



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

Case Reference : **CHI/00HB/LVT/2014/0001**

Property : **Arlington Villas, Bristol, BS8 2EG**

Applicant : **Guinness Partnership Limited**

Representative : **Taylor and Emmet LLP**

Respondent : **The Lessees**

Representative : **No attendance**

Type of Application : **Application under Section 35 of the
Landlord and Tenant Act 1987 for the
variation of leases.**

Tribunal Members : **Judge D Archer (Chairman)
Mr Jan Reichel (Chartered Surveyor)**

Date and Venue of Hearing : **Paper Hearing**

Date of Decision : **16 March 2015**

DECISION

For the reasons set out below, the Tribunal makes a determination that the proposed variation of leases is likely to substantially prejudice the respondents. The Applicant is granted 14 days from

service of the decision to make representations to the Tribunal. In the absence of any representations within 14 days, this application will be dismissed.

REASONS

Background

1. Guinness Partnership Limited is the current proprietor of the freehold reversion of Arlington Villas, Clifton, Bristol BS8 2EG (“the property”) and is the Applicant in this application. There are a total of 10 residential flats within the property. The Respondents are the leasehold owners of the flats that fall within the Property and are the subject of this application. They are Alan George Pascoe and Lauren Isabel Pascoe (flat 14A), Rebecca Sarah Hughes (flat 14B), Michael James Barber and Sonia Clare Barber (flat 14C), Camilla Elaine Barclay (flat 14E), Christopher James Robinson (flat 15A), Lorraine Julia Dunn-Ceylan (flat 15B), Katherine Fawcett (flat 15C), Gillian Rachel Watkins (flat 15D) and John Patrick Couchman and Helen Louise Pack (flat 15E). Flat 14D is owned by the Applicant and is not involved in this application.
2. The original application to vary the leases was amended after the Applicant wrote to the Tribunal on 5 December 2014. The amended application is set out in full below;

“Flat No. and Lease Particulars

14A – lease dated 6 November 1987 between Avondown Housing Association Limited and Richard Nicholas Stevens

Term in the lease to be varied

Clause 4(iii) – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter ... contribute and pay one equal tenth part of the costs, expenses, outgoings and matters mentioned in the Fifth Schedule hereto other than in respect of the common entrance way, staircases, halls, landings and passages in the main part of the mansions.”

Draft Clause

Clause 4(iii) – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter...

- (a) contribute and pay 10% of the costs of services provided regarding the external communal areas, including (but not limited to) the rear garden, pathway to the rear garden, and maintenance of the boundaries, roof, guttering, drains and structure of the building; and
- (b) contribute and pay 12.5% of the costs of the service provision for the expenses listed in the Fifth Schedule of the Lease, namely the maintenance of the internal communal areas.

Flat No. and Lease Particulars

Flat 14C – lease dated 12 March 1986 between Broadcasting Employees Housing Association Limited and John Anthony Smith

Term in the lease to be varied

Clause 4(iii) – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter ... contribute and pay one equal tenth part of the costs, expenses, outgoings and matters mentioned in the Fifth Schedule hereto such payment (hereinafter called the “Service Charge” being subject to the terms and provisions set out in Part II of the Fifth Schedule hereto.”

Draft Clause

Clause 4(iii) – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter...

- (a) contribute and pay 10% of the costs of services provided regarding the external communal areas, including (but not limited to) the rear garden, pathway to the rear garden, and maintenance of the boundaries, roof, guttering, drains and structure of the building; and
- (b) contribute and pay 12.5% of the costs of the service provision for the expenses listed in the Fifth Schedule of the Lease, namely the maintenance of the internal communal areas.

Flat No. and Lease Particulars

Flat 15A – lease dated 31 October 1986 between Broadcasting Employees Housing Association Limited and Mr and Mrs Wartnaby

Term in the lease to be varied

Clause 4(iii) – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Flats comprised in the Mansions that the Lessee will at all times hereafter... contribute and pay to the lessor on the 24th day of June in each year one equal tenth part of the costs, expenses, outgoings and matters mentioned in Part 1 of the fifth schedule hereto other than in respect of the common entrance ways, staircases, halls, landings and passages in the main part of the mansions. such payment (hereinafter called the Service Charge) being subject to the terms and provisions set out in Part 2 of the Fifth Schedule hereto”.

Draft Clause

Clause 4(iii) – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter contribute and pay to the Lessor on the 24th day of June in each year ...

- (a) 10% of the costs of services provided regarding the external communal areas, including (but not limited to) the rear garden, pathway to the rear garden, and maintenance of the boundaries, roof, guttering, drains and structure of the building.

Flat No. and Lease Particulars

Flat 15B – lease dated 22 July 1988 between Avondown Housing Association Limited and Mrs Clifton

Term in the lease to be varied

Clause 4(iii) – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter... contribute and pay one equal tenth part of the costs, expenses, outgoings and matters mentioned in the fifth schedule hereto other than in respect of the common entrance way, staircases, halls, landings and passages in the main part of the mansions.”

Draft Clause

Clause 4.3 – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter...

- (a) contribute and pay 10% of the costs of services provided regarding the external communal areas, including (but not limited to) the rear garden, pathway to the rear garden, and maintenance of the boundaries, roof, guttering, drains and structure of the building; and
- (b) contribute and pay 12.5% of the costs of the service provision for the expenses listed in the Fifth Schedule of the Lease, namely the maintenance of the internal communal areas.

Flat No. and Lease Particulars

Flat 15C – lease dated 01 November 1991 between Guinness Housing Association Limited and Catherine Aldred

Term in the Lease to be varied

Clause 4.3 – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter ... contribute and pay one equal tenth part of the costs expenses outgoings and matters mentioned in the Fifth schedule hereto.”

Draft Clause

Clause 4.3 – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter...

- (c) contribute and pay 10% of the costs of services provided regarding the external communal areas, including (but not limited to) the rear garden, pathway to the rear garden, and maintenance of the boundaries, roof, guttering, drains and structure of the building; and
- (d) contribute and pay 12.5% of the costs of the service provision for the expenses listed in the Fifth Schedule of the Lease, namely the maintenance of the internal communal areas.

Flat No. and Lease Particulars

Flat 15D – lease dated 05 November 1993 between The Guinness Housing Association Limited and Michael James Gudgeon

Term in the lease to be varied

Clause 4.3 “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter ... contribute and pay one equal tenth part of the costs expenses outgoings and matters mentioned in the Fifth schedule hereto.”

Draft Clause

Clause 4.3 – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter...

- (a) contribute and pay 10% of the costs of services provided regarding the external communal areas, including (but not limited to) the rear garden, pathway to the rear garden, and maintenance of the boundaries, roof, guttering, drains and structure of the building; and
- (b) contribute and pay 12.5% of the costs of the service provision for the expenses listed in the Fifth Schedule of the Lease, namely the maintenance of the internal communal areas.

Flat No. and Lease Particulars

Flat 15E – lease dated 24 September 1984 between Broadcasting Employees Housing Association Limited and Jacqueline Anne Marshall

Term in the lease to be varied

Clause 4(iii) - “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter ... contribute and pay to the Lessor on the 24th day of June in each year one equal tenth part of the costs, expenses, outgoings and matters mentioned in Part 1 of the fifth schedule hereto other than in respect of the common entrance ways, staircases, halls, landings and passages in the main part of the mansions and to pay one equal eight part of the said costs expenses and outgoings and matters mentioned in Part I of the Fifth Schedule hereto in respect of the common entrance way staircases halls landings and passages in the main part of the Mansions such payment (hereinafter called the Service Charge) being subject to the terms and provisions set out in Part 2 of the Fifth Schedule hereto”.

Draft Clause

Clause 4(iii) – “the Lessee hereby covenants with the Lessors and with the owners and lessees of the other Residences comprised in the Mansions that the Lessee will at all times hereafter...

- (a) contribute and pay 10% of the costs of services provided regarding the external communal areas, including (but not limited to) the rear garden, pathway to the rear garden, and maintenance of the boundaries, roof, guttering, drains and structure of the building; and
- (b) contribute and pay 12.5% of the costs of the service provision for the expenses listed in the Fifth Schedule of the Lease, namely the maintenance of the internal communal areas.

Ground relied upon to vary the clause (applicable to all leases)

The Landlord & Tenant Act 1987 Section 35(2)(e)

The lease fails to make satisfactory provision with respect to

“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 number of persons who include that other party”

and Section 35(2)(f)

“the computation of a service charge payable under the Lease”.

For the purposes of subsection (2)(e) the Lease does not allow the applicant to recover from the Leaseholders all of the expenditure it incurs when carrying out maintenance, repair, redecoration and renewal plus cleaning and decorating and managing the common entrance

ways, staircases, halls, landings and passages in the main part of the mansions. Currently some leaseholders pay 10%, some pay nothing and some pay 12.5%.

For the purposes of subsection (2)(f) the Lease fails to make satisfactory provision with respect of the computation of the service charge payable under it as it provides for the charge to be a proportion of expenditure incurred/to be incurred by the landlord and other tenants of the landlord are also liable under their leases to pay by way of service charge proportions of any such expenditure but the aggregate of the amounts that will be payable are less than the whole of any such expenditure."

3. The application was accompanied by a copy of the leases of the flats within the property. The Tribunal issued directions on 16 October 2014 stating that the application shall stand as the Applicant's statement of case, any Respondents who oppose the application shall send to the Applicant a statement in reply by 21 November 2014, the Applicant shall submit the bundle of relevant documents by 19 December 2014 and the Tribunal would inspect the property on or about 9 January 2015.
4. None of the Respondents have opposed the application. The application was listed for paper hearing on 9 January 2015. The Respondents were notified of the date, time and venue of the hearing by letter from the Tribunal.
5. The Applicant submitted a statement of case within the Applicant's bundle at pages 88-93. That documents appears as follows;

"Background

1. The Applicant has set out in its position in its application filed and served on 10 October 2014. However, the Applicant now wishes to file a further statement of case to summarise the purpose of the application.
2. This is an application for an order for the variation of 7 leases of Arlington Villas, Clifton, Bristol BS8 2EG (the Property) pursuant to section 35 & 38 of the Landlord & Tenant Act 1987.
3. The Applicant, The Guinness Partnership, is a charitable Housing Association which provides housing and services across England. The Applicant is the freehold owner of Arlington Villas and deals with management of the Property. Arlington Villas is a block of 10 flats, 9 of which are leasehold having been bought in the 1980's under the Right to Buy legislation. These 9 leasehold properties have since been sold on via the open market. The leases are long leases for 125 years with an annual rent of £10. One of the flats in Arlington Villas being Flat 14d is owned by the Applicant and is let out on an assured tenancy.

Official Copies of Register of Title for the relevant freehold and leasehold interests are enclosed in the bundle at section 1

4. The Respondents are long leaseholders of 7 of the flats in the property as follows, please refer to the application and the attachment 1.

5. The flats in Arlington Villas are divided up as follows basement flats x2 (14E & 15A), ground floor flats x2 (15B & 14D), first floor flats x2 (15C & 14C), second floor flats x2 (14B & 15D) and third floor flats x2 (14A & 15E). There is a communal entrance serving all flats except the basement flats. The basement flats each have their own separate entrance door.

Terms to Vary

6. In recent times it became apparent to the Applicant that there was a problem with the apportionment of service charge which meant that it could not recover the full cost of some of the works it is required under the lease to carry out. The problem related to the Applicant's ability to collect service charge for works in relation to the common entranceway, staircases, halls, landings and passages in the main part of the mansions (to be referred to as "the common entranceway etc"). Reference to the Respondents obligation to pay these sums is set out in clause 4(iii) of the leases.

7. As it currently stands the 7 leases which require to be varied are all in a very similar form. However, they are not identical. It appears that the leases for 14b, 14e, 15a and 15e are all in the same format but the leases for 15b and 14a are in the same format. The two formats differ slightly.

8. The differences are;

- (1) that the leases for 15b and 14a state that rent and service charge is to be paid in two annual instalments whereas the other leases refer to being paid in one instalment.
- (2) The leases for 15b and 14a also refer to the service charge being governed by housing authority legislation.
- (3) Further the leases for 15b & 14a comprise of two paragraphs stating how the service charge should be calculated whereas the other leases have a full detailed breakdown of the requirements which apply to the landlord in respect of collecting service charge.

9. The Applicant is of the view that the fact that at schedule 1 the leases for 15b and 14a make reference to the service charge being governed by Housing Association legislation and the other leases are silent on this point is irrelevant. That particular reference is outdated but in any event the Applicant is bound by such legislation in its capacity of the Housing Association. Therefore, no amendment to the leases is required in this regard and this variation cannot be made under s.35 in any event.

10. Further, although the leases for flats 15b and 14a set out a basic framework for how the Applicant must collect and account for the service charge rather than a detailed breakdown as provided in the other leases, it is not suggested that these leases need amending in this regard. This is because the Applicant is governed by statutory obligations in this regard in any event.

11. Therefore the Applicant's main concern, and the focus of this application, is varying clause 4(iii) of the leases. This clause is a lessees covenant to *contribute and pay to the costs expenses and outgoings and matters mentioned in part 1 of the fifth schedule*. This clause currently requests the leaseholders flats 14c, 15c and 15d to pay 10% of all service charge including costs incurred in relation to the common entranceways etc. Flat 14d is owned by the Applicant and the Applicant contributes

and will contribute 10% of the service charge relating to Arlington Villas in connection with this flat including common entranceways etc.

12. However, clause 4(iii) of the Respondents leases allow the Applicant to collect 10% of all service charge except for in relation to common entranceways etc. Some of the leaseholders are not obliged to pay anything at all in relation to common entranceways etc and some leaseholders are required to pay more than 10% in this regard. It is the Applicant's position that it is just and convenient for each of the 10 leaseholders to be responsible for paying 10% of all service charge expenditure in respect of Arlington Villas. All the Respondents use the common entranceways etc and/or have the express right to use the common entranceways etc.

13. The Applicant covenants to provide the services described in the fifth schedule at clause 5 of the leases.

14. Part 1 of the Fifth Schedule sets out the "costs expenses outgoings and matters in respect of which the lessee is obliged to contribute" includes

1. *The costs expenses outgoings of maintaining, repairing, redecorating and renewing:*
 - a. *The roof, main structure (including... beams joists roof timbers boundary walls, fences, gutters and rain water down pipes and vents) in the mansions;*
 - b. *The gas and water pipes, drains and electric cables and wires in through under and upon the residences and enjoyed or used by the Lessee in common with the owners*
 - c. *and Lessees of the other residences;*
 - d. *any other thing in or about the mansions or used or enjoyed or intended to be used and enjoyed in connection therewith...*
2. *The cost of cleaning the passages and landing and staircase referred to in paragraph 1 of the Third schedule to this lease and all other parts of the mansions so enjoyed.*

15. The Applicant requires the Respondents leases to be varied so that each flat in the block is responsible for 10% of all service charge expenditure. It is simpler to simplify this issue so that every leaseholder pays 10% in respect of maintenance of the whole of the Property. Other alternatives such as contribution of service charge based on floor space etc would be expensive to put into practice and surveyors would need to be instructed etc. On a small development such as this it is the Applicant's view that is dis-proportionate. All of the leaseholders at Arlington Villas benefit from the Property being maintained and benefit from this being done properly. 10% is a fair and reasonable proportion of service charge relating to all works including the common entrances etc. For the avoidance of doubt the basement flats have an express right in the lease to use these areas as per paragraph 1 of the third schedule.

16. Section 35 of the 1987 Act (so far as is relevant to the present proceedings) provides us follows:

35 Application by party to lease for variation of lease.

1. *Any party to a long lease of a flat may make an application to the court 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.

(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.

17. Section 38 of the 1987 Act provides:

38 Orders by the court 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 court, the court 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 court with respect to the leases specified in the application under section 36,

(c) the court 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 court with respect

to the leases specified in the application, the court 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 court thinks fit.

(6) The court shall not make an order under this section effecting any variation of a lease if it appears to the court—

(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.

The variations sought and the grounds of the application

18. The Applicant requests that each of the 7 leases be varied by the replacement of clause **4(iii) which governs the computation of the service charge payable by the Lessees using the suggested replacement clauses. Please refer to the application and attachment 2. A draft precedent deed of variation for flats 14a, 14b, 14e, 15a, 15b and 15e is enclosed in the bundle at section**

19. The Applicant's view is that each of the Respondents flat leases fails to make satisfactory provision for the computation of a service charge and the recovery by one party to the lease from another party to it of expenditure incurred or on his behalf, for the benefit of that other party or of a number of persons who include that other party and hence the Tribunal has power to order variation under Section 35(2)(f) and (e) of the 1987 Act. The leases are unsatisfactory in terms of computation of the service charge as the aggregate amounts of service charge the Applicant is able to collect is less than the total expenditure and the criteria for unsatisfactory provision as set out in section 35(4)(c) applies to this case.

20. The Applicant suggests contributions, as per the schedule prepared, which is that all properties pay 10% for external expenditure and properties a properties bar 15e pay 12.5% internal expenditure.

21. The Applicant therefore seeks the suggested variations so that the total amount recoverable under the service charge equates to 100% of the actual service charge expenditure.

Order Sought

23. We request that the Tribunal find that each of the flat leases fails to make satisfactory provision for the computation of service charge and the recovery of expenditure and that it has the power to order the requested variations of the leases under Section 35(2)(f) and (e) and make an order under section 38 of the 1987 Act.

24. The Applicant considers that the leases must be varied, because effectively it has no other source of income other than from the contributions from the leaseholders to maintain the common entranceways etc. and has no practical means of managing the estate properly until this issue is resolved. The suggested variations are reasonable and a resolution to this problem needs to be found in order to avoid serious management difficulties in years to come. The Applicant will not be able to

manage the estate effectively if it is unable to recover the totality of service charge expenditure reasonably incurred. It follows that it is in the collective best interests of the Applicant and of the Respondents to find a solution to this funding problem by way of variation of the leases. “

The Law

6. Section 35 of the Landlord and Tenant Act 1987 (“the Act”) provides that a party to a long lease of a flat may make an application to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application. The grounds on which any such application may be made are that the lease fails to make satisfactory provision in relation to various matters including those relied upon by the Applicant above. Section 38 of the Act gives the tribunal power to make an order varying the lease in such manner as is specified in the order but also provides at section 38(6) that the tribunal shall not make an order if the variation would be likely to substantially prejudice any respondent to the application and that an award under section 38(10) would not afford him adequate compensation. Section 38(10) provides that where a tribunal makes an order 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 her is likely to suffer as a result of the variation.

The Leases

7. The Tribunal had before it a copy of the relevant leases. They appear at pages 121-380 of the Applicant’s bundle.

Inspection

8. The Tribunal inspected the property on 9 January 2015. 14 and 15 Arlington Villas have separate entrances and common parts. There is one flat per floor for each block. 14E and 15A are basement flats. 14E and 15A have rear entrances with no access to the communal parts. The other flats in 14 are, from ground floor upwards, 14D, 14C, 14B and 14A. The other flats in 15 are, from ground floor upwards, 15B, 15C, 15D and 15E. There is a communal garden for both blocks. 15 has more spacious common parts but in both blocks the common parts are limited to hall, staircase and landings.

The Hearing

9. The Tribunal proceeded by way of a paper hearing.

The Evidence

10. The evidence submitted by the Applicant is all contained within the Applicant's bundle i.e. draft deeds of variation, correspondence, statement of case and Land Registry documents. There was no evidence from the respondents.

Conclusions

11. The Tribunal notes that Flat 14D is owned by the Applicant and the Applicant contributes and will continue to contribute 10% of the total service charge in connection with that flat including common entranceways, etc. The Tribunal accepts that the current leases for the flats that are the subject of this application contain a mixture of provisions in relation to the common entranceways, etc. Some of the leaseholders are not obliged to pay anything and some are required to pay more than 10%. The current leases create the possibility of a shortfall in maintenance funds which cannot be recovered from the leaseholders. As a result, the Tribunal finds that the requirements of sections 35(2)(a) and 35(2)(e) of the Landlord and Tenant Act 1987 are met i.e. the current leases fail to make satisfactory provision in relation to the repair and maintenance of the flats, building or land and the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred to the benefit of that other party.
12. The Tribunal therefore accepts that the application is well founded in that the Applicant has no source of income in respect of the property other than from the contributions of the leaseholders and its own contribution in respect of Flat 14D. The Applicant has no practical means of managing the estate properly until this issue is resolved. A resolution to this problem needs to be found in order to manage the estate effectively. It is in the collective best interests of the Applicant and the Respondents to find a solution to this funding problem by way of variation of the leases. However, those findings are the high water mark of the Applicant's case for the reasons set out below.
13. The Tribunal notes certain defects in the applicant's statement of case. Paragraph 18 (page 93 of the applicant's bundle) is plainly incomplete. Paragraph 20 refers to all properties bar Flat 15E paying 12.5% internal expenditure. That would result in recovery of 112.5% of total expenditure. The Applicant might have intended to exclude the basement flats (14E and 15A) from the 12.5% but that is not

what is said in paragraph 20. The statement of case is not, of course, the application itself but the defects do indicate some muddled thinking on the part of the Applicant's representatives.

14. The substantive difficulty is the relationship between the proposed draft clauses and the Fifth Schedule to the leases. That is headed "*Costs expenses outgoings and matters in respect of which the lessee is to contribute*". Under Part 1 of the Fifth Schedule, those costs, etc. include maintaining, repairing and renewing the roof and main structure including the beams, joists, roof timbers, boundary walls, fences, gutters and rainwater down pipes and vents, gas and water pipes and electric cables and wires, entrances including door steps and pathways, passages, landing and staircases, and any other thing in or about the property or used and enjoyed or intended to be used and enjoyed in connection with the use or enjoyment of which is common between the lessee and the lessors. The Fifth Schedule goes on to refer to the costs of cleaning the passages, landings and staircases and other parts of the property so enjoyed or used by the lessee and of keeping all parts of the property in good condition and also the garden grounds, the costs expenses and outgoings of decorating the exterior of the property, rates taxes and outgoings, the cost of insurance and an additional charge of 10% administration expenses in respect of costs incurred.
15. The Tribunal finds that the Fifth Schedule contains a comprehensive list of costs that might be incurred by the Applicant and can be claimed from the Respondents under the lease. However, the proposed clause 4(iii) of the leases would require the Respondents to contribute and pay 10% of the costs of the services provided regarding the external communal areas, including (but not limited to) the rear garden, pathway to the rear garden and maintenance of the boundaries, roof, guttering, drains and structure of the building; **and** (except for basement Flat 15A) to contribute and pay 12.5% of the costs of the service provision for the expenses listed in the Fifth Schedule of the lease, namely the maintenance of the internal communal areas.
16. The Tribunal finds it impossible to reconcile the proposed clause 4(iii)(f) with the plain wording of the Fifth Schedule which is not restricted to the maintenance of the internal communal areas. The Tribunal also finds that the proposed clause 4(iii) allows for the possibility of the Applicant charging the Respondents twice for the same services i.e. 10% under 4(iii)(e) and 12.5% under 4(iii)(f). That is because the proposed clause 4(iii) does not properly define the relationship between the 10% charge and the various possible charges that appear in the Fifth Schedule. There are a number of possible drafting solutions to this problem but it is not for the Tribunal to redraft the application, even where it is well founded and not opposed by the Respondents.
17. The Tribunal therefore finds that the proposed clause 4(iii) is a lease variation that is likely substantially to prejudice the Respondents to the application because it open up the

possibility of double charging for services for the reasons set out above. An award under section 38(10) of the Landlord and Tenant Act 1987 would not afford the Respondents adequate compensation because it is impossible to predict the extent of any future double charging, if any. The Tribunal is therefore bound by section 38(6) of the Act which states that a Tribunal **shall not** make an order effecting any variation of a lease in these circumstances. The application is therefore refused; subject to paragraph 18 below.

18. We recognise that this application was not opposed by the Respondents and they have made no submissions in relation to the Tribunal. We therefore consider it appropriate to grant the Applicant 14 days to make representations to the Tribunal before the application is dismissed. In the event of a future redrafted application, the Applicant may wish to consider whether Flats 14B and 14E should be included. The current application has no proposed draft clause in respect of those flats.

Appeals

19. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
20. If the person wishing to appeal does not comply with the 28-day time limit the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
21. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the ground of appeal, and state the result the party making the application is seeking.

Judge D Archer (Chairman)

Dated: 6 April 2015