



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

Case reference : **LON/00AN/LVT/2021/0002**

**HMCTS code
(paper, video,
audio)** : **V: CVPREMOTE**

Property : **112 Askew Road London W12 9BL**

Applicants : **Alex Gordon & Lolita Laguna Crespo (1)
Mr Hava (2)**

Representative : **N/A**

Respondent : **Mr Sunil Patani**

Representative : **Ms Gandhi (representations only)**

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

Tribunal members : **Judge H Carr
Ms A Flynn MA MRICS**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of decision : **14th January 2022**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: SKYPEREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in 2 bundles, one of 76 pages and the second, containing the lease documentation comprising of 47 pages, the contents of which I have noted.

Decisions of the tribunal

- (1) The tribunal determines not to vary the definition of maintenance rent in the applicants' leases under s.35 of the Landlord and Tenant Act 1987.
- (2) The tribunal makes no determination on the application made by the applicants in their statement of case to vary paragraph 1 of Part 1 of the Second Schedule to the applicants' leases.
- (3) The tribunal makes the determinations as set out under the various headings in this Decision.
- (4) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

The application

1. The applicants seeks a determination pursuant to s.35 of the Landlord and Tenant Act 1987 ("the 1987 Act"). The variation applied for in the application form is to the apportionment of the service charge. In the applicants' statement of case a further variation was applied for to vary paragraph 1 of Part 1 of the Second Schedule to the lease.

The hearing

2. The applicants appeared in person at the hearing and the Respondent appeared as did his son, Mr Ashish Patani.
3. The tribunal discussed with the parties whether the application should be amended to include the variation sought in relation to the repairing obligations.
4. The respondent said that he was content to allow the tribunal to determine the variation in relation to repairing obligations and therefore the tribunal decided to allow the amendment to the application.

5. The respondent's daughter, Ms Ghandi, joined the hearing 10 minutes after its commencement and subsequent to the discussion about the further variation. Mr Patani's daughter is a lawyer and had prepared the legal skeleton submitted to the Tribunal immediately prior to the hearing.
6. Neither the tribunal nor the applicants had been informed that the respondent was to be represented by his daughter. The tribunal would have delayed the commencement of the hearing if it had been aware that there was to be representation. In the event Ms Ghandi made it clear that her role would be limited to making submissions on behalf of the Respondent.

The background

7. The property which is the subject of this application is a terraced property converted into three units; one commercial unit on the ground floor and basement currently used as a restaurant and two self-contained flats on the first and second floors of the property. In addition, there is a connected stock room at the back of the restaurant converted more recently to living accommodation and rented out directly by the Landlord.
8. Both the applicants hold long leases of flats within the property which require the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease will be referred to below, where appropriate.
9. The lease of the first floor flat (Flat A) is dated 12th April 2001 and is for a term of 125 years commencing 25th March 1997 and made between Lindmead Ltd (the Lessor) and Villachase Limited (the lessee).
10. The lease of the second floor flat (Flat B) is dated 11th July 1997 and is for a term of 125 years commencing 25th March 1997 and made between Lindmead Ltd (the Lessor) and Care Developments Limited (the lessee).
11. The leases are in identical terms and include a term that every lease of a flat in the property hereafter granted by the Lessor shall contain Lessee's covenants and regulations to be observed and performed by the Lessee thereof similar to those contained herein as far as applicable.
12. The application to vary the lease is one of three interconnected applications by the applicants in relation to the property. The application under s.27A was determined on 2nd August 2021 (reference number LON/00AN/LAM/2021/0115) and the application

to appoint a manager was determined on 18th Msy 3032 (LON/00AN/LAM/2020/0013)

The law

13. The relevant provisions of the Landlord and Tenant Act 1987 are as follows:

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 $\frac{3}{4}$ the whole of any such expenditure.

(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 and Tribunal Procedure Rules shall make provision—

(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be)

the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and

(b) for enabling persons served with any such notice to be joined as parties to the proceedings.

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

(a) the demised premises consist of or include three or more flats contained in the same building; or

(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) In this section “service charge” has the meaning given by section 18(1) of the 1985 Act.

(9) For the purposes of this section and sections 36 to 39, “appropriate tribunal” means—

(a) if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal

The terms of the lease in dispute

14. The first variation applied for by the applicants is to the definition of maintenance rent. The lease provides as follows:

MAINTENANCE RENT One third part of the costs and expenses of the Lessor in complying with its obligations under Part I of the Second Schedule and one half part of the costs and expenses of the Lessor in complying with its obligations under Part II of the Second Schedule.

15. The proposed variation is as follows:

MAINTENANCE RENT One fourth part of the costs and expenses of the Lessor in complying with its obligations under Part I and part II of the Second Schedule.

16. The second variation applied for by the applicants is the definition of the repairing responsibilities under paragraph 1 of the second schedule to the lease. It provides:

Maintaining and keeping in good and substantial repair and condition:-

1. The main structure of the Property including the foundations but excluding the windows and window frames and roof, gutters, down pipes and parapet walls thereof

17. The proposed variation is as follows:

Maintaining and keeping in good and substantial repair and condition:-

1. The main structure of the Property including the foundations, roof, gutters, downpipes and parapet walls but excluding the windows and window frames .

The issues

18. The following issues were identified by the tribunal at the directions hearing of this matter:

- Do the proposed variations fall within the grounds set out in section 35(2) of the Act, that is to say, does the lease fail to make satisfactory provision for one of the matters set out in that section?
- Should the tribunal order the proposed variation(s) to be made to the lease(s)?
- If it does make an order varying the lease(s), should the tribunal order any person to pay compensation to any other person (see section 38(10) to the Act).

19. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The argument of the applicants

20. The applicants say that the property is a mixed use (commercial and residential) building containing four properties, as follows:

- (i) Two flats on long leases (Flats A and B) are situated on the first and second floor, with 101 years unexpired on their leases (leases commenced in 1997).

- (ii) One flat, recently registered under the name of the Landlord's son, is attached to the back of the building. This flat was built in 2004, ie after the two long leases were created, as a stockroom to the commercial premises, and was recently transferred to a new title register. No lease has been put in place for this property. It is currently rented out as a residential flat through a shorthold tenancy. –
 - (iii) The commercial premises covers part of the ground floor and the whole of the basement level. It is unclear whether there is a lease in place for the commercial premises - a copy of a 20 year lease was provided by the Landlord for a previous hearing (regarding the appointment of a manager for the building) but its validity was in doubt and it was not registered.
- 21. The commercial space is currently rented out to a restaurant “Beirut Meza” although the restaurant has not been operating since 14th July 2021 and it is unclear whether it has now permanently closed or if this closure is only temporary.
- 22. The applicants argue that the provisions in the lease do not reflect the current use of the property and that the circumstances have changed since they entered into the lease.
- 23. Under the terms of their leases Flats A and B pay one half each of the costs of maintenance and refurbishment of the internal communal areas of the property and one third each of the costs of maintenance and refurbishment of external areas of the building and of the buildings insurance.
- 24. At the time the leases for the two original flats in the building were drafted the commercial premises was a shop rather than a restaurant and did not use the communal hallway other than as a fire exit. The front door of the building was installed for the use of the residents at the time that the flats leases were created in 1997
- 25. When the leases for Flat A and B were created Flat C did not exist and was therefore not included in the service charge split at all.
- 26. However the occupants of Flat C use the shared corridor to walk through each day to collect their post. In addition, they are part of the same building and therefore need to also be responsible for external building maintenance and buildings insurance.

27. The applicants say that the lease is clear that any later lease granted on another flat in the Property shall contain the same covenants and obligations as the existing leases and that where no lease is granted on such a property the Lessor will be liable for payments and obligations that would have otherwise fallen on the Lessee.
28. They referred the tribunal to the following clauses from Pages 2-3 of the Leases of Flats A and B.

The Lessor HEREBY COVENANTS with the Lessee:-

b) i. That every lease of a flat in the Property hereafter granted by the Lessor shall contain lessee's covenants and regulations to be observed and performed by the lessee thereof similar to those contained herein so far as applicable.

ii. That the Lessor will not hereafter grant a lease of any other flat in the Property except to a lessee who has entered or will enter into similar covenants and undertake similar obligations to those on the part of the Lessee herein contained so far as applicable and that the Lessor will be under like obligations in respect of any other flat in the Property for the time being not so leased.

iii. That the Lessor will upon the request in writing of the Lessee enforce the covenants entered into or to be entered into by the lessee of any of the other flats in the Property upon the Lessee agreeing by deed in such form as the Lessor may reasonably require to indemnify the Lessor against all costs and expenses in respect of costs and expenses as the Lessor may reasonably require

iv That while any other flat or flats comprised in the property shall not for the time being be let under a Lease in the same terms as this Lease (mutatis mutandis) or in the event that any other Lease becomes forfeited the Lessor shall be liable to make all payments and observe and perform such obligations as the lessee or lessees thereof would have been liable to make observe and perform if that flat or those flats were so let.

29. The applicants say that there is a need to vary the terms of the lease as it was established at the hearing for the appointment of a building manager (Case Ref: LON/00AN/LAM/2020/0013) the state of the building is very poor with very little maintenance or refurbishment having been carried out for a considerable period. Fire safety works are also urgently required as a result of the commercial premises' change of use to a restaurant (in October 2013).

30. The landlord is not prepared to make contributions to the costs of maintenance and repair of the building despite his ownership of Flat C. The applicants argue that a variation to the leases is required in order to make explicit reference to the existence of an additional flat to ensure there is full clarity around each property's share of contribution towards costs.
31. The Landlord has never made any contribution to Maintenance Rent owed by Flat C despite the flat being listed on the insurance policy for several years. The Applicants only discovered this after a full copy of the building's insurance documents was provided after a court request, in response to our recent application on reasonableness of Service Charges. He also failed to contribute towards a recent Fire Risk Assessment and Electrical Testing carried out on the building. Failure to pay his share of maintenance rent will stop works from going ahead as any works would not be fully funded.
32. In addition the applicants argue that as the commercial premises have regularly used the communal area of the building (multiple times per day), causing significant degradation, their responsibility to contribute to maintenance should be reflected in the lease.
33. The applicants also seek a change to the description of what falls under the maintenance responsibilities of the lessor/building manager as there are currently a number of items excluded that have fallen into disrepair. This case is also laid out in more detail below.
34. Most of the costs expected to be incurred in the next 12-18 months are because of the failure of the Landlord to maintain the building over the course of many years, as he has failed to comply with obligations of the leases. As there appear to be no leases in place for two of the four properties, through which contributions can be enforced, we believe the two existing leases need to be amended to ensure works are funded in full by all four parties.
35. The Applicants therefore argue that the leases of Flats A and B should be amended to state that they should pay one quarter of the costs of the lessor in complying with its obligations under the lease, this to include the cost of making the amendments to the lease.

The argument of the respondent

36. In his statement of case the respondent objected to the application and made the following points:
 - (i) 112C is totally independent of the main building with its own access from the public footpath. The unit

users have no key to the corridor of the main building and do not need to access the property

- (ii) Flat 112C has its own post box and post is delivered there directly.
 - (iii) The electric and water supply come through the basement of the shop and it has its own meters in the unit.
 - (iv) The applicants are wrong about the arrangement for the maintenance of the building. The only exterior wall attaching to the shop is the front. It does not have an exterior side or rear wall. Both the sides are terraced. The effect of this is that Flat 112C is already contributing 1/3 to the exterior repairs.
 - (v) Whilst the shop leaseholder previously used the corridor in dispute to gain access to the basement this has not been the case for the last 8 years since the applicants created an internal stairway from the shop floor to access the basement.
 - (vi) The applicants would gain a considerable financial advantage from the variation.
 - (vii) The applicants bought their leases having thoroughly inspected the building and have discussed their leases with their lawyers.
37. On the day of the hearing the respondent produced some legal arguments. His daughter prepared submissions relating to s.35(2) and 35(4). The starting point is that the applicants were fully aware of the terms of their leases and that the purpose of s.35 of the Act is not to provide for fairness but to set out a limited number of circumstances in which variations to leases can be made.
38. The respondent argues that it is not clear which sub section of s.35 of the Act the applicants are making their application under. This failure is very significant.
39. The respondent suggests that the applicants are making the application under s.35(2)(f) and s.35(4).
40. The respondent argues that these sections provide that the Tribunal can re-calculate the share of expenditure due from each leaseholder only if the aggregate of the service charges does not add up to 100%. If the

service charges do add up to 100% the Tribunal has no jurisdiction to vary on this ground even though the apportionment has been done in an unsatisfactory manner.

41. The leases provide that Flat A and B together pay 100% of internal communal and 66.7% combined of external areas, with the other 33.3% paid for by the commercial leaseholder, which also totals 100%.
42. The respondent refers the Tribunal to the case of *Morgan v Fletcher* [2009] UKUT 186 (LC) in which the Upper Tribunal determined that it had no jurisdiction to vary the leases where the landlord had reduced the service charge proportion payable in respect of its own flat and that of one other lessee to almost nil in order to bring the aggregate service charge down from 116% to 100%. This means that if the landlord adds an additional unit (such as Flat C in our case) to the block the Tribunal has no jurisdiction under section 35(2)(f) to order that unit to bear a proportion of the service charge expenditure.
43. In the case of *Triplerose Limited v Stride*, 2019, the respondent pointed out that the Upper Tribunal highlighted that for an order of variation to be made, there must be evidence of an actual problem. The purpose of section 35 is not to allow the FTT to update old leases or standardise poorly drafted leases.
44. In summary the respondent argues that both parties agreed to a commercial deal, the terms of which are set out in the lease. The tribunal is not there to remedy “unfair” provisions or obligations which one party considers unreasonable. Tenants have to provide evidence that the tribunal has grounds to vary the lease under s.35 of the Act.
45. The respondent also addressed the additional variation proposed by the applicants in their statement of case. The point was made that there was insufficient evidence of the problem that the variation was designed to address and that it was not clear exactly what statutory provision the application was made under.
46. The respondent also indicated that, dependent upon the outcome of the application, the respondent may be prepared to concede the variation sought.

The response of the applicants

47. The applicants say in response to the statement of case
 - (i) That the restaurant has made extensive use of the corridor and the applicants have provided photographs in support.

- (ii) Flat C is not separate from the rest of the building as it is attached to the ground floor shop and waste water pipes from flats A and B run along the roof of Flat C and that the electricity and water supply for Flat C is routed through the basement of the restaurant. This was confirmed in the decision of the tribunal LON/00AN/LAM/2020/0013.
- (iii) The occupiers of Flat C continue to use the hallway to collect their post.
- (iv) The applicants note that the door to the restaurant's basement has recently had a small padlock attached to it. However they point out that a padlock is not a permanent solution as it can be unlocked or removed at any time.

48. In their submissions the applicants emphasised that the application was made because of failure to maintain the building. They also pointed out that the building insurance was paid by them but included insurance of Flat demonstrating that the respondent should contribute to the costs.

The tribunal's decision

49. The tribunal determines not to make the variation sought to vary the service charge provision. It makes no determination in respect of the application made in the applicants' statement of case.

Reasons for the tribunal's decision

Proposed variation to service charge apportionment

- 50. The applicants were not clear about the precise statutory provision under which their application was made. When asked by the Respondent and in their submissions they stated that their concern was that the property was not being maintained and would not be maintained unless the variations sought were made. They agreed however that what they wanted was a change in the apportionment of the service charges.
- 51. The tribunal has therefore agreed with the respondent and determined that the application in the application form was made under s.35(2)(f) and s.35(4).

52. The tribunal agrees with the respondent that the purpose of the statutory provisions about variation of leases is not to rectify unfairness.
53. The tribunal is persuaded by the respondent's argument that the proper meaning of s.35(2)(f) and s.35(4) is that the tribunal has no jurisdiction to intervene if the service charge provisions total 100% and that it is bound by the decision in *Morgan v Fletcher*.
54. It therefore determines that the proposed variation set out in the application form does not fall within the grounds set out in section 35(2) of the Act and therefore the proposed variation cannot be made.

Proposed variation to maintenance obligation

55. In relation to the additional variation proposed in the applicants' statement of case the tribunal considered that this had not been properly argued by the applicants who had not realised that they are required to demonstrate fully that it falls within one of the grounds set out in s.35(2) of the Act. Nor had the applicants provided any evidence of the problems caused by the current terms of the lease.
56. In the light of indications from the respondent that he was prepared to negotiate with the applicants on their proposed variation, the tribunal made no determination on this second proposed variation.
57. If the negotiations are unsuccessful the applicants will be able to make a further application in connection with this proposed variation and directions will be issued which will make clear the evidence and argument that would be required.

Application under s.20C and refund of fees

58. In the application form the Applicants applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, the tribunal determines not to make such an order.

Name: Judge H Carr

Date: 14th January 2022

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).