12036

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

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| **Case Reference** | : | CHI/24UL/LVT/2016/0004 |
| **Type of Application(s)** | : | (1) Variation of leases under section 35 Landlord and Tenant Act 1987. |
| | : | (2) For an order under section 20C Landlord and Tenant Act |
| **Applicant (1)** | | A2Dominion South limited |
| **Respondent (1)** | : | Leaseholders of Flats 8, 11, 21, 22, 25, 26, 27, 29, 30, 39, 40, 41, 43, 44, 50, 51, 53, and 54 Calloway House, Coombe Way, Farnborough, Hampshire, GU14 7FT. |
| **Applicants (2)** | : | Leaseholders of flats 8, 27, 53 and 54 Calloway House. |
| **Respondent (2)** | : | **A2Dominion South Limited** |
| **Tribunal Member(s)** | : | Judge M Davey<br>Mr M Ayres |
| **Date of decision** | : | 6 December 2016 |

## Decision

The Tribunal orders that the parties vary the leases, which are the subject of the application, in accordance with the terms of the attached Order

## Reasons for decision

### The 1987 Act Application

### The property and the leases

1. Calloway House, Coombe Way, Farnborough, is a block of flats ("the Block" or "the Building"), in a larger residential development - the Farnborough Road Estate ("the Estate"). There are 253 dwellings (houses and flats) on the Estate. The Applicant, A2 Dominion South Limited, holds separate leases ("the Headleases") of each of the 18 flats in Calloway House, to which the Application relates. Each Headlease was granted to the Applicant by the freeholder at the time, Fairview New Homes (Bow) Limited, for a term of 125 years from 29 September 2007. Farnborough Road (Farnborough) Management Company Limited ("the Management Company") is a party to the Headleases. At the time of the Application the freehold was vested in Fairview Enfield Limited.

2. Following the grant to A2 Dominion South Ltd of the 20 leases of flats in Calloway House, that company ("the Landlord") granted an underlease of each flat to the respective underlessees ("the leaseholders"), for a term of 125 years, less one day, under a shared ownership scheme. Under that scheme the leaseholder pays a premium, being a proportionate share of the purchase price of the lease, and a monthly rent in respect of the remaining share. Leaseholders can then buy further proportionate shares up to 100%. This process is referred to as "staircasing". As the proportionate share that has been paid to the Landlord rises, the rent on the remaining share is proportionately reduced, falling to nil when the premium paid reaches 100%.

### The Application

3. The Landlord now applies to the First-tier Tribunal (Property Chamber) (Residential Property) ("the Tribunal") under section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act") for an order varying the leases held by the Respondent leaseholders in the terms set out in the document annexed to the Application. The Applications were made on 4 July 2016. Judge D. Agnew issued Directions on 13 July 2016. The parties subsequently agreed that the matter should be dealt with on the basis of written representations without the need for an oral hearing.

4. The Landlord says that the structure of the leasehold scheme at Calloway House is such that its objectives cannot be fully achieved in law. Under the terms of the Headleases, the Management Company is responsible for the management, maintenance and insurance of the structure and common parts of Calloway House ("the Block")

and the common parts of the Estate of which it forms a part. In return, A2 Dominion South Limited is obliged to pay the Management Company a service charge for these services. The service charge comprises costs relating to the Block and the Estate. Under the terms of the Headleases the Management Company charges A2 Dominion South Limited a 1/58th part of the total costs relating to the Block and a 1/253rd part of the total costs relating to the Estate.

5. However, by the terms of the underleases the Landlord covenants with the leaseholders to provide the same services, and the leaseholder is obliged to pay a service charge to the Landlord, in respect of those services. Furthermore the amount payable is significantly less than the cost of the services to the Landlord. (That is to say the sums it pays to the Management Company under the Headleases).

6. The service charge reserved by the underlease is in two parts. The first relates to the "Building Service Provision" and the second relates to the "Estate Service Provision". The former relates to the service charge costs incurred by the Landlord in respect of the Building ("the Building costs") and the latter to the service charge costs incurred by the Landlord in respect of the Estate ("the Estate costs"). By the terms of each underlease, the leaseholder of each flat is obliged to pay 0.57% of the Building costs and 0.395% of the Estate costs being the specified proportions.

7. When the scheme began there were 20 leases, granted by the Landlord, of flats at Calloway House. Two of those leaseholders (flats 7 and 36) have since staircased to 100% and have also acquired the Headlease of their respective flats. They are therefore not part of the present Application because the Landlord is not their landlord. By acquiring the Headlease they are brought into a direct legal relationship under that Lease with the Management Company and thus liable to pay the equal proportion of the service charge attributable to the flat under the Headlease. The remaining 18 leaseholders are the Respondents to the Application. Two of those leaseholders have staircased to 100% but have not acquired the Headleases of their flats.

8. It follows that although the Landlord pays a proportionate service charge under the Headleases, to the Management Company, in respect of the services provided by the latter to the Building and the Estate, it is not, under the terms of the underleases, able to recover, from the leaseholders of the flats, more than a specified proportion of the amount that it pays to the Management Company in respect of Building costs and Estate costs. That is to say, 10.26% of the Building costs (i.e. 18 x 0.57%) and 7.11% of the Estate costs (i.e. 18 x 0.395%).

9. The Landlord therefore seeks a variation of the relevant underleases to permit recovery, from the leaseholders, of the proportionate

Building and Estate costs, which the Management Company under the Headleases of those flats has charged the Landlord.

10. The Landlord explained that in practice this is what has been happening at Calloway House since the inception of the shared ownership scheme, despite the terms of the leases. The Landlord, a registered social landlord, is a non-profit making entity whose role in the scheme is to facilitate the purchase of the flats in Calloway House on a shared ownership basis, by individuals who would otherwise have been unable to purchase a property on the open market at full market value. Thus, despite the terms of the leases, the Landlord has been operating the scheme by charging to the leaseholders the full service charge costs (which it pays to the Management Company) in respect of the Building and Estate services provided by the Management Company. It follows that the current 18 leaseholders are each charged 5.5% of the total service charge paid by the Landlord in respect of the 18 flats. It is this arrangement, which the Application seeks to legitimize by the variations sought.

11. The Landlord also seeks other associated variations of the underleases. First, by the terms of each underlease, the Landlord is obliged to repair, improve, redecorate and renew the structure and common parts of the Block and the Estate ("the repairing covenant"). However, as noted above, the Headlease already provides that this is an obligation of the Management Company. The Landlord says that this possibly renders the repairing covenant in the underleases unenforceable by the leaseholders. It therefore seeks a variation to the underleases whereby its obligations under the repairing covenant do not extend to those matters that are the responsibility of the Management Company under the Headleases.

12. Second, as currently drafted the underleases do not make provision obliging a leaseholder who has staircased to 100% thereafter to pay his or her service charge directly to the Management Company, although this is in practice what has happened. The Landlord accordingly seeks a variation of the leases whereby sums payable under the underlease by the leaseholder to the Landlord shall be payable to the Landlord or such other person as the Landlord may direct. It says that this would be of benefit to the leaseholders because they would no longer pay a management charge to the Landlord for managing their service charge account.

13. The Landlord requests that all the variation orders sought be backdated to the date of the grant of the respective underleases and relies on the decision of the Upper Tribunal (Lands Chamber) in *Brickfield Properties Limited v Botten* [2013] UKUT 133 (LC).

## The Law

14. Section 35 of the Landlord and Tenant Act 1987 as amended provides that

> **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 [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)

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

(5) Rules of court 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 Landlord, 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

(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.

**The Landlord's case**

15. The Landlord submits that because the service charges payable by the leaseholders amount to less than 100% of the service charge costs incurred by the Landlord, each of the underleases thereby fails to make satisfactory provision with regard to the computation of the service charge. Accordingly, sections 35(1) and 35(4) of the 1987 Act are engaged.

16. As drafted at present, clause 3(4) of the underleases for flats 8, 11, 21, 22, 25, 26, 29, 30, 39, 40, 41, 43, 44, 50, 51 and 54 provide for the leaseholder to pay a service charge in accordance with clause 8. That clause provides that the leaseholder shall pay a specified proportion of the costs incurred by the Landlord (i) in connection with the repair management maintenance improvement and provision of services for the Building ("the Building Service Provision") and the Estate ("the Estate Service Provision"). The particulars of the lease define the Specified Proportion of the Building Service Provision as 0.57% per annum and the specified proportion of the Estate Service Provision as 0.395% per annum.

17. In reality, as noted above, the only sums incurred by the Landlord in connection with the Building Service Provision and the Estate Services Provision are those which are charged to it by the Management Company (which performs these services) under the Headlease. As also noted above this means that the Landlord cannot recover in full from the leaseholders the charges which it is obliged to pay to the Management Company for the services provided by that Company (for the benefit of the leaseholders). The Landlord therefore seeks a variation of the underleases whereby the definition of the Specified Proportion of the Building Services Provision in the particulars of the underleases would be as follows:

> "Equal share based on the number of dwellings for which the Landlord is charged by a Landlord or Management Company under the Headlease"
>
> and the definition of the Specified Proportion of the Estate Services Provision in the particulars of the lease as follows:
>
> "Equal share based on the number of dwellings for which the

Landlord is charged by a Landlord or Management Company under the Headlease."

18. The underleases for flats 27 and 53 are worded differently to those of the other flats. Clause 7(1) of the underleases of flats 27 and 53 contains a covenant by the leaseholder to pay a service charge in accordance with the remainder of that clause. Clause 7(4) defines the "Service Provision" as "all expenditure reasonably incurred by the Landlord in connection with the repair management maintenance and provision of services for the Building and Estate....." "Service Charge" is defined in Schedule 9 as "the aggregate of the Specified Proportion of the Building Service Provision and Specified Proportion of the Estate Service Provision." In turn the Particulars define the former as "0.57% per annum of the elements of the Service Provision (as defined in clause 7 hereof) in relation to the costs incurred for the Building and the latter as 0.395% of the elements of the Service Provision (as defined in clause 7 hereof) in relation to the costs incurred for the Common Parts of the Estate."

19. In the case of these underleases therefore, the Landlord seeks a variation of the underlease whereby the definition of the Specified Proportion of the Building Services Provision in the particulars of the lease would be as follows:

> "Equal share based on the number of dwellings for which the landlord is charged by a Landlord or Management Company under the Headlease per annum of the elements of the Service Provision (as defined in Clause 7 hereof) in relation to the costs incurred for the Building. "
>
> and the definition of the Specified Proportion of the Estate Services Provision in the particulars of the lease as follows:
>
> "Equal share based on the number of dwellings for which the landlord is charged by a Landlord or Management Company under the Headlease per annum of the elements of the Service Provision (as defined in Clause 7 hereof) in relation to the costs incurred for the Common Parts of the Estate."

20. The Landlord further applies for an order varying the terms of the underleases pursuant to sections 35(1) and 35(2)(a) of the 1987 Act. It argues that each of the leases fails to make satisfactory provision with regard to the repair or maintenance of any land or building in respect of which rights are conferred on the leaseholders by the terms of the lease. This is because, as noted above, whilst Clause 7 of the Headlease for each flat places the repairing obligation in respect of the Building and the Estate Common Parts on the Management Company, the underlease places substantially the same obligations on the Landlord. The Landlord says that this arguably makes the repairing covenants in the underlease unenforceable. This is

particularly so because the land comprising the Estate and some of the land comprising the Building are not demised to the Landlord by the Headleases but are reserved by the Head Lessor.

21. The relevant provisions of the Headlease are as follows:

22. Clause 7 "the Company HEREBY COVENANTS with the Lessee to perform and observe the obligations and each of them set out in Part IV of the Schedule hereto"

23. Schedule Part IV – "subject to the due performance by the Lessee of his obligations to contribute to the costs charges and expenses of the Company as herein provided...

(a)

1 the Company will well and substantially maintain repair redecorate and renew

(a) The external walls and structure and in particular the main load bearing walls and foundations and the roof storage tanks gutters rainwater pipes lifts (if any) of the blocks and the balconies if any but so that the Company shall only be liable to decorate the external walls and the underside of any balconies.
(b) The gas and water pipes drains and electric cables and wires in under and upon the Blocks and any communal aerial system and any other communal facilities thereto enjoyed or used by the Lessee in common with the lessees of other parts of the Blocks

(b)

1 The Company whenever reasonably necessary.....maintain repair redecorate and renew

(a) All areas marked on the plan "area of common parts/ management company responsibility" (other than the Blocks) (including any street furniture and lighting apparatus ancillary to all or any part thereof) (together called "the Estate Common Parts"
(b) Any gates for access and/or egress or which are otherwise constructed or provided by the Lessor in conjunction with the construction and development of the Estate."

24. The relevant obligations in the underleases for flats 8,11,21,22,25,26,29,30,39,40,41,43,44,50, 51and 54 are as follows

Clause 6 (3) "that.... The Landlord shall maintain repair improve redecorate and renew

(a)(i) the roof foundations and main structure of the Building and all external parts thereof including all external and load-bearing walls the doors on the outside of the Units balconies and all parts of the Building.....(ii) the Service Installations....
(b)(i) the boundary walls and fences of the Estate (ii) any Visitors Parking Spaces (iii) all the parts of the Building and the Estate not included in the foregoing subparagraphs and not included in this demise or the demise of any other Unit or part of the Estate.
(c) The Estate Common Parts and the Building Common Parts
(d) That subject as aforesaid and so far as practicable the Landlord will keep the Building Common Parts adequately cleaned and lighted."

25. The relevant obligations in the underleases for flats 27 and 53 are as follows

"Clause 5.3.....The Landlord shall maintain, repair, redecorate, and (in the event in the Landlord's reasonable opinion such works are required) improve or shall procure the maintenance repair and redecoration improvement and renewal of in accordance with the terms of the Headlease

(a) the load bearing framework and all other structural parts of the Building, the roof, foundations, joists and external walls of the Building the windows (not forming part of a flat) and doors on the outside of the flats within the building (save the glass in any such doors and the moveable parts of and doors and the interior surfaces of the walls and Service Media and machinery and plant within (but not exclusively serving) the Premises and all parts of the Building.....
(b) The Service Media cisterns and tanks and other gas, electrical, drainage, ventilation and water apparatus and machinery in under and upon the Building and the Estate....
(c) The Common Parts of the Building and Common Parts of the Estate

Clause 5.4 ..... and so far as practicable to keep the Common Parts adequately cleaned and lighted."

26. The Landlord seeks the following variations in order to deal with this conflict of rights and obligations.

27. In relation to flats 8, 11, 21, 22, 25, 26, 29, 30, 39, 40, 41, 43, 44, 50, 51 and 54 clause 6(3) to read

"that....the Landlord shall maintain repair improve redecorate and renew (subject to any provision in the Head

Lease whereby such matters are the responsibility of any other party pursuant to the Headlease to do so and for the avoidance of doubt where any provision in this Clause conflicts with or is inconsistent in anyway whatsoever with any provision in the Headlease the Headlease shall take priority."

28. In relation to flats 27 and 53 clause 5.3 to read

"The Landlord shall maintain, repair, redecorate, and (in the event in the Landlord's reasonable opinion such works are required) improve or shall procure the maintenance repair and redecoration improvement and renewal of (subject to any provision in the Headlease whereby such matters are the responsibility of any other party pursuant to the Headlease to do so and for the avoidance of doubt where any provision in this Clause conflicts with or is inconsistent in anyway whatsoever with any provision in the Headlease the Headlease shall take priority....."

29. The Landlord further applies for an order varying the terms of the underleases pursuant to sections 35(1) and 35(2)(e) of the 1987 Act on the basis that each of the leases fails to make satisfactory provision with respect to 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 party or of a number of persons who include that other party.

30. This is because, on a leaseholder staircasing to 100% ownership of the lease, the Management Company named in the Headlease carries out the responsibility for billing and recovering the service charge via their agent even where the leaseholder has not then acquired the Headlease. The underlease does not make provision for this arrangement. To legitimate this practice, the Landlord asks that the underleases for flats 8, 11, 21, 22, 25, 26, 29, 30, 39, 40, 41, 43, 44, 50, 51 and 54 be varied by inserting

"clause 3(42) Payment of sums due under this Lease

Upon Final Staircasing to pay the sums payable to the Landlord under the terms of this Lease to the Landlord or such other person as the Landlord may direct"

and that the leases for flats 27 and 53 be varied by inserting

"clause 3(42) Payment of sums due under this Lease

Upon Final Staircasing to pay the sums payable to the Landlord under the terms of this Lease to the Landlord or such other

person as the Landlord may direct"

## The Respondent's Case

31. Of the 18 Respondents to the 1987 Act Application, the leaseholders of flats 27, 43, 44, 53 and 54 originally opposed the Application and made written submissions to the Tribunal. Before the Tribunal considered the Application, the leaseholders of flats 27, 43, 44 and 53 withdrew their opposition and expressed themselves to be in agreement with the orders sought. The leaseholders of flats 8, 21, 25, 39 and 40 also agreed with the orders sought by the Landlord. This left the leaseholder of flat 54, Sean Usher, as the only Respondent who expressly opposed the Application and has not withdrawn that opposition. No submissions were made by any other Respondents.

32. By his letter to the Tribunal, of 20 July 2016, Mr. Usher opposes the Application on five grounds. First, that he bought a defective lease in good faith. Second, that the Landlord has been overcharging him for service charges according to the apportionment as stated in the lease. Third, that the Landlord had been bullish in their communication with him and his fellow residents and feels that they can railroad the leaseholders into this situation. Fourth, that the Landlord has made many errors in computing the service charges and has totally disregarded their responsibilities under the lease and their obligations in the Landlord and Tenant Act 1987, and have failed to respond to his enquiries regarding this matter. Fifth, that the Landlord did not consider the issue of lease variation until the leaseholders challenged them on their poor accounting of the service charges. He says that it was the leaseholders that had identified the incorrect apportionments according to the leases.

33. Mr Usher also opposes the Landlord's request that any variation be backdated; on the ground that this would severely prejudice the previous and current leaseholders, as they were all sold a lease in good faith. He submits that the decision in *Brickfield Properties Limited v Botten* (above) was a decision regarding enfranchisement and therefore does not apply in the circumstances of the present case.

## The section 20C Applications

34. The leaseholders of flats 8, 27 and 53 applied for an order under section 20C of the Landlord and Tenant Act 1985. Those Applications have not been withdrawn. In their letters of opposition to the 1987 Act Application, the leaseholders of flats 43 and 44 stated "We intend to make a section 20C Application for limitation

of costs in this respect." However, no such Applications were actually received by the Tribunal. Although Mr. Usher did not complete a section 20C Application, he stated in his letter of objection to the 1987 Act claim that "additionally, I wish to be represented as a group under the same section 20C Application which has been completed by Cheryl Bucci 27 Calloway House, Farnborough, Hants GU 14 7F T." The Tribunal has treated this as a section 20C application.

35. Mr. Usher further states that the Landlord is not offering leaseholders any form of compensation. Furthermore, he says that the Landlord intends to fully recharge all of its legal costs, in gaining the lease variation, to the leaseholders at Calloway House. He strongly objected to this on the ground that the defect was of the Landlord's own making and the lease variation that it seeks would be in its favour. He therefore asks the Tribunal to make an order under section 20C of the Landlord and Tenant Act 1985 preventing the Landlord from recovering its costs in the Tribunal proceedings from the leaseholders through any future service charge demand.

36. As noted above, section 20C Applications were also made by the leaseholders of flats 8, 27 and 53. The Applicants all make the point that the defect that the Landlord in the section 35 claim is seeking to rectify was of its own making and that they had bought their leases in good faith. Ms. Bucci also says that, because it has not been possible for the Landlord to communicate with all the leaseholders, a section 35 application was required even had the remaining leaseholders all agreed to the Application. She submits therefore that it would be unreasonable for the Landlord to be able to recover its costs, incurred in the proceedings, by way of a future service charge demand.

**The Landlord's response**

37. The Landlord says that the service charge related issues raised by the Respondents were the subject matter of an application to the Tribunal under section 27A of the Landlord and Tenant Act 1985 (CHI/24UL/LSC/2016/0051) by a group of Respondents. That Application has been dealt with by way of mediation and therefore the Landlord made no further observations on those matters.

38. In his letter opposing the 1987 Act Application, Mr. Usher stated "the Leaseholders purchased their leases with the legally binding contract of paying the apportionments as stated in the leases and had considered this when purchasing the lease and when considering their future value." In response the Landlord states that defective leases can be varied either by agreement of the parties or by an Application to the Tribunal under the 1987 Act. The Landlord also does not accept that the shared owners purchased the leases on the

basis of the apportionments as stated in the leases. It says that the shared owners have always understood that they would be charged an equal share of the service charge costs and they have paid that apportionment without challenge until mid 2015.

39. In response to Mr. Usher's assertion that the Landlord has been bullish in their communication with him and his fellow residents and feels that they can railroad them into this situation, the Landlord refers to its letters to the Respondents of 12 April and 20 May 2016 in which it explained the need for the variations and sought to obtain the leaseholders' agreement to those variations. The Landlord also referred to the minutes of a meeting of 31 May 2016, which it called to discuss the proposed variations with leaseholders and at which it sought to reach agreement with them by co-operation, which failed.

40. With regard to Mr. Usher's claim that the Landlord has made many errors in computing the service charges and has totally disregarded their responsibilities under the lease and their obligations in the Landlord and Tenant Act 1987 and have failed to respond to his enquiries regarding this matter, the Landlord says that these issues were fully addressed in mediation and shown to be unfounded. Indeed, the section 27A Application had been withdrawn.

41. In response to the charge that the issue of the apportionments only arose when the leaseholders made their section 27A Application, the Landlord says that the matter of apportionment arose because of a misunderstanding on the part of the leaseholders. As explained above, the Landlord charged each of the 20 leaseholders 5% of the service charge costs that it had been charged by the Management Company under the Headleases. When a leaseholder staircased to 100% that leaseholder was thereafter billed direct for its share by the Management Company. The percentage paid by the remaining 19 leaseholders then rose but the amount paid remained the same because it was a percentage of a smaller sum (that is to say the service charges in respect of 19 rather than 20 flats). It was this misunderstanding that had led to the section 27A Application that was subsequently withdrawn.

42. With regard to Mr. Usher's assertion that the Landlord was offering no compensation to the Respondents, the Landlord says that because the Respondents have been making service charge payments on the understanding that the scheme was meant to operate in the way that the variations seek to regularize, the Respondents would not suffer any loss by reason of the variations. Furthermore, where the leases are defective and the variations ensure that a fair payment is made for services received, it is not a loss or disadvantage to the leaseholders to have their leases varied even if the result is that they pay more than hitherto (See *Frank Parkinson v Keeney Construction limited* [2015] UKUT 0607).

43. The Landlord opposes the section 20C Applications on the ground that

the legal costs are recoverable by clause 8(5)(c) (flat 8 et al) and clause 7.4(c) (of flats 27 and 53) of the underleases and that the opposition to the proposed variations are unfounded and have involved the Landlord in unnecessary costs. It says that from the outset it offered to pay for legal advice for the Respondents from an independent source and they have done so and paid for the same. This was done in an attempt to settle the matter by cooperation.

44. With regard to the request for any variation to be backdated, the Landlord says that it does not intend to recover from the Respondents underpaid service charges prior to 31 March 2015. It says that leaseholders have enjoyed the benefit of the services relating to the Block and the Estate and have always understood that an equal share of the service charges was intended to be payable by them. Any disallowing of a backdated claim and award of compensation would prejudice the Landlord which is a not for profit social landlord that invests in local communities. It not only provides shared ownership, but also affordable private and social rented homes, student, key worker and temporary accommodation as well as supported and sheltered housing. It cannot afford to subsidise home owners who are receiving services, the costs of which far exceeds the sums payable under the underleases as they stand.

45. Finally, the Landlord says that the Respondents have the benefit of section 20B of the Landlord and Tenant Act 1985, whereby service charge demands must be sent within 18 months of the relevant costs being incurred and if they are not the charges are irrecoverable.

**Consideration and decision**

46. It is undoubtedly the case that the leasehold structure at Calloway House, which is part of a much wider development, leaves much to be desired. The developer freeholder leased the flats, which are the subject of this Application, to the Applicant under individual leases (the Headleases) to which the Management Company was a party. Under those leases the Applicant covenanted to pay a proportionate service charge to cover costs incurred or to be incurred by the Management Company in complying with its obligations as set out in the Headleases. Those obligations include the repair and maintenance of the Block and the Estate Common Parts. Thus each year the Management Company bills the Applicant for its service charge contribution in respect of each flat, which it then pays.

47. Subsequent to the grant of the Headleases, the Applicants sub-leased the flats to individual purchasers under a shared ownership scheme. Unfortunately, the Management Company was not a party to those underleases. Furthermore, the underleases also made provision for a proportionate service charge, which was predicated on the Applicant complying with its obligations under the lease. Those obligations include the repair and maintenance of the Building (the Block) and the Estate Common Parts. In the case of flats 8, 11, 21, 22, 25, 26, 29,

30, 39, 40, 41, 43, 44, 50, 51 and 54, the Specified Proportion is defined as 0.57% per annum of the Building Service Provision and 0.395% per annum of the Estate Service Provision.

48. Clause 8(1)(e) of the sublease defines the "Service Provision" as "the Estate Service Provision and the Building Service Provision." In turn clause 8(1)(c) provides that "the Building Service Provision" means the sum computed in accordance with sub clause (5) of this clause relating to the Building Common Parts and "the Estate Service Provision" means the sum computed in accordance with sub clause (5) of this clause relating to all the Estate Common Parts." Clause 8(5) provides so far as relevant that "the relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably incurred by the Landlord in connection with the repair management maintenance improvement and provision of services for the Building and the Estate....."

49. As explained above it is impossible for the Applicant to carry out its service charge obligations with regard to the Block/Building and the Estate Common Parts because these are retained by, and repaired and maintained by, the Lessor and Management Company under the Headleases. In reality therefore the expenditure referred to in the subleases as comprising the Service Provision is the service charge, which is levied on, and paid by, the Applicant under the Headleases. Furthermore, the Specified Proportion of that expenditure recoverable under the subleases is far less than the total charge paid to the Management Company by the applicant in respect of the flats.

50. It follows that the underleases clearly fail to make satisfactory provision with regard to the computation of the service charge payable under the lease. They do not permit the Landlord to recover the aggregate expenditure that it incurs on the provision of services. (Sections 35(1) and 35(4) of the 1987 Act). The fact that the actual services are provided by a party to the Headlease does not alter this position. The Landlord is liable to pay the full costs of the service charges provided by the Management Company under the Headleases. These are the service charge costs, which the Landlord incurs and is unable to recover in full because of the defectively drafted underleases.

51. The Tribunal agrees therefore that the leases should be varied to ensure that the Landlord is able to recover 100% of the costs that it incurs under the service charge provisions of the Headleases, which it holds, of flats at Calloway House. The Landlord suggests that the definition of Specified Proportion of the Building Service Provision in the Particulars of the lease be redefined as

> "Equal share based on the number of dwellings for which the Landlord is charged by a Landlord or Management Company under the Headlease "

and the definition of the Specified Proportion of the Estate Services Provision in the particulars of the lease be redefined as:

"Equal share based on the number of dwellings for which the Landlord is charged by a Landlord or Management Company under the Headlease."

52. The Tribunal agrees in principle with the proposed variation but would expand the definitions as follows in order to make clear the basis of computation and to bring the leases in line with the leases for flats 27 and 53 as varied (as to which see below).

"Equal share based on the number of dwellings for which the Landlord is charged by a Landlord or Management Company under the Headlease per annum in respect of the elements of the Service Provision (as defined in Clause 8(5) hereof) as relate to the Building."

"Equal share based on the number of dwellings for which the Landlord is charged by a Landlord or Management Company under the Headlease per annum of the elements of the Service Provision (as defined in Clause 8(5) hereof) as relate to the Estate."

53. As explained in paragraphs 18 and 19 above the underleases of flats 27 and 53 are differently worded to the others. In the case of these leases the Tribunal agrees with the variation proposed by the Landlord whereby the definition of the Specified Proportion of the Building Services Provision in the particulars of the lease would be as follows:

"Equal share based on the number of dwellings for which the landlord is charged by a Landlord or Management Company under the Headlease per annum of the elements of the Service Provision (as defined in Clause 7 hereof) in relation to the costs incurred for the Building. "

and the definition of the Specified Proportion of the Estate Services Provision in the particulars of the lease as follows:

"Equal share based on the number of dwellings for which the landlord is charged by a Landlord or Management Company under the Headlease per annum of the elements of the Service Provision (as defined in Clause 7 hereof) in relation to the costs incurred for the Common Parts of the Estate."

54. The Tribunal also orders that all of the above variations shall be backdated with effect from the date on which each underlease was granted. The defect, which it is necessary to cure, has existed from

that time and the leaseholders have received the benefit of the relevant services since that time. The leaseholders were warned about the defect as soon as it became apparent and the Landlord made every effort to resolve the matter by agreement or by an Application to the Tribunal under section 37 of the 1987 Act. It also notified leaseholders that if that proved not to be possible it would make an Application under section 35. The circumstances are on all fours with the decision of the Upper Tribunal (Lands Chamber) in *Brickfield Properties Limited v Botten* [2013] UKUT 133 (LC).

55. With regard to the matter of whether the leaseholders should be entitled to compensation under section 38(10) of the 1987 Act, the Tribunal would need to be satisfied that the leaseholders had suffered a loss or disadvantage as a result of the variation (as explained in *Frank Parkinson v Keeney Construction limited* [2015] UKUT 0607). In the present case the leaseholders will be legally obliged to pay more by way of service charge than they had been before the variation. However, that is not necessarily a loss or disadvantage to the leaseholders. They will now, prospectively and retrospectively, be obliged to pay a fair proportion for services that they have received, or be entitled to receive and which have been provided at a higher cost. As ordered above the variation has been backdated and thus the liability of the leaseholders to pay the higher sums is retrospective. In practice they will not need to pay more either as to the past or the future because they have already been paying the higher sums. It follows that they have not suffered any loss or disadvantage as a result of the variation in Annex A(2)(ii).

56. The second variation sought, as set out in Annex 2(b)(ii) of the Application would not, in the judgment of the Tribunal, achieve a satisfactory outcome. This is because it would mean that the underlessees would be unable to enforce those repairing etc. obligations in the underlease that are in conflict with the terms of the Headlease(s). This is because there is no legal relationship between the underlessees and the Management Company. The Tribunal therefore alerted the Applicant and Respondents to this difficulty and suggested an alternative variation, to which the Applicant gave a positive response. As a result the Tribunal orders a variation to the underleases of flats 8, 11, 21, 22, 25, 26, 29, 30, 39, 40, 43, 44, 50, 51 and 54 Calloway House as follows.

> "6 (3) .....the Landlord shall maintain repair improve redecorate and renew (save that where under the terms the Headlease such matters are the responsibility of any party to that lease the Landlord shall in the absence of compliance with that obligation by such party or parties procure compliance with the same in accordance with the terms of the Headlease)"

and a variation of the underleases to flats 27 and 53 as follows

"5.3.....the Landlord shall maintain, repair, redecorate, renew (and in the event in the Landlord's reasonable opinion such works are required) improve (save that where under the terms of the Headlease such matters are the responsibility of any party to that lease the Landlord shall in the absence of compliance with that obligation by such party or parties procure compliance with the same in accordance with the terms of the Headlease)"

57. It is unclear from the Application whether the Landlord is seeking an order backdating the variations proposed in Annex 2(b)(ii) to its Application to the dates when the underleases were granted. However, the Tribunal considers that there is no need for such a backdating of the variations. They are designed to operate for the future.

58. The third variation sought by the Applicant is based on the ground set out in section 35(2)(e) of the Act which provides

"(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—

(d).....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."

57. The Landlord explained that an underlessee who has staircased to 100% is at present thereafter billed directly for a service charge by the Management Company. The Landlord acknowledges that the underlease does not provide this for. It seeks a variation to enable the Management Company to bill such an underlesse directly. However, if the lease were to be so varied, this would still not make the relationship between the underlessees and the Management Company direct in law. The underlease would remain in existence and the terms of the underlease, which place the responsibility for billing the underlessees for service charge, would remain, in accordance with the underlease, with the Landlord.

58. The Tribunal is not satisfied that the Applicant has made out this ground. It cannot be said that the underlease fails to make satisfactory provision with respect to *the recovery by one party to the lease from another* ..... because the leaseholder can be billed by the Landlord who thereby recovers the service charge levied on them by the Management Company under the terms of the Headlease. The solution to the problem highlighted by the Applicant is for the Landlord and underlessee who has staircased to 100% to negotiate a transfer of the Headlease thereby bringing the underlessee into a direct relationship with the other parties to the Headlease.

## The Section 20C Application

59. Section 20C(1) of the Landlord and Tenant Act 1985 provides in so far as relevant 'that a tenant may make an application for an order that all or any of the costs incurred by the landlord in connection with proceedings before a court or tribunal.....are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application." Section 20C(3) provides that "The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

60. The Tribunal therefore has discretion as to whether to make an order under Section 20C. In the present case the Landlord says that it intends to recover the costs of these present proceedings through a future service charge demand and it will rely on the following clauses in the two types of lease. In the case of flat 8 et.al. clause 8(5)(c). Clause 8(5) provides that

> "The relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably incurred by the Landlord in connection with the repair management maintenance improvement and provision of services for the Building and the Estate and shall include (without prejudice to the generality of the foregoing):- (c) all reasonable fees and charges and expenses payable to the Surveyor any solicitor accountant surveyor valuer architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the Estate or the Building or complying with the Landlord's obligations under this Lease including the computation and collection of rent (but not including fees charges or expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation of the account of the Service Charge and preparing and issuing certified accounts and audits in respect of such work and if any such work shall be undertaken by an employee of the Landlord as a management charge and/or the Landlord does not retain agents to maintain the Building and/or the Estate then a reasonable allowance for the Landlord of such work as a management charge."

In the case of flats 27 and 53, clause 7.4(c) which provides

> "The relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably incurred by

the Landlord in connection with the repair, management, maintenance, and provision of services for the Building and Estate and shall include (without prejudice to the generality of the foregoing): (c) all reasonable fees, charges and expenses payable to the Authorised Person, any solicitor, accountant, surveyor, valuer, architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the Building including the computation and collection of rent (but not including fees, charges or expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation of the account of the Service Charge and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work."

61. The leaseholders have not argued in the present proceedings, that the lease does not, as a matter of construction, permit recovery of the Landlord's costs in connection with the current proceedings. However, if the costs are not so recoverable the need for a section 20C order disappears. The matter of whether a landlord's costs of legal proceedings against its tenants can as a matter of contract be recovered through the service charge has arisen in a number of cases. The authorities were examined in the recent decision of the Upper Tribunal (Lands Chamber) ("the Tribunal") in *Cannon & Cannon v 38 Lambs Conduit LLP* [2016] UKUT 0371 (LC) where the judge stated that

"36. Whether a landlord is entitled to recover legal costs which have been incurred in relation to tribunal proceedings depends upon the true construction of the provisions of the lease upon which reliance is placed. There are no special rules of interpretation applicable to service charge clauses, which should be construed as any other written contractual provision. Lord Neuberger set out those principles in *Arnold v Britton* at [15]:

'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at [14]. And it does so by focussing on the meaning of the relevant words... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that

the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.'

37. What must be construed is the particular clause in the particular lease of the particular property."

62. If we turn to the wording of the leases in the present case the only mention of legal costs is in clause 8(5)(c) which refers first to "all reasonable fees and charges and expenses payable to the Surveyor any solicitor accountant surveyor valuer architect or other person whom the Landlord may from time to time reasonably employ *in connection with the management or maintenance of the Estate or the Building...*" (emphasis supplied).

63. Although this wording makes reference to the fees of a solicitor it does so in the context of payment for work done in connection with "the management or maintenance of the Estate or Building". The reference to management of the building is far from clear. The natural and ordinary meaning of the remaining words is that they refer to costs incurred in relation to the carrying out of works of maintenance to the Estate or Building. It is unlikely that the parties would have had in mind the possibility that this would include the cost of tribunal proceedings for an order of variation of a lease which, as both parties admit, was unknown, at the time it was entered into, to be defective.

64. Clause 7.4(c) is worded differently. In the case of the leases of flats 27 and 53 clause 7.4(c) makes no mention of solicitors' costs in connection with complying with the Landlord's repairing obligations. Instead clause 7.4(a) refers to "the costs of and incidental to the performance of the landlord's covenants contained in .....Clause 5.3 (Repair redecorate renew structure) and clause 5.4 (lighting and cleaning of common parts)...." Once again the natural and ordinary meaning of these words is that they refer to costs incurred in relation to the carrying out of repair works to the Estate or Building and are insufficiently specific to cover the costs of Tribunal proceedings to vary, what nobody assumed to be, a defective lease.

65. This Tribunal is aware that the construction of the lease is a contentious issue and has not been fully argued. It will therefore consider whether it should make a section 20C order without prejudice to its decision on the construction of the lease that legal costs of tribunal proceedings are not recoverable. This turns on whether it is just and equitable to make such an order. The Landlord argues that it is not and says that it made every effort to explain to the Respondents why it needed to make the Application to the Tribunal. It argues that the opposition to the proposed variations by a number of Respondents was unfounded and has involved the Landlord in unnecessary costs. It says that from the

outset it offered to pay for legal advice for the Respondents from an independent source and they have done so and paid for the same. This was done in an attempt to settle the matter by private treaty or, if a sufficient number of leaseholders had agreed, by way of an Application to the Tribunal under section 37 of the 1987 Act.

66. The leaseholders, by contrast, argue that the defect that the Landlord in the section 35 claim is seeking to rectify was of its own making and that they had bought their leases in good faith. Ms. Bucci also says that, because it has not been possible for the Landlord to communicate with some of the leaseholders, a section 35 (rather than section 37) application was required even had the other leaseholders all agreed to the application (which they did not at the time).

67. In *Daejan Properties v Griffin* [2014] UKUT 0206 (LC) the Deputy President of the Upper Tribunal (Lands Chamber) stated that, "Section 20C confers a wide discretion to make such order on the application as the Tribunal considers just and equitable in the circumstances. The circumstances in which disputes to which section 20C applies come in a great variety of forms. It is impossible to lay down rules on how the discretion should be exercised, other than at the highest level of generality and even then only as factors to be taken into account. That is reflected in the well known observation of His Honour Judge Rich QC in *Tenants of Langford Court (Sherbani) v Doren Limited* LRX/37/2000 (at paragraph 28) that the only principle upon which the discretion should be exercised is "to have regard to what is just and equitable in all the circumstances." In *Conway v Jam Factory Freehold Limited* [2013] UKUT 0592 (LC) the Tribunal emphasised the importance of considering the practical and financial consequences for all of those who would be affected by an order under the section when deciding on the just and equitable outcome (paragraph 75). In paragraphs 51 – 58 of that decision the Tribunal reviewed the best known of the relevant authorities and it is not necessary to repeat that exercise here.

68. The Tribunal has accordingly weighed in the balance the competing arguments of the parties. The contention of the leaseholders that they bought their lease in good faith in the belief that their contribution to the service charge was limited to the sums specified in the underlease is not tenable. They paid the sums charged by the Landlord without any objection until 2015. They have also received the services, the full cost of which the Landlord has paid the Management Company under the Headleases. The Landlord says that but for tenant opposition an application to the Tribunal would have been unnecessary. However, in the absence of agreement with all leaseholders, some of whom were apparently difficult to contact, an application to the Tribunal was inevitable. Furthermore, although the variations would be for the benefit of both parties, the defective lease was of the Landlord's making.

69. By contrast, the Landlord says that it is a non-profit making social landlord and because of the continued opposition to the Application by two of the section 20C Applicants, the leaseholders of flats 53 and 54, it incurred extra legal costs in rebutting their objections in its statement of case dated 5 September 2016. The leaseholders of flats 8, 27 and 53 (who seek a section 20C Order) withdrew their objections to the variations on 18 and 19 August and 25 September 2016 respectively. The leasseholder of flat 54 did not withdraw his objection. It could be said therefore that the extra legal costs incurred in preparing a rebuttal to the proposals were incurred because of continued opposition by the leaseholders of flats 53 and 54, both of whom seek a section 20C Order. However, it is difficult to assess what element of the Landlord's costs is attributable to this aspect of its statement of case.

70. On balance the Tribunal considers that it would be unjust to expect the section 20C applicants to have to contribute to the Landlord's costs of the proceedings, the outcome of which benefits both parties, by way of a future service charge demand. Furthermore, it was the existence of a defective lease drafted by the Landlord that necessitated the Application. The Tribunal will accordingly make a section 20C order. However, as explained above the Tribunal considers that such an order is unnecessary because, as a matter of construction of the lease, the Tribunal finds that the Landlord's legal costs incurred in connection with the proceedings are not recoverable under the lease.

Martin Davey

Chairman

## Order

The Tribunal orders that the parties shall vary the underleases of flats 8, 11, 21, 22, 25, 26, 27, 29, 30, 39, 40, 41, 43, 44, 50, 51, 53, and 54 Calloway House, Coombe Way, Farnborough, Hampshire, GU14 7FT as follows.

PARTICULARS

**Specified Proportion of Building Service Provision:**

"Equal share based on the number of dwellings for which the Landlord is charged by a Landlord or Management Company under the Headlease per annum in respect of the elements of the Service Provision (as defined in Clause 8(5) hereof) as relate to the Building."

**Specified Proportion of Estate Service Provision:**

"Equal share based on the number of dwellings for which the Landlord is charged by a Landlord or Management Company under the Headlease per annum of the elements of the Service Provision (as defined in Clause 8(5) hereof) as relate to the Estate."

**6. LANDLORDS COVENANTS**

6 (3) ".....the Landlord shall maintain repair improve redecorate and renew (save that where under the terms of the Headlease such matters are the responsibility of any party to that lease the Landlord shall in the absence of compliance with that obligation by such party or parties procure compliance with the same in accordance with the terms of the Headlease):-"

The Tribunal orders that the parties shall vary the underleases of flats 27 and 53 Calloway House, Coombe Way, Farnborough, Hampshire, GU14 7FT as follows.

PARTICULARS

**Specified Proportion of the Building Service Provision**

"Equal share based on the number of dwellings for which the landlord is charged by a Landlord or Management Company under the Headlease per annum of the elements of the Service Provision (as defined in Clause 7 hereof) in relation to the costs incurred for the Building. "

**Specified Proportion of the Common Parts of the Estate Service Provision**

"Equal share based on the number of dwellings for which the landlord is charged by a Landlord or Management Company under the Headlease per annum of the elements of the Service Provision (as defined in Clause 7 hereof) in relation to the costs incurred for the Common Parts of the Estate."

## 5. LANDLORDS COVENANTS

5.3 ".....the Landlord shall maintain, repair, redecorate, renew and (in the event in the Landlord's reasonable opinion such works are required) improve (save that where under the terms of the Headlease such matters are the responsibility of any party to that lease the Landlord shall in the absence of compliance with that obligation by such party or parties procure compliance with the same in accordance with the terms of the Headlease):"