



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

**Case reference** : **LON/00AH/LVT/2020/0001**

**HMCTS code  
(paper, video,  
audio)** : **P: PAPER REMOTE**

**Property** : **Flats 1, 2 & 3, 110 Bridgstock Road,  
Thornton Heath, Surrey CR7 7JB**

**Applicant** : **Cyntra Properties Limited**

**Representative** : **Pembroke Property Management  
Limited**

**Respondents** : **Mr C and Mrs B Nwosu (Flat 1)  
Ms M V Lee (Flat 2)  
Mr P D Withers (Flat 3)**

**Representative** : **In person**

**Type of application** : **Application for the variation of leases**

**Tribunal member** : **Judge N Hawkes**

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

**Date of decision** : **20 May 2020**

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**DECISION**

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## **Covid-19 pandemic: paper determination**

This has been a remote determination on the papers which has been consented to by the Applicant and which has not been objected to by any of the Respondents. The form of remote hearing was P:PAPER REMOTE. A face-to-face hearing was not held because it was not practicable and all issues in dispute could be determined on paper. The documents that I was referred to are in a bundle of 99 pages, the contents of which I have noted. The order made is described at the end of these reasons.

### **The application**

1. The Applicant seeks to vary the leases of three flats at 110 Bridgstock Road, Thornton Heath, Surrey CR7 7JB (“the Property”), under section 35 of the Landlord and Tenant Act 1987 (“the 1987 Act”).
2. The Tribunal has been informed that the Property is a Victorian House which has been converted into three leasehold flats.
3. Two applications have been made; one to ensure 100% recovery of service charge expenditure and another to vary the leases to include provision for a reserve fund to be created. At a case management hearing, which took place on 11 February 2020, the two applications were consolidated.
4. The directions of 11 February 2020 (“the Directions”) record that the lessees of Flats 1 and 3 contacted the Tribunal to indicate that they were in agreement with the proposed variations. The lessee of Flat 2 may have been unaware of the case management hearing because correspondence was sent to solicitors believed to be acting for her who subsequently informed the Tribunal that they were not instructed.
5. The proceedings were stayed on 19 March 2020 due to the covid-19 pandemic. A digital hearing bundle was requested by the Tribunal on 5 May 2020 and, following receipt of this bundle, the matter was listed for a paper determination.
6. The Directions include provision for the Respondents, by 27 March 2020, to send the Applicant a Statement in Reply stating whether they agree to the proposed variations and, if not, setting out the reasons for their objection. The Statements in Reply were also to set out any compensation which would be sought if the proposed variations were to be made. The Applicant was directed to include any Statements in Reply in the hearing bundle.
7. The hearing bundle includes a written statement from the lessees of Flat 1 in support of the proposed variations. No other statement in response to the applications is included in the hearing bundle.

8. By email dated 12 May 2020, Pembroke Property Management Limited, which acts for the Applicant, confirmed that the hearing bundle was sent to each of the Respondents both by post and digitally and that the Applicant has not received any objection to the applications from any of the Respondents.
9. Accordingly, on the basis of the documents before the Tribunal, the lessees of Flats 1 and 3 appear have to agreed to the proposed variations (although written confirmation has only been received from the lessees of Flat 1 in accordance with the Directions); the proposed variations are not opposed by the lessee of Flat 2; and no compensation is sought by any of the Respondents. No application has been made for the reimbursement of Tribunal fees or for orders under section 20C of the Landlord and Tenant Act 1985 and/or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002.

### **The Tribunal's determinations**

10. Section 35 of the 1987 Act provides, so far as is material:

*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.*

...

*(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;*

11. Section 37 of the 1987 Act includes provision that:

*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*

...

*(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.*

12. Section 38 of the 1987 Act includes provision that:

*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.*

...

*(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 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) A 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.*

...

*(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.*

The application to enable 100% recovery of service charge expenditure

13. Clause (C)(i) of the Particulars to the lease of Flat 2 provides:

*“During the said term by way of further and additional rent the lessee will pay on demand one fifth of the costs and expenses reasonably incurred or to be incurred by the Lessor in complying with the obligations imposed by clause 3(1)(5)(6) and (7) hereof (hereinafter called the service charge ...”*

14. The Applicant seeks a variation of Clause (C)(i) of the Particulars so as to state (emphasis supplied):

*“During the said term by way of further and additional rent the lessee will pay on demand **two fifths** of the costs and expenses reasonably incurred or to be incurred by the Lessor in complying with the obligations imposed by clause 3(1)(5)(6) and (7) hereof (hereinafter called the service charge ...”*

15. In its application, the Applicant states:

*“There are three flats within the building and the service charge contributions do not add up to 100%. Flat 1 is to contribute 2/5. Flat 2*

*is to contribute 1/5 and Flat 3 is to contribute 1/5. Therefore, there is 1/5 missing annually from the amount which is being collected. We are looking to vary Flat 2's contribution to 2/5 due to the size of the property, as it is the same size as Flat 1. Flat 3 is significantly smaller."*

16. In its Statement of Case, the Applicant states that the proposed variation would enable 100% of the service charge to be collected, as only 80% is currently payable under the terms of the three leases.
17. This is not disputed by the lessee of Flat 2 and this application is unopposed. In all the circumstances, I am satisfied that the lease of Flat 2 fails to make satisfactory provision for the computation of service charge and exercise my discretion to direct the relevant parties to make the variation sought by the Applicant. As stated above, no compensation is sought.

The application to vary the leases to make provision for a reserve fund to be created

18. There is currently no provision in the leases for a reserve fund. The Applicant seeks a variation of the lessees of all three flats at the Property so as to enable a reserve fund to be created.
19. The Applicant seeks a variation to add the following Clause (C)(ii) to each of the three leases:

*"To contribute such sum as shall be considered reasonably necessary by the Landlord (whose decision shall be final) to provide reserves or sinking funds for items of future expenditure for major works in connection with Clause (1)(5)(6) and (7) hereof."*

20. As regards the proposed words "whose decision shall be final", it is noted that, pursuant to the provisions of the Landlord and Tenant Act 1985, lessees have the right to seek a Tribunal determination in respect of the reasonableness and payability of reserve fund contributions.
21. At page 7 of the application, the Applicant states:

*"... A reserve fund with a healthy balance will allow the landlord or manager to cover the cost of major works without demanding additional service charges from leaseholders in that particular accounting year. A well-managed reserve fund will also enhance the property as prospective buyers will see this as an advantage over leasehold blocks without a reserve fund. Furthermore, a reserve fund is recommended in the Service Charge Residential Management RICS Code of Practice."*



22. In its Statement of Case, the Applicant expands upon these points and, in support of this application, the Applicant relies upon a Major Works and Long-term Maintenance Plan dated February 2020 (“the Maintenance Plan”).
23. The Maintenance Plan records that significant works are required to the common parts of the Property, in particular, to comply with a Fire Risk Assessment, and to repair, replace and/or maintain the roof, gutters and down pipes, internal decorations, front entrance door, and the intercom system. The Maintenance Plan also states that the external decorations will require attending to in the next couple of years and that the carpets in the communal areas of the Property are in poor condition and pose a potential trip hazard. Photographs have been provided.
24. The test which must applied is set out in *Camden LBC v Morath* [2019] UKUT 193 (LC) at [16] (emphasis added):

*“... 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 section 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.”*

25. Further, in *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) it is stated at [40]:

*“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. Because House of Hector is a lessee owned company and in the light of *Cleary and Shellpoint* 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 members of House of Hector, that might constitute the necessary evidence. But there is no such evidence at present.”*

26. I agree with the Applicant that there would be significant advantages in building up a reserve fund. However, it is clear from the passages set out above that the Tribunal has no power to vary leases simply to improve the contractual arrangements between the parties; because the proposed variations are standard terms; or because the absence of a reserve fund is inconvenient.

27. It is not asserted in the Applicant's Statement of Case that the clear absence of a reserve fund is "unworkable" and there is no evidence that it is beyond the means of the relevant parties to fund the proposed works in the absence of a reserve fund. Accordingly, I am not satisfied on the basis of the evidence and submissions before me that the original lease terms are "unsatisfactory" within the meaning of section 35 of the 1987 Act by reason of the absence of any provision for a reserve fund.
28. In its Statement of Case, the Applicant states that the application also falls under section 37 of the 1987 Act. Written confirmation has, to date, only been received from the lessees of one of the three flats, in accordance with the Directions, that they consent to the proposed variation. However, there may have been confusion as to whether written confirmation was required because the lessees of two flats contacted the Tribunal to indicate that they supported the Applicant's application prior to the case management hearing.
29. Accordingly, I will make the further directions which are set out below in order to enable the Applicant to proceed with its application under section 37 of the 1987 Act.

### **Conclusion**

30. The Applicant's applications under section 35 of the 1987 Act have been determined as preliminary issues:
- (i) The Applicant and the lessee of Flat 2 are directed to vary clause (C)(i) of the lease of Flat 2 to state:  
  

*"During the said term by way of further and additional rent the lessee will pay on demand two fifths of the costs and expenses reasonably incurred or to be incurred by the Lessor in complying with the obligations imposed by clause 3(1)(5)(6) and (7) hereof (hereinafter called the service charge ..."*
  - (ii) The Applicant's application under section 35 of the 1987 Act to vary the leases of all three Flats so as to include provision for a reserve fund is dismissed.
31. If the Applicant wishes to proceed with its application concerning the reserve fund under section 37 of the 1987 Act, it shall by **5 June 2020** write to the Respondents stating whether it intends to include the words "*whose decision shall be final*" in the proposed lease variations. If so, it shall also set out the basis for including these words when the lessees have the right to apply to the Tribunal for a determination concerning the reasonableness and payability of reserve fund contributions. The

Applicant shall also, in this correspondence, seek the Respondents' written consent to the proposed variations.

32. The Applicant shall by **19 June 2020** file and serve a digital bundle containing written evidence that the requirements of section 37 of the 1987 Act are satisfied or, alternatively, notice of withdrawal of the application under section 37 of the 1987 Act, pursuant to rule 22 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

**Name:** Judge N Hawkes

**Date:** 20 May 2020

### **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).