FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UD/LVL/2019/0001
Property	**:**	The Flour Loft, Silchester Mews, Silchester Road, St Leonards on Sea, East Sussex TN38 0JB
Applicant	**:**	Albert Rofrano
Representative	**:**	-
Respondent	**:**	Browood Limited (substituted for David Rothbart)
Representative	**:**	Sussex Legal Consultants Limited
Type of Application	**:**	Variation of lease: section 35 Landlord and Tenant Act 1987
Tribunal Member	**:**	Judge E Morrison
Date of Decision	**:**	5 September 2019

DECISION

The application

1. The Tribunal received an application dated 16 April 2019 from the lessee of The Flour Loft seeking a variation of his lease pursuant to section 35 Landlord and Tenant Act 1987 ("the Act"). Specifically the Applicant wanted to reduce the proportion of his service charge contribution from 50%, as set out in the lease, to 14.5%.

The lease

2. The Applicant's lease is dated 6 February 2003 and is for a term of 99 years from that date. The relevant provisions of the lease can be summarised as follows:

   (i) By clause 2(3) the lessee is required to pay a service charge, and in the Fifth Schedule this is specified as one-half of the lessor's expenditure in carrying out its obligations under clause 3(3) in respect of the building in which the Applicant's flat is situated
   (ii) The obligations under clause 3(3) refer to those set out in the Sixth Schedule and include the repair, maintenance and management of the building
   (iii) Under Clause 1 the lessee is obliged to pay rent which includes one half of the cost incurred by the lessor insuring the building
   (iv) Recital (2) provides:
   "The Lessor intends when the occasion arises to demise the flats or maisonettes comprised in the Building known [*sic]* in accordance with a general scheme and that in every such Lease … the tenant thereof shall enter into obligations … as or substantially as stated in clause 2…"
   (v) Clause 3(6) provides that if any part of the building (other than common parts) is not demised or occupied by the lessor, the lessor will perform the obligations that lessees would otherwise be required to perform, and pay a service charge in accordance with the Fifth Schedule.

The relevant law and jurisdiction

3. The relevant provisions in section 35 of the Act are as follows:

(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.

…

(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]3 the whole of any such expenditure.

…

(8) In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.

(9) For the purposes of this section and sections 36 to 39, "appropriate tribunal" means—

(a) if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; …

Procedural background

4. On receipt of the application the Tribunal issued directions. They provided for the application to be determined on written submissions and without a hearing unless a party objected within 28 days. There was no such objection, but having received the determination bundle the Tribunal was concerned that (i) it appeared that not all necessary persons had been given proper notice of the application and (ii) the application appeared to have no reasonable prospect of success. The Tribunal therefore listed a case management hearing and notified the parties that the Tribunal was minded to strike out, with submissions on strike out to be considered at that hearing.

5. The case management hearing was conducted by telephone on 3 September 2019, The Applicant attended in person and the Respondent was represented of Ms Stoneham of Sussex Legal Consultants Ltd. The Applicant confirmed that he did not request a full oral hearing of his application.

6. The Tribunal takes the view that a strike out is justified, but in view of the Applicant's stated intention to pursue his case further, it has been decided to provide a written determination on the merits.

7. The Applicant had named the Respondent as David Rothbart. This was incorrect as the lessor is Browood Limited, of which Mr Rothbart is a director. However Mr Rothbart responded to the application by setting out the lessor's case, and at the case management hearing it was agreed by Ms Stoneham that Browood Limited should be substituted as Respondent in place of Mr Rothbart.

8. It remains unclear whether other lessees in the building have been given proper notice of the application. However, in light of the Tribunal's decision, this does not need to be pursued.

The Applicant's case

9. When the Applicant acquired his lease in 2007 The Flour Loft was the only residential unit in the building. At this point the Applicant considered that the service charge provisions in his lease were satisfactory.

10. By 2018 six further flats had been created by the lessor within the building. There is also one commercial unit. The Applicant submitted that this redevelopment required that the service charge provisions in his lease be reformulated. He objected that he would still have to pay 50% whereas the lessor would be paying nothing. Furthermore the service charges should be "spread more evenly" between his flat and the other 6 flats.

11. In the application the Applicant proposed that his proportion should be reduced to 14.5%. In his written submission there was an amended

proposal. If the Respondent was requiring the commercial unit to contribute 18.5%, then the remaining 81.5% should be equally divided between the seven flats so they each paid 11.6% of the service charge. This would be fair and reasonable.

12. In support of his position he produced a commentary on the Upper Tribunal's decision in *Rossman v The Crown Estate Commissioners* [2015] UKUT 288 (LC).

13. At the case management hearing the Applicant put his case in a slightly different way. He submitted that his lease required the lessor to pay 50% of the expenditure, and by incrementally allocating its share to the new flats as they were demised, the lessor was not complying with the lease and therefore the provision was no longer satisfactory.

14. Although the Applicant stated that he also relied on section 35 (2)(a)(b)(c) and (d) of the Act he adduced no evidence in this regard. His submissions were all focussed on section 35 (2)(f) and section 35(4), namely the alleged failure of the lease to make satisfactory provision with respect to computation of the service charge.

The Respondent's case

15. The Respondent's case was that the service charge was now apportioned so that The Flour Loft paid 50%, the commercial area 18.5%, and the remaining six flats 5.25% each, producing a total of 100%, although three of the flats are not yet demised and are retained by the lessor.

16. Reference was made to the second recital in the lease, to show that the lessee was made aware of the planned future development of the building from the outset.

17. It was submitted that the Applicant had failed to produce any evidence to explain why the 50% service charge apportionment in his lease was incorrect or failed to make satisfactory provision for payment of the service charge.

18. Reliance was placed on the authorities of *Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC), *Triplerose v Stride* [2019] UKUT 99 (LC), and *Mayor and Burgesses of the London Borough of Camden v Morath* [2019] UKUT 0193 (LC).

Discussion and determination

19. In *Morgan v Fletcher* [2009] UKUT 186 (LC) the Upper Tribunal decided that section 35(4) of the Act must be construed as if the word "if" reads "only if". In other words, a lease fails to make satisfactory provision with respect to computation of the service charge only if the total of the amounts payable by lessees are more or less than 100% of the recoverable expenditure.

20. In a written document prepared for the case management hearing, the Applicant accepted this proposition. However, he suggested that while not all the flats are demised, the service charges do not add up to 100%. Doing the best it can, the Tribunal understands his argument to be that so long as lessees are not paying the whole of the remaining 50% that is not paid by the Applicant, nor the lessor itself paying the whole of that 50%, the service charges payable do not add up to 100%.

21. In the view of the Tribunal this argument is misconceived. It does not appear to be disputed that once all the flats are demised, the service charges payable will amount to 100% of the recoverable costs. In the meantime clause 3(6) of the Applicant's lease requires the lessor, in respect of those flats not yet demised, to pay the service charge which would otherwise be payable under the leases of those flats. The Tribunal considers that section 35(4)(b) of the Act must be construed so that the words "other tenants of the landlord" include the landlord itself if there is no tenant but the landlord is obliged to pay the share which a tenant would otherwise be required to pay.

22. Any other interpretation would lead to absurd results. For example, the lessees of a new block of 25 flats could argue that each lease requiring a service charge contribution of 4% was unsatisfactory until every single flat had been sold, even though the lessor was paying the service charge attributable to the unsold flats. A lease would also become "unsatisfactory" under section 35(4) if another lease in the block was forfeited. These are not the type of situations at which section 35(4) was directed; that provision is concerned only with situations where the service charges payable by all those who have to pay them either exceed or are less than 100% of the service charge expenditure.

23. Therefore the Tribunal rejects the Applicant's argument that the service charge provision in his lease is unsatisfactory under section 35(2)(f) and 35(4) of the Act.

24. The case of *Rossman v The Crown Estates Commissioners* [2015] UKUT 288 (LC) cited by the Applicant does not assist him for two reasons. First, it concerns an application for a new lease under section 48 of the Leasehold Reform, Housing and Urban Development Act 1993 and the power to modify the lease terms in those circumstances. This is an entirely different statutory scheme. Second, in that case the lessees' service charge contributions exceeded 100% of the actual costs.

25. Nor does it assist the Applicant to submit that his 50% contribution is excessive or unfair, compared to the contributions payable by the other residential lessees. In *Morgan* this argument was considered but rejected, it being concluded that the above statutory provisions did not address or provide a remedy for that mischief (see *Morgan* at para [18]).

26. Further, in *Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC) the Upper Tribunal considered the question of unequal contributions payable by lessees who received the same benefits, in the context of section 35(2)(e) of the Act. At paragraph 27 the President concluded: "*There is, in my judgment, nothing arguably "unsatisfactory" in the fact that two lessees pay a contribution to the lessor's costs of management and four do not. It simply reflects different contractual provisions that do not appear to cause any difficulty in interpretation or application*".

27. This reasoning was also applied in *Triplerose v Stride* [2019] UKUT 99 (LC), concerned with a proposed variation under section 35(2)(a). It was held that although one of four leases did not require the lessee to contribute towards the cost of maintaining the structure of the building, this alone did not render that lease unsatisfactory. Very recently, in *Mayor and Burgesses of the London Borough of Camden v Morath* [2019] UKUT 0193 (LC) Judge Elizabeth Cooke reaffirmed this position:

> "What I take from [the decisions in *Cleary* and *Triplerose*] is that the Tribunal will consider whether the wording of the lease as it stands is clear, and whether the term sought to be varied is workable. If it is clear and workable then it is not unsatisfactory. Obviously the question whether the bargain as it stands works in practice has to be considered on the basis of the evidence in each case. But section 35 does not enable the Tribunal to vary a lease on the basis that it imposes unequal burdens, or is expensive or inconvenient. It would be very strange if it did, in view of the law's general resistance to the temptation to interfere in or improve contractual arrangements freely made" [16].

28. The Applicant has not adduced any evidence that his lease is unsatisfactory under any provision in section 35(2) of the Act. His lease is clear and there is no evidence that the service charge scheme is unworkable. The application for a variation of his lease is therefore refused.

Fees and Costs

29. The Applicant has requested reimbursement from the Respondent of his Tribunal application fee and payment of his costs. Given that his application has not succeeded, these requests are refused.

30. The Respondent has applied for a costs order against the Applicant pursuant to Rule 13 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, on the ground that the Applicant has acted unreasonably in bringing proceedings which were without substance or merit and had no reasonable prospect of success.

31. The parties are asked to consider the guidance in *Willow Court v Alexander* [2016] UKUT 0290 (LC). The Respondent must write to the Tribunal by 30 November 2019 stating whether or not it wishes to

pursue its application. If it does, directions will then be given permitting the Applicant to respond.

32. For the avoidance of doubt, the outstanding issue over costs does not affect the time limit for making any request for permission to appeal against this decision.

Dated: 5 September 2019

Judge E Morrison

Appeals

1. 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.

2. 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.

3. 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.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.