considered whether to apply for an oral hearing, but they did not do so. They also did not return to the Tribunal Office the Respondent form and did not at any time indicate either whether they agreed with the Application or objected to it. The Tribunal is satisfied that the Second Respondent has had full opportunity to take part in these proceedings had it wished to do so. In any event, the Second Respondent is not a 'person concerned' within section 37 and the terms of its head lease with the Applicant are not changed by the variations proposed in the underleases.

12. The second issue is to ensure that the grounds on which an application is made under section 37 is satisfied and that the objects to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect. The Application proposes a series of major variations to the leases. These may be summarised as follows:

1. Incorporation of the concept of good estate management by requiring adherence to the Royal Institution of Chartered Surveyor's Code of Practice for Residential Leasehold Properties.
2. The introduction of more modernised service charge provisions in a new Eighth Schedule to all the underleases which will permit the Applicant to request payments in advance on account of the cost of anticipated work and to replace the current position that service charges can only be demanded once accounts have been audited.
3. The requirement of a five-year planned maintenance programme.
4. Allowance for the establishment of a reserve fund to cover the cost of identified future maintenance and repairs.
5. The setting out in more detail the services that the Applicant may provide.
6. Clarification and amendment of the division between the Applicant and the leaseholders of the repairing responsibilities for the windows and the doors of the flats.
7. Supplementation of the rights included in each demise by a right to attach fixtures and fittings to the internal faces of the structural walls.

13. The Tribunal is satisfied that these proposed variations, and the additional detailed amendments consequent upon them, cannot be satisfactorily achieved unless all the leases are varied to the same effect. None of the reasons for not granting an order set out in section 38 apply in this case.

14. As far as the third issue is concerned, the Tribunal is satisfied that the proposed order varying the leases does not give rise to any compensation becoming payable under section 38(10) of the Act.

15. For these reasons, the Tribunal therefore makes the order set out in the Determination above as requested by the Applicant and supported by the requisite percentage of the 24 leaseholders constituting the First Respondents.

Right of Appeal

16. 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 (RPSouthern@justice.gov.uk). 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.

17. 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.

18. 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.

17 March 2022