



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

**Case Reference** : **MAN/30UK/LVT/2019/0004**

**Property** : **Westcliffe Court, 13, Westcliffe Road,  
Southport PR8 2TF**

**Parties** : **Various leaseholders at Westcliffe Court  
and  
Westcliffe Court Management Company  
Limited**

: **Mr & Mrs A Gouldbourne (who oppose the  
application)**

**Type of  
Application** : **Application to vary leases  
Landlord and tenant Act 1987 Section 37**

**Tribunal Members** : **Mr J R Rimmer  
Mr Richard Harris MBE, FRICS**

**Date of decision** : **12<sup>th</sup> March 2021**

**Date of  
Determination** : **31 March 2021**

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**DECISION**

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**Order : The leases for each flat at Westfield Court are varied as set out below**

- (1) By deleting Cause 5 of the leases**
- (2) By amending paragraph 5 of Part II of the seventh Schedule in each lease to read: The cost of such buildings insurance and insurance against 3<sup>rd</sup> party risks as is required to be taken out under Clause 5.1 of the Ninth Schedule and such other insurance policies as at is reasonable for the Management Company to seek**
- (3) By amending Clause 5.1 of the Ninth Schedule by adding the words**

**And such third-party risks against which it is reasonable to seek appropriate cover.**

**A. Application and background**

- 1 This is an application made by an appropriate number of leaseholders of leases of residential flats at Westcliffe Court, 13, Westcliffe Road, Birkdale, Southport to vary leases relating to all the flats in the development. There are 14 flats in total; 12 are two-bedroom flats and 2 are three-bedroom duplex penthouses.
- 2 The reason for the making of the application is that within the leases of all the flats there are two conflicting ways in which the costs of insurance are to be apportioned between the respective flats and leaseholders.
- 3 Clause 1.5 of the leases for each flat contains a particular provision in relation to buildings insurance whereby the leaseholder pays, “by way of further or additional rent from time to time on demand a sum or sums of money equal to one fourteenth part of the amount which the (management) company may from time to time expend in effecting or maintaining the insurance of the buildings and Grounds in pursuance of its covenants hereinafter contained and also against third party risks (if any) as the company shall deem desirable or expedient”.
- 4 The covenant to effect appropriate insurance is found at paragraph 5.1 of the Eighth Schedule to the lease and the leaseholders’ covenants to pay the rent are found in paragraph 1 of the Seventh Schedules to their leases. Clause 5.1 is quite clear and refers to taking out a policy in respect of what are termed “the usual risks”

- 5 The combination of these provisions place a duty upon the landlord to effect an appropriate policy and upon the leaseholders to contribute to it in equal shares
- 6 Further provisions within the lease are made within the service charge provisions:
  - (1) Paragraph 5 of Part II of the Seventh Schedule refers to  
The cost of insurance against third party risks in respect of the Building and grounds if such insurance shall in fact be taken out by (the management Company or the Company).
  - (2) Clause 4 of the Eighth Schedule provides for the Management Company to-  
Keep the Company the Management Company and each of its members insured in an Insurance Office of repute against all liability arising out of any claim made in respect of injury to persons on the property...resulting from the condition of anything forming part of the estate or from negligence of any persons employed by the Management Company or its licensees.
- 7 The leases, as drawn, envisaged a separation between landlord and management company, with differing obligations but those two roles are occupied by the management company alone.
- 8 Elsewhere in the lease there are what might be loosely termed “the usual provisions” for the effective management, maintenance and repair of the building by the management company and for the recovery of the costs for such services within a service charge. Those charges are apportioned differently according to the type of flat to which they relate. The 12 two-bedroom flats pay 5.95% of the total charges and the 2 penthouses pay 14.3%
- 9 In the exercise of its powers of good management and service provision the management company has taken out two additional policies of insurance, one in relation to the electrical plant within the building and the other in relation to potential liability, or default, on the part of the directors of the management company.
- 10 In consequence the premia for these policies are paid in different proportions: 5.95% or 14.3% in respect of service charges and 1/14<sup>th</sup> or 7.14% for the buildings policy.
- 11 Mr Moon, in his email to the Tribunal of 3<sup>rd</sup> December 2020 stresses that the purpose of the application is to remove the ambiguity in the lease and is not made in order to seek an interpretation of clause 1.5.

## **B The Law**

12 The application to vary the leases is provided for by Section 37 Landlord and Tenant Act 1987 which provides:

- (1) Subject to the following provisions of this section, an application may be made to [the appropriate tribunal] in respect of two for an order varying 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 varies 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 (sic) 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 parties concerned and at least 75 percent 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 shall constitute one of the parties concerned (so that in determining the total number of parties concerned a person who is a 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.

13 The powers of the Tribunal in relation to Section 37 are then subject to the relevant provisions of Section 38:

- (1) ...
- (2) ...
- (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 the leases in such manner as specified in the order
- (4) ...
- (5) If the grounds referred to in subsection...(3)... 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
    - (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) ...
- (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 lease to vary it in such manner as is to be 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 to 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 any other person, compensation in respect loss or disadvantage that the tribunal considers he is likely to suffer as a result of the variation.

### **C Submissions and hearing**

- 14 The application is generated by the situation that has arisen from the purchase of one of the penthouses in the recent past by Mr and Mrs Gouldbourne. It would appear to be the case that up to that point the management company charged the building insurance to the leaseholders in the same proportions as the service charges. Even after their acquisition of the property Mr and Mrs Gouldbourne continued to pay that proportion of the cost – 14.3%.
- 15 They then became aware that the building insurance provisions of their lease, and it transpires, the others, provided for that premium to be paid equally between all fourteen leaseholders. The view they therefore held was that they were being overcharged.
- 16 It is quite clear that various opinions were sought from a variety of sources as to what was the correct manner of apportioning the buildings insurance premium. Positions became entrenched and relationships became acrimonious.
- 17 Both sides of the argument have been put to the Tribunal in what have occasionally been quite forceful terms. None of the parties appears to

have been helped by the accidents of history that have brought the situation to its present pass and have coloured their views:

- The failure of the lease to deal with service charges and the insurance premium in different proportions
- The ability to affect further insurances as part of the service charges clearly requiring the 5.95/14.3% apportionment
- The difference never apparently being highlighted in any conveyancing transactions at the time leases were purchased, or assigned
- The willingness of all leaseholders to accept the unequal apportionment of the premium without question until the issue of overpayment was raised by the Gouldbournes.
- A recognition that the situation has existed since the time of the construction of the flats and leaseholders have been either disadvantaged, or had a benefit, for a considerable time and will continue to do so, but in a reverse way compared with the past, if variation of the leases takes place.

- 18 This matter could have been resolved much more quickly, and the evident discomfort for Mr and Mrs Gouldbourne more speedily resolved, had this matter been resolved by a paper determination. The Applicants, however, as is their right, elected for a hearing.
- 19 Whilst it appears from the submissions made by the parties that the matter of previous overpayment, or otherwise, has yet to be resolved between the parties, both sides of the argument in relation to a variation of the lease are sure of the correctness of their own positions.
- 20 Those in favour of the application are satisfied that to vary the contributions for the premium to the proportions used for the service charge is fairer, given the relative sizes of the penthouses compared with the 12 two-bedroom flats than it is to continue with the present arrangement, if that is to divide the premium equally.
- 21 The Gouldbournes hold the opposite view. The lease is clear in what it provided in relation to the different apportionments. Although there is a clear argument that services should be paid in some way be paid for according to proportionate use there is an argument that 14 leaseholders providing for cover against common risks should bear that burden equally. They point to other situations in the lease where they pay more for services by virtue of the apportionment of the charges than is reflected in the use or enjoyment from which they benefit, parking and landscaping in particular.
- 22 On behalf of the Applicants Mr Moon and Mr Greenhalgh outline the history of payment of the service charges and premia in early years,

particularly until all flats are disposed of by the developer. They suggest that this shows clearly that the intention was for the premia to be paid according to the service charge apportionment and clause 1.5 is ambiguous.

- 23 The Tribunal would not agree with that conclusion. It is satisfied that the meaning of clause 1.5 is clear and unambiguous. The Tribunal cannot be sure now what was intended at that time in the manner suggested by Mr Moon and Mr Greenhalgh. It can only be guided here by the clear words used in the clause. On its face the lease is quite clear that it intended the buildings insurance premium to be apportioned differently to the service charge.
- 24 Those provisions, as noted in paragraph 4 and 5, above, place obligations upon the parties in respect of buildings insurance. Paragraph 5.1 of the Eighth Schedule refers to a policy relating to the usual risks, but not 3<sup>rd</sup> party liability. That is, however, likely to be covered in a modern policy. If it isn't there is power, by virtue of paragraph 5 of Part II of the seventh Schedule to effect a separate policy.

## **D Determination**

- 25 Sections 37 and 38 of the Act provide a number of matters for the tribunal to consider and set a number of preconditions for an application to be made:
- (1) Section 37(2) – all the leases must be long leases with the same landlord. All fourteen leases are for a period of 999 years from 1<sup>st</sup> January 2001 and all the leases relate to flats where the landlord is now the management company.
  - (2) Section 37(5)(b) – where there are 14 leases the application at least 75% of the parties, which by virtue of subsection (6) includes the landlord, consent to the application and no more than 10% oppose it. At the time the application is made it indicated that 13 leaseholders and the management company/landlord consent to the application and the Gouldbournes oppose it. The 75% threshold is passed for the application to proceed and the 10% threshold to stop it is not.
  - (3) The object being sought by the variation, the bringing of payment of the building insurance premium to within the same proportions as the service charge cannot be achieved without varying every lease to every flat in order to avoid the provision of Clause 1.5 which divides payment equally. This satisfies the requirement of section 37(3).
- 26 Given that the Tribunal is satisfied that the criteria for the making of an application are made out, and it is clear to the Tribunal that the requirements in relation to this are to be judged at the time the

application is made, it moves on to consider the application of Section 38.

- Section 38(3) provides that if Section 37(3) is satisfied ( that is the object sought cannot be achieved without varying all the leases the Tribunal may make an order. This is a discretion granted to the Tribunal. It is not bound to make an order.
- Furthermore, this discretion is removed altogether, and an order cannot be made, if the conditions in Section 38(6) apply, that is to say where
  - (1) A respondent or some other person would be substantially prejudiced by the order to an extent that could not be remedied by an award of compensation, or
  - (2) For any other reason it would not be reasonable to make the order.

27 It is clear that as Respondents, the Gouldbournes would suffer some financial disadvantage if the order was made. It makes this decision satisfied in its own collective mind that they should currently, under the clear present terms of clause 1.5, be paying 1/14<sup>th</sup> of the premium.

28 On the best evidence provided to the Tribunal at the hearing by the management company representative, Mr Cunningham, an increase to a 14.3% contribution would amount to an increase in the region of £182.00 in respect of the current year's premium. In one sense it may be seen as large amount. In the context of it increasing the overall cost in respect of both service charge and premium, the costs payable to the landlord for the privilege in occupying their own property, the increase would be from £2459.00 to £2641.00; about 7.40%.

29 Under the terms of Section 38(5)(a) the Tribunal is precluded from making an order where there is likely to be substantial prejudice to a respondent (Mr & Mrs Gouldbourne) and they cannot be adequately compensated under Section 38(10).

30 The Tribunal must therefore decide if the prejudice suffered, and there clearly is prejudice in having to fund a greater proportion of the annual premium, doubling their contribution, is substantial. In terms of the overall increase to Mr and Mrs Gouldbourne in the cost to them of occupying their own property the value judgement the Tribunal makes is that it is not substantial. It may therefore proceed to consider further the merits of making an order.

31 The Tribunal reminds itself of the purpose mentioned by Mr Moon as the Applicants' reason for seeking the variation. His email of 3<sup>rd</sup> December 2020 (see paragraph 9, above) points out it is to resolve ambiguity in the lease.



- 32 Although the Tribunal is not being asked directly to interpret clause 1.5 it has effectively done so in what it has set out previously. It makes no apology for doing so because it is entitled to examine the reason why the application is brought and what it is seeking to do.
- 33 Although this is not stated as the reason for the application it is clear that this is what the Applicants are desirous of achieving. The Tribunal is entitled to exercise its discretion in their favour if it is reasonable to do so. What is proposed is reasonable. It effects the apportionment of costs, almost all of which are, within the wording of the lease, service charges. The outlier is the building insurance which would henceforth be payable in the same proportions.
- 34 The Tribunal has given careful consideration to the background to the application as recounted by the parties. The Tribunal has little doubt that such animosity as may exist would have been greatly reduced if acceptance of Mr Gouldbourne's interpretation of the existing building insurance provision had been accepted and not ignored as it has been during these lengthy proceedings.
- 35 The Tribunal also notes that elsewhere within the Act Section 35 enables an application to be made to vary a provision if it fails to make satisfactory provision in respect of insurance of the building (section 35(2)(b)). That is not the test under section 37. Paragraph 5.1 of the does make satisfactory provision, but it is not what an appropriate number of Applicants want. If they vote for change they are entitled to seek it under section 37.

Tribunal Judge J R Rimmer

## **ANNEX A**

### **List of Leaseholders**

Flat 1 Westcliffe Court - Mr & Mrs Hickey

Flat 2 Westcliffe Court – Mr B Greenhalgh

Flat 3 Westcliffe Court – Mr S Haw

Flat 4 Westcliffe Court- Mrs L Whittle

Flat 5 Westcliffe Court- Mr & Mrs Hefty

Flat 6 Westcliffe Court- Mr & Mrs Bartoloni

Flat 7 Westcliffe Court – Mr & Mrs Summerfield

Flat 8 Westcliffe Court – Mr L Moon & Mrs S Callaghan

Flat 9 Westcliffe Court – Mr & Mrs Mckittrick

Flat 10 Westcliffe Court – Mr & Mrs Clitheroe

Flat 11 Westcliffe Court – Dr E Matan

Flat 12 Westcliffe Court – Mr M Channon

Flat 14 Westcliffe Court – Mr & Mrs Jackson

Flat 15 Westcliffe Court – Mr & Mrs Gouldbourne