FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AG/LVT/2019/0003**
Property	**:**	**Hillfield Court Belsize Avenue Hampstead London NW3 4BG**
Applicant	**:**	**Hillfield Court Limited**
Representatives	**:**	**Mr Justin Bates of Counsel; Northover; solicitors**
Respondents	**:**	**The leaseholders of Hillfield Court**
Objecting tenant	**:**	**Celia Anne Trenton Schapira**
Type of Application	**:**	**To vary leases (Part IV Landlord and Tenant Act 1987)**
Tribunal Members	**:**	**Judge Professor Robert M Abbey** **Mr Hugh Geddes (Professional Member)** **Mr Alan Ring (Lay Member)**
Venue of Paper Based Hearing	**:**	**10 Alfred Place, LondonWC1E 7LR**
Date of Decision	**:**	**10 June 2019**

DECISION

Decisions of the Tribunal

(1) The Tribunal grants the application for the variation of leases at the property under sections 35, 37 and 38 of the Landlord and Tenant Act 1987, ("the Act"). The precise form of variations is more particularly described in the following determination. The relevant legislation is set out in an appendix to this decision.

(2) The reasons for the decision are set out below.

The background to the application

1. The applicant seeks to vary leases at Hillfield Court ("the property") under the provisions of Part IV, (Variation of Leases), of the Landlord and Tenant Act 1987. The applicant is the freeholder of the property which is a tenant owned company, owned by 84 of the leaseholders at the property. The applicant's freehold title is registered at the Land Registry under Title Number NGL440217 and has been since July 23, 1986. The freehold is subject to 113 leases some of which are the subject of the application. They are all residential flats with leasehold interests but regrettably the leases of the flats are not all in the same form.

2. The applicant has identified four problems with the leases. First, eight flats have a fixed service charge of £372p.a with an end of year balancing charge. All other leases express the service charge to be paid as one that is "fair and reasonable". Secondly, in the leases of those same eight flats, there is no provision for a reserve fund. All other leases have a reserve fund provision. Thirdly, only a minority of leases allow for the charging of interest on service charge arrears. Fourthly, the recoverable service charges in all the leases amount in total to 101.81%. Clearly it is anomalous to have such a total over 100%.

3. At the time of a hearing for directions on 26 March 2019 Tribunal Member Mrs E Flint FRICS required the applicant landlord to send copies of the directions to the tenants. If a tenant opposed the application then they were required to make their objections known. At the time of the determination only one written objection was filed with the tribunal from the objecting tenant.

The determination

4. By directions of the tribunal dated 26 March 2019 it was decided that the application be determined with an oral hearing. At the hearing held on 3 June 2019 the applicant was represented by Mr Bates of Counsel and the objecting tenant did not attend although the nature of her objection was set out in documentation in the trial bundle. Additionally one further tenant, Mr Ebstein, attended at the hearing and did

advance his own thoughts and views on the application before the Tribunal but these had not previously been expressed in writing.

5. The tribunal had before it two bundles of documents prepared by the applicant and written representations made on behalf of the one objecting tenant.

For the purposes of this application, the applicant relies on s.35 of the Landlord and Tenant Act 1987 the details of which can be found in an appendix at the end of this decision.

Accordingly, the applicant seeks to make the variations to address lease defects regarding an interim service charge, the reserve fund, interest on arrears and the total service charge recovery. The applicant says these are all required to remove impediments to good management of the property that all arise from the nature of the lease terms.

The issues

6. There were four issues for the Tribunal to decide. First, eight flats have a fixed service charge of £372p.a with an end of year balancing charge. All other leases express the service charge to be paid as one that is "fair and reasonable". Was it appropriate for the tribunal to vary the eight leases so that the fixed charge was replaced by the fair and reasonable provision?

7. Secondly, in those same eight leases there is no provision for a reserve fund. All other leases have a reserve fund provision. Was it appropriate for the Tribunal to insert reserve fund provisions in these eight leases?

8. Thirdly, only a minority of leases allow for the charging of interest on service charge arrears. Again was it appropriate for the Tribunal to insert interest provisions in leases when arrears accrued relating to unpaid service charges?

9. Fourthly, the recoverable service charges in all the leases amount in total to 101.81%. Was it appropriate for the Tribunal to vary the leases so that the total recoverable service charges amounted to 100%?

10. The Tribunal was also mindful of the very recent decision of the Upper Tribunal in the case of *Triplerose Limited v Ms Bronwen Stride* [2019] UKUT 0099 (LC) where Judge Behrens made it clear that if a variation is sought then there must be evidence of a problem or difficulty arising from the term that is subject to the possible variation. In that regard Mr Bates was able to call evidence from a director of the applicant company, Mr Philp McCreery. His evidence will be considered later in this decision when considering each of the following four lease variation issues to be determined.

11. Accordingly, having heard and read the evidence and submissions from the Applicant and having considered all of the copy deeds and documents provided by the applicant, and the written submissions from the objecting tenant, the Tribunal determines the four lease variation issues as follows.

12. First, the applicant wishes to vary Part 6 of Schedule 2 of the relevant leases so as to delete "Three hundred and seventy two (£372) pounds" and replace it with "such sum as the Lessors or their Managing Agents shall specify in its discretion to be a fair and reasonable payment." The applicant's submissions on this proposed variation were :-

> "This proposed variation falls within s.35 (2)(a), in that the practical effect of this is that it significantly reduces the funds available to the applicant for undertaking service chargeable works (both "day-to-day" and major works). In addition, for similar reasons, varying the service charge mechanisms to ensure that all leaseholders will pay in advance falls within the terms of ss.35(2)(c) and (d). There is no prejudice to any leaseholder in this variation. The *total* amount recoverable does not change but, rather than having a large balancing demand, the costs can be spread over the year. Nor does any leaseholder lose any statutory protection. Any demand made under the wording of the proposed variation would be subject to s.19(2), Landlord and Tenant Act 1985 (*i.e.* this variation cannot be used to demand an unreasonable amount on-account, since statute would prevent this). "

13. The evidence from the company director supported these submissions in that Mr McCreery asserted that the terms of the eight leases only require payment on account of a fixed sum. This sum was set at the date the leases were granted in the 1970s. At that time, the fixed service charge was probably sufficient but clearly the cost of services has increased in the last 40 years. These fixed sums are in his opinion grossly inadequate to cover the costs the applicant incurs during the financial year in providing services to the property. As a consequence of only being able to collect the actual amount payable at the end of the service charge year, it creates cash flow difficulties during the year because the service charge fund is short on his estimation by up to circa £50,000.

14. There did not appear to be anything in the comments from the objecting tenant in this regard. The Tribunal considered carefully the evidence and was satisfied that the problem of the fixed service charge was of significant consequence and was a very real problem for the applicant and that as a result a lease variation in the manner sought was entirely appropriate and necessary. Therefore the Tribunal determines that there be the variation applied for in regard to the fixed

interim service charge in the eight leases affecting flats 1, 38, 52, 54, 66, 79, 90 and 93.

15. Secondly, the variation applied for seeks to include a reserve fund in eight leases where there is no such provision. It applies to the leaseholders of flats 1, 38, 52, 54, 66, 79, 90 and 93. The proposal is to add a clause in the same or similar wording as exists in the other leases in the property in the following terms :

"... such sums of money as the [applicant] shall reasonably require to meet such future costs as the [applicant] shall reasonably expect to incur of replacing maintaining and renewing those items which the [applicant has] hereby covenanted to replace maintain or renew." (clause.5(5)(p)).

16. The applicant's submissions on this proposed variation were :-

> "…. The inability to establish a fund of money for major works items means that all major repairs are required to be funded in full from the annual service charge bill (i.e. a project costing several hundred thousand pounds must be billed in one go, as it is impossible to build up a fund over time to fund such expenditure). The desirability of such a fund is well-known. The RICS Service Charge Residential Management Code expressly recommends that, if the leases do not provide for such a fund, one should be established (including by an application like the present, if necessary):
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> > "A reserve fund can have benefits for both landlords and tenants alike. Where the lease allows for a reserve fund to be set up but no such fund exists, you should recommend to your client that a reserve fund be created. Where the lease does not allow for the collection of reserves, consider seeking the agreements of the tenants to a variation of the leases, or an application to [the First-Tier Tribunal (Property Chamber)]."
>
> No leaseholder can be prejudiced by this variation. The amount to be demanded will be subject to s.19(2), Landlord and Tenant Act 1985 and simply allows for costs to be spread over a much longer period. In particular, it will allow a contribution to be collected towards the anticipated major works so as to allow leaseholders to spread these costs over a period of time."

17. Again the evidence from the company director supported these submissions in that Mr McCreery asserted that the absence of a reserve fund in the relevant leases:

> "…. makes it extremely difficult to plan major works as the costs of those works have to be front loaded but the Applicant is unable to recover the costs in advance from all of the lessees. This means that any larger projects can only be funded by increasing the service charge from one year to the next, which impacts on lessees and makes their household expenditure planning much harder. These difficulties have previously been experienced when replacing the lifts, resurfacing of the roof and carrying out electrical works. "

18. Mr McCreery gave the example of the problems caused by the missing reserve find clause in relation to recent electrical works. The electrical works cost the lessees approximately £1.1million and it had to be funded over the course of two financial years. The property has many elderly residents but even those who are still in employment have been put under great financial strain as a result of not having a reserve fund in place and having to raise these funds in two consecutive years. Had there been a reserve fund in place, the financial burden would have been alleviated for all service charge contributors. Mr McCreery explained that no reserve fund contributions were currently demanded from lessees whose leases permitted them as this would complicate the management of the service charge account. Fortunately, the applicant was holding funds of its own (from rental income) and was able to lend the necessary monies to the service charge fund pending payment by the lessees. However, the Tribunal accepted that this "solution" was not a satisfactory state of affairs. The lessees were also helped by the contractor agreeing to accept payment a month late so that the applicant could arrange and put in place the loan mentioned above.

19. In his evidence Mr McCreery also indicated that there were several major works planned where the likely expenditure could exceed £2.5 million pounds. Consequently he asserted that if there is no reserve fund in place, allowing leaseholders to plan ahead financially and collect funds gradually for the larger, more costly, projects, the applicant will in his view continue to place leaseholders under unnecessary financial strain, potentially jeopardising vital projects which would improve the safety of the building as well as complying with the lease terms should leaseholders be unable to find such large sums.

20. The objecting tenant did raise some points regarding this proposed variation but none were of such merit as to persuade the tribunal of their relevance. Most seemed to be concerned with the possibility of increased service charges but the Tribunal was satisfied that this would not be the consequence of the proposed variation. The Tribunal considered carefully the evidence and was satisfied that the problem of the absent reserve fund was of significant consequence and was a very real problem for the applicant and that as a result a lease variation in the manner sought was entirely appropriate and necessary. Therefore the Tribunal determines that there be the variation applied for in

regard to the absent reserve fund in the eight leases affecting flats 1, 38, 52, 54, 66, 79, 90 and 93.

21. Thirdly, this proposed variation applies to the leaseholders of the flats set out in the Schedule attached to the applicant's statement of case, some 58 flats in total. In these leases, there is no provision to charge interest on late payments. In the other leases, there is provision to charge interest after 21 days, at a rate of 4% above the Nat West bank base rate. The proposed variation is to add a similar right to charge interest. The applicant submitted that the failure of the leases to make any provision for the payment of interest is within the scope of ss.35(2)(e) and (3A). Given that the failure to make such a provision is expressly identified in s.35(2)(3A) as an example of an unsatisfactory situation, the applicant submitted that this variation should be allowed. Mr McCreery took the view that he considered it unfair that some of the lessees are obliged to pay interest for late payment of service charges whereas others can be significantly overdue in paying their service charges without any consequence; it is effectively in his view an interest free loan.

22. There did not appear to be anything in the comments from the objecting tenant in this regard. The Tribunal considered carefully the evidence and was satisfied that the problem of the absent interest charging provision was of significant consequence and was a very real problem for the applicant and that as a result a lease variation in the manner sought was entirely appropriate and necessary. Therefore the Tribunal determines that there be the variation applied for in regard to the fixed interim service charge in the fifty-eight leases listed in the appendix to the applicant's statement of case.

23. Fourthly, and finally, this variation relates to the total service charge recovery and applies to all the leases in the property. The proposed variation is to reduce the service charges on a pro rata basis, in effect to formalise the extra-contractual variation currently in force so as to ensure that the total adds up to 100% and not to the current erroneous 101.81%. The precise percentage changes are listed in the trial bundle at pages 20 to 30 in the applicant's list of interested parties. The applicant submitted that the fact that the recoverable service charge exceeds 100% falls within s.35(2)(f) and, in light of the decision in *Rossman v Crown Estate Commissioners* [2015] UKUT 288 (LC), the ad hoc arrangement cannot simply be left in place. The Tribunal readily accepted that this was a very real problem for the applicant that should not be allowed to continue. Therefore the Tribunal determines that there be the variation applied for in regard to the total service charge recovery in all the leases in the property by way of a prorata reduction to ensure that the total recovery is at the level of 100%..

24. The tribunal also considered whether there should be any form of compensation pursuant to section 38(10) of the Act but took the view

that it was not appropriate that there be any award for compensation given the circumstances of the application. In particular whilst the objecting tenant did ask for compensation no evidence was supplied in support of the claim. The Tribunal again noted some judicial guidance from *Triplerose* in that it was appropriate that an expert should seek to compute the level of compensation sought. In the absence of any such supporting evidence it is not possible for the Tribunal to make any order for compensation. Furthermore to make an order for compensation the Tribunal must be satisfied that in making the variation order that prejudice has been caused as a result. On looking at the form of variations to be made the Tribunal was of the view that there was no such prejudice because the changes were really varying payment timeframes rather than imposing additional financial responsibilities.

25. The Tribunal considered the method by which the variations should be made. It decided that to try to make formal written deeds for each lease was likely to prove disproportionately expensive and very time consuming. Therefore it determined that the applicant should draft an Order for the approval of the Tribunal. This Order should set out the terms of this determination and should be drafted in such a way so as to enable an application to the Land Registry in relation to each lease in the property to make sure that the variations were duly registered against each and every leasehold title. Therefore the applicant is required within 21 days of this decision to submit to the Tribunal such a draft order in the above terms

26. Also within 21 days of this decision the applicant shall file stamped addressed envelopes addressed to each leaseholder, (all 113), to enable the Tribunal to serve a copy of this decision on the lease variations (as is now required following the Upper Tribunal decision in *Hyslop v 38/41 CHG Residents Co Ltd* [2017] UKUT 0398 (LC)).

27. Rights of appeal made available to parties to this dispute are set out in an Annex to this decision.

Name: Judge Professor Robert M. Abbey **Date:** 10 June 2019

ANNEX - RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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.

Appendix

Relevant legislation

Landlord and Tenant Act 1987

Part IV Variation of Leases

Applications relating to flats

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.
(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002and Tribunal Procedure Rules shall make provision—
(a)for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and
(b)for enabling persons served with any such notice to be joined as parties to the proceedings.
(6)For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—
(a)the demised premises consist of or include three or more flats contained in the same building; or
(b)the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.
(8)In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.
For the purposes of this section and sections 36 to 39, "appropriate tribunal" means—
(a)if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and
(b)if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.

36 Application by respondent for variation of other leases.

(1)Where an application ("the original application") is made under section 35 by any party to a lease, any other party to the lease may make an application to the tribunal asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application.
(2)Any lease so specified—
(a)must be a long lease of a flat under which the landlord is the same person as the landlord under the lease specified in the original application; but
(b)need not be a lease of a flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease.
(3)The grounds on which an application may be made under this section are—

(a)that each of the leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application; and
(b)that, if any variation is effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons who are parties to the leases specified in that application, to have all of the leases in question (that is to say, the ones specified in that application together with the one specified in the original application) varied to the same effect.

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
(b)in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.
(6)For the purposes of subsection (5)—
(a)in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and
(b)the landlord shall also constitute one of the parties concerned.

Orders varying leases

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.
(2)If—
(a)an application under section 36 was made in connection with that application, and
(b)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 under section 36,

the tribunal may (subject to subsections (6) and (7)) also make an order varying each of those leases 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 tribunalwith 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) 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.
(7)A tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—
(a)which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or
(b)which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or
(c)which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.
(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.