FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/00KF/LVT/2020/0002**
Property	:	**Princes Court, 27 – 29 Princess Street, Southend on Sea, Essex SS1 1QA**
HMCTS (paper, video, audio)	:	**Paper**
Applicants	:	**1. Barry Geoffrey Wild** **2. Victoria Ann Jones** **3. Anne Margaret Vaughan**
Representative	:	**Paul Robinson Solicitors LLP**
Respondent	:	**1. Peter Anthony Saunders** **2. Peter Alan Jones**
Date of Application	:	**25th March 2020**
Type of Application	:	**To vary a lease by a party to the lease (s35 Landlord and Tenant Act 1987)**
Tribunal	:	**Judge J R Morris**
Date of Decision	:	**4th November 2020**

DECISION

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Covid-19 Pandemic: Remote Video Hearing

This determination included a determination on the papers which has been consented to by the parties. A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined on paper. The documents referred to are in a bundle, the contents of which are noted.

Pursuant to Rule 33(2A) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 and to enable this case to be heard remotely during the Covid-19 pandemic in accordance with the Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal the Tribunal has

directed that the hearing be held in private. The Tribunal has directed that the proceedings are to be conducted wholly as video proceedings; it is not reasonably practicable for such a hearing, or such part, to be accessed in a court or tribunal venue by persons who are not parties entitled to participate in the hearing; a media representative is not able to access the proceedings remotely while they are taking place; and such a direction is necessary to secure the proper administration of justice.

Decision

1. Pursuant to section 38 of the Landlord and Tenant Act 1987 ("the 1987 Act") the Tribunal orders the following variation to the Leases of Flats 1, 1A, 2, 3 and 4:
   (a) Plans 1 and 2 are to be replaced by the plan annexed to the Order annexed hereto.
   (b) Clause 2 of the Recitals to the Lease shall be deleted and replaced with the words:
   "The Lessor in the owner of the Property referred to in Part III of the Particulars (hereinafter called "the Property") which Property comprises 5 flats and is registered at the Land Registry under Title No: EX598548 and has agreed with Lessee for the grant by the Lessor to the Lessee of the Flat."
   (c) Clause 1(iv) of the Lease shall be deleted and replaced with words:
   "Together with the right of way and use in common with the Lessees of the other flats firstly over the forecourt shown edged green and the right of access shown edged brown on the Plan annexed hereto and the right to park one vehicle on the blocked paved area also shown edged green on the plan annexed hereto."
   (d) Clause 3(1) of the Lease is to be deleted and replaced with the words:
   "To pay the annual ground rent on the day and in the manner aforesaid together with the service charge equivalent to 1/5 (one fifth) of the total cost to the Lessor in complying with their obligations under Clause 6(d) and (e) hereof."

2. The Tribunal determines pursuant to section 38(6) of the 1987 Act that the Respondents are not prejudiced by the above variation and no order is made for compensation pursuant to section 35(10) of the 1987 Act.

3. The Tribunal determines that the Clause 3(1) of the Lease shall not be varied so as to delete the words "Clause 6(d) and (e).

Reasons

Background

4. The Applicants seek to vary the Leases of Flats 2 and 4 at the Property under section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act"). The Applicants intend to vary their own Leases in identical terms.

5. This Application follows the purchase of the freehold by the Applicants in accordance with the Tribunal Decision dated 8th May 2019 in respect of case reference CAM/00KF/OCE/2019/0006 (a copy of which was provided).

6. The Property is a conversion from an industrial building and was initially configured as 4 flats. In 2014 Flat 1 was divided into two (known as Flat 1A and Flat 1. But a single Lease remains in relation to the flat as originally configured. The Leases to Flats 1, 2, 3 and 4 are in like form. It is intended that a separate Lease to Flat 1A which is currently that of Flat 1, is to be granted in the same form.

7. The difficulty in the Leases as currently drawn is that they make no provision for the recovery of the Lessor's costs of maintenance, only a quarter's contribution to the costs of the insurance. The proposed variation is to change the contribution to a **fifth** of **all** the expenses incurred (the "Proposed Variation"). This will recognise the contribution of Flat 1A and include in the contributions of all the Lessees all the costs incurred in maintenance.

8. The Proposed Variation contained in a Deed of Variation (copy provided) to be executed by the Lessees of the five flats is as follows:
Deleting Clause 3(1) of the Lease and replacing it with the words:
"To pay the annual ground rent on the day and in the manner aforesaid together with the service charge and equivalent to 1/5 (one fifth) of the total cost to the Lessor in complying with their obligations under Clause 6 hereof"

9. The varied words are underlined. The amount of 1/4 is changed to 1/5 (one fifth) and Clause 6 (d) and (e) is varied to only refer to Clause 6 and so includes Clause 6(c) which refers to maintenance work (the Lease provisions are set out below).

10. In addition to the variation of Clause 3(1) the following three further related variations were submitted as being necessary and are contained in a Deed of Variation:

11. Replacing "Plan 1" and "Plan 2" referred to in the Lease with a plan to be annexed to the Variation Deed which reflects the actual situation with regard to the Property.

12. Deleting Clause 2 and replacing it with the words:
"The Lessor is the owner of the Property referred to in Part III of the particulars (hereinafter called "the Property") which property comprises 5 flats and is registered at the Land Registry under Title No.: EX598548 and has agreed with the Lessee for the grant by the Lessor of the Lessee of the Flat".
This will amend the number of flats in the Clause from 4 to 5, which is the actual number of flats at the Property.

13. Deleting Clause 1(iv) and replacing it with the words:
"Together with the right of way and use in common with the Lessees of the other flats firstly over forecourt shown edged green and the right of access shown edged brown on the Plan annexed hereto and the right to park one

vehicle on the blocked paved area also shown edged green on the plan annexed hereto”.
This links the Leases to the new plan attached to the Deed of Variation.

14. The Leases to Flats 1, 2, 3 and 4 are in like form and a separate Lease to Flat 1A which is currently that of Flat 1, is to be granted in the same form as that of Flats 1, 2, 3 and 4. Therefore it is intended that all Leaseholders will execute the Deed of Variation varying all the Leases in the same way.

15. Directions were issued on 23rd June 2020 which identified the following issues:
    1. Do the proposed variations fall within the grounds set out in section 35(2) of the 1987 Act, that is to say do the Leases fail to make satisfactory provision for one of the matters set out in the section?
    2. Should the Tribunal make an order for the proposed variations to be made to the Leases taking into account section 38(6) of the 1987 Act?
    3. If it does make an order varying the Leases should the Tribunal order any person to pay compensation to any other person under secton 38(10) of the 1987 Act?

16. The Directions required the Applicants to:
    a) Prepare a Statement of Case which sets out the factual background to the variation and supporting the claim that the lease fails to make satisfactory provision for repair and maintenance together with supporting documents including photographs showing the need for such works to be undertaken.
    b) Send a copy of the Application Form and Statement of case with supporting documents to any persons they know or believe are likely to be affected by the proposed variation and informing them that they should write to the Tribunal if they wish to be joined as a party by 21st July 2020. Confirmation this has been done should be sent to the Tribunal by 28th July 2020.

17. The Applicants complied with the Directions and the Bundle included a Certificate of Service to Mortgage Business Plc, Topaz Finance Ltd, Peter Alan Jones (Respondent) and Peter Saunders (Respondent).

18. The Directions required the Respondents to provide a statement in reply to the Application to be included in the bundle by 1st September 2020. No statements or other evidence were received.

The Freehold and Leasehold Title and Leases

19. A copy of the Official Copy of the Land Registry Entry for the Freehold Title No.: EX598548 shows the Proprietors of the Property to be Barry Geoffrey Wild, Victoria Ann Jones and Anne Margaret Vaughan following their purchase of the freehold in accordance with the Tribunal Decision dated 8th May 2019 (CAM/00KF/OCE/2019/0006).

20. Copies of all the Leases held at the Land Registry together with an Official Copy of the Land Registry Entry and Title Plan for each Flat were provided

Flat 1	Lease dated 21/04/2004	Title No. EX906442
Flat 1A	Lease as for Flat 1	Title No. EX748981
Flat 2	Lease dated 27/04/2004	Title No. EX760201
Flat 3	Lease dated 13/04/2005	Title No. EX728136
Flat 4	Lease dated 11/06/2004	Title No. EX730880

21. All the Leases are for a term of 999 years from 1st January 2004. The relevant clauses of the Leases are the same for each Lease and are as follows:

Clause 1
The Lessor with Full Title Guarantee HEREBY DEMISES UNTO THE LESSEE FIRSTLY ALL THAT the flat more particularly described in Part V of the particulars hereto (here in after called "the Demised Premises") the site of which is shown edged red on the Plan numbered one annexed hereto

Part V of the Particulars of the Lease
DEMISDE PREMISES ALL THAT FLAT ... 27/29 PRINCES STREET, SOUTHEND-ON-SEA SS1 1QA

Clause 3
The Lessee hereby covenants with the Lessor as so far as the owner or occupier for the time being thereof is capable of benefiting therefrom with the owner or occupier of the other flats:

(1) To pay the reserved rent on the day and in the manner aforesaid together with a service charge equivalent to one quarter of the total cost to the Lessor complying with his covenants under clause 6(d) and (e) hereof.

Clause 6
The Lessor hereby covenants with the Lessee as follows:

(a) ... (Not relevant to the service provisions)

(b) ... (Not relevant to the service provisions)

(c) To keep the external structure of the Property including the foundations and roof in a good and tenantable repair and condition and to paint all exterior paintwork at least once in every 3 years and shall keep the drains and sewers of the property free form obstruction and cleansed and to keep the common parts and the service conduits in good repair and condition and rebuild and replace any parts that are required to be rebuilt or replaced (common parts meaning parts of the Property not comprised in this Lease or any other Lease of a part of the Property granted or to be granted)

(d) To insure and keep insured the Property during the term hereby granted against loss or damage by fire and storm tempest any other comprehensive risk including subsidence and heave and land slip in an insurance office of repute to the full value thereof and to make all payments necessary for the above purposes within seven days after

the same shall be respectively become payable and to produce to the tenant on demand a policy or policies of such insurance and the receipt for every such payments.

(e) *As often as any part of the Property shall be destroyed or damaged as aforesaid to rebuild and restate the same to the satisfaction of the Lessee and is hereby agreed that any monies received in respect of such insurance shall be applied so far as the same shall extend in re-building or reinstating any of the flats in accordance with the then existing laws regulations and planning and development to requirements of any competent authority then affecting the same and if the monies received under such policies shall be insufficient for the full and proper rebuilding- reinstatement of the flat and to make up any deficiency out of its own money.*

Statements of Case

22. In their Statement of Case (which is précised and paraphrased here) the Applicants stated that they were three leasehold proprietors of flats 1, 1A and 3 who acquired the freehold title in 2019 following an application under the Leasehold Reform and Urban Development Act 1993. The Respondents are the leasehold proprietors of flats 2 and 4 and are non-resident leaseholders and the flats are occupied by tenants on Assured Shorthold Tenancies.

23. Attempts have been made to contact the Respondents in writing and via their tenants but without response. The Applicants can only speculate as to their reasons for not participating in the freehold acquisition. Possibly they see the flats as investment properties and do not wish to incur the costs associated with acquisition. The Applicant said they would be willing for them to join the freehold title on payment of their share of the acquisition costs.

24. It is the intention that all the Leases should be varied in similar manner.

Satisfactory Provision

25. The Leases are considered unsatisfactory and unworkable for two reasons:

    1. Firstly, when the building was converted four flats were created but since flats 1 was divided into two flats creating flat 1A there are now five flats. Flat 1 and 1A are under one Lease and as drafted the Leases of Flats 1, 2, 3 and 4 require the Lessees to pay a quarter contribution towards the service charge.

    2. Secondly, Clause 3(1) of the Lease only requires the Lessees to contribute by way of service charge to the cost incurred by the Lessor in insuring the Property under Clause 6(d) and (e). The Lessees are not required to contribute to the costs incurred by the Lessor under Clause 6(c) in maintaining and repairing the Property.

26. There are no shared internal common parts to the Property as the flats have their own entranceways and staircases. However, there are external common

parts which are the pathways and parking spaces and there is also the external structure of the building itself. Under the Lease the Lessees have no obligation to contribute to either the day to day cleaning, maintenance and minor repairs or the major works such as external decoration or structural repairs.

27. The Freeholder alone is responsible for these matters.

28. The Applicants stated that the service charge provisions were referred to in the Decision of the First-tier Tribunal in the enfranchisement proceedings where the following was stated:

> *17. Of much greater concern is the fact the lessor covenants to keep the structure and exterior of the building in repair but the lessees contain no service charge provisions enabling recovery of the costs from the lessees. This provides the lessor with no incentive at all to make her whereabouts known. An annual rent of £40.00 seems poor recompense.*
>
> *23. The Tribunal notes the defects in the leases with regards to the recovery of the costs of maintenance of the building and had the expired terms be much shorter, this may have significantly affected the values of the flats. The Applicants may wish, post-acquisition, to rectify this problem wither by agreement or application to the tribunal under section 36 of the Landlord and Tenant Act 1987.*

29. It was submitted that these passages showed that the tribunal was of the opinion that the defect in the Leases was such that they would impact on the future value of the flats. Therefore, the failure to include 6(c) within the service charge provisions is unsatisfactory not only in terms of the Applicant's position as freeholder but also will have an effect upon all the Leaseholders as there will be no incentive for major works to be carried out. The Applicants stated there was an anomalous situation where as Leaseholders they were not obliged to contribute but as the Freeholder and the Lessor the responsibility would fall on them to make repairs.

30. In addition, if the Freeholder were left to bear the obligation and cost of major works alone it may become insolvent if it were unable to fund them. The Property would then revert to the Crown and whilst the Crown may not undertake any repair works any incoming freeholder would equally be in the same position showing the Leases to be entirely defective.

31. The Applicant submitted that although there is no specific requirement for service charges to enable full recovery of costs as held in *Fairbairn v Etal Court Maintenance Limited* [2015] UKUT 639 (LC) (*Fairbairn*) section 35 enables a lease to be varied if it is unsatisfactory. The standard for this was set by Judge Cooke in *London Borough of Camden v Morath* [2019] UKUT 193 (*LBC v Morath*) which states at [193]:

> *The tribunal will consider whether the wording of the Lease as it stands is clear, and whether the terms sought to be varied are 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. Section 35 does not enable the tribunal to vary a lease on the basis that it imposes unequal burdens, or that it is expensive or inconvenient. It would be very strange indeed in view of the law's general resistance to the temptation to interfere in or improve contractual arrangements freely made.

32. The Applicants submitted that unlike in *LBC v Morath* this is not a matter of whether the words in the Lease are clear. The words in the Lease regarding a contribution by the Lessees to costs associated with maintenance are entirely absent. It was submitted further that, unlike in *Fairbairn,* here it is not that the Freeholder cannot fully recover the cost of maintenance but that the Freeholder cannot recover the cost of maintenance at all.

33. The Lease as drafted makes no provision for the costs of either minor or major repairs. As a result, no decoration in accordance with the Lease has been undertaken and no maintenance has occurred since the Property was converted and the Leases were granted in 2005.

34. The Applicants submit that the failure in the service charge provisions of the Lease to require the Leaseholders to contribute to any of the costs incurred by the Freeholder associated with the maintenance of the building places a disproportionate obligation upon the Applicants when the Respondents receive the benefit of the maintenance. As Leaseholders both the Applicants and the Respondents are exempt from contributing to maintenance and repair but as the Freeholders the Applicants are left to pay the full amount. It is submitted that this goes beyond an unequal burden.

35. The Applicants submitted that for the above reasons the service charge was unsatisfactory and within section 32(2)(a), (b), (c), (d) and (e) of the landlord and tenant act 1987.

36. In support of the Application one of the Applicants Ms Vaughan provided a witness statement.

37. She said that the Applicants had been unable to contact Raquel Rodriquez either with a view to carrying out repairs or with regard to the enfranchisement proceedings. It was believed that this was due to the obligation in the lease for the freeholder to repair and maintain the property but unable to recover the associate costs of doing so from the Lessees through the service charge.

38. The acquisition of the Property by the Applicants was partially for the reason that the Property was beginning to fall in to disrepair and that they needed the ability to undertake works as and when required. The Applicants were aware that once the Freehold had been acquired than an application could be made to vary the Lease.

39. Attempts had been made to contact the Lessees of Flats 2 and 4 both in respect of the enfranchisement and subsequently with regard to the variation proceedings. The address for service at HM Land Registry is the flats

themselves, however, these are let on Assured Shorthold Tenancies and neither the tenants for either flats nor the Agent for Flat 4 were prepared to give their landlord's address. The Applicants believe that they have found the address of the Lessee for Flat 2 but have received no reply from their most recent correspondence.

40. Ms Vaughan said that the works that were needed are as follows:
   - Damp in Flats 2 and 4 and photographs were provided at pages 22 to 38 of the Witness Statement (pages 208 to 225 of the Bundle) showing the areas of damp both inside and outside the flats.
   - A leak in the main bedroom of Flat 3 which emanates from the region of the bathroom of Flat 2 but could be caused by the ongoing damp issues resulting from external disrepair.
   - Damp around the front door of Flat 3 caused by the failed pointing. A photograph was provided at page 35 (page 222 of the Bundle).
   - The security lights need maintenance and repair photograph was provided at page 40 (page 226 of the Bundle)
   - The entrance gate to the flats is not working. This is designed to provide security to prevent others for accessing the site photograph was provided at page 41 (page 227 of the Bundle).

41. The above issues will only become worse over time. Ms Vaughan said that the incomes of the Applicants as Freeholders did not allow them to fund major works and a contribution from all the Leaseholders is required. If the Lease is not varied it will not be possible to carry out the works. It is therefore submitted that the absence of the service charge provision for maintenance and repair is not considered to be merely unusual or inconvenient but entirely unsatisfactory.

Substantial Prejudice

42. The Applicants acknowledged that the Respondents would be required to pay a service charge which they are not currently required to pay under the Lease and that arguably there is a disadvantage. However, the failure to pay those sums ultimately will result in there being a situation where maintenance of the Property is so lacking that it would create a significantly greater prejudice than the imposition of the service charge.

43. It was said that in to *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) the variation of the Lease would remove the detrimental effect that affected the Leases and as a result increase the value of the Lease to a degree. It was said that the tribunal determining the enfranchisement proceedings indicated that the absence of sufficient service charge provisions would likely devalue the Property in the future. It was submitted that the benefits of the variation far outweigh any detriment and therefore there is no prejudice to the respondents.

Compensation

44. With regard to compensation it was stated that whereas the variation would make the service charge a liability the obligations under Clause 6(c) would not amount to a regular sum. The calculation of any compensation would be difficult to calculate. In addition, the costs associated with the maintenance of the Property would have the effect of ensuring the value of the Respondents' flats costs whereas if the works are not undertaken the value of the flats will reduce. It was therefore submitted that in effect the variation will enable the flats to increase in value which is compensation in itself, therefore no compensation should be provided.

Decision

45. The Tribunal considered all the evidence in relation to the following issues:
    1. Do the proposed variations fall within the grounds set out in section 35(2) of the 1987 Act, that is to say do the Leases fail to make satisfactory provision for one of the matters set out in the section?
    2. Should the Tribunal make an order for the proposed variations to be made to the Leases taking into account section 38(6) of the 1987 Act?
    3. If it does make an order varying the Leases should the Tribunal order any person to pay compensation to any other person under section 38(10) of the 1987 Act?

1. Satisfactory Provision

46. Firstly, the Tribunal considered whether the Leases failed to make satisfactory provision for one of the matters set out in the section. The relevant provisions of the section were referred to but not specifically identified and addressed. Taking into account the two issues of the Lease which were said to be unsatisfactory the Tribunal identified the legislative provisions as follows.

Issue 1

45. There are now five flats and the Leases of Flats 1, 2, 3 and 4 require the Lessees to pay a quarter contribution towards the service charge. It is submitted that if a similar provision were contained in the Lease granted to Flat 1A then the relevant section 32(2)(f) would apply in that the computation of a service charge payable under the lease is unsatisfactory because it would come within section 32(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.

47. In the present circumstance the Tribunal found that in respect of the proposed new Lease to Flat 1A the proportions would exceed the whole of any such expenditure.

Conclusion re Issue 1

48. The Tribunal therefore determined that the Leases are to be varied so that the expenditure is to be divided by one fifth instead of one quarter.

Issue 2

49. The Applicants allege that the failure in Clause 3(1) to mention Clause 6(c) is unsatisfactory as the effect is that the Lessor is "*To keep the external structure of the Property including the foundations and roof in a good and tenantable repair and condition and to paint all exterior paintwork*" but the Lessees are not required to contribute. The Applicants referred to the relevant provision as Section 35(2)(a) i.e. the Lease made unsatisfactory provision for 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.

50. The Applicants also referred to section 32(2)(b), (c), (d) and (e), however the Tribunal did not consider these paragraphs of the legislation applicable because section 32(2)(b) relates to insurance, section 32(2)(c) refers to the repair and maintenance of installations and section 32(2)(d) refers to the provision or maintenance of services. Section 32(2)(e) refers to the recovery by one party from another of expenditure incurred by him for the benefit of that other, in particular under secton 32(3A), in respect of a failure to pay the service charge by the due date.

51. The Tribunal referred to the case of *Fairbairn v Etal Court Maintenance Limited* [2015] UKUT 639 (LC) and to *London Borough of Camden v Morath* [2019] UKUT 193 mentioned by the Applicants. It also referred to *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) (*Triplerose*) the facts of which were that one of the flats was subdivided and the leases of flats were granted at different times and in different forms. As a result, the contributions for items in the service charge differed. Under the service charge provisions of the respective leases, all four leaseholders were liable for the insurance premiums, three were liable for a quarter each of the costs of structural repair and maintenance, two were liable for one third each of the internal decoration and two were liable for a quarter each of the management charge. The leases were all different and the reason for the proposed variation was to rationalise the service charge arrangement.

52. In *Cleary v Lakeside Developments Limited* [2011] UKUT 264 (LC) (*Cleary*), the case for the lessor was that the cost to the lessor of employing a manager, which was borne by the lessor, with contributions from two of the lessees, was unsatisfactory and the proposed variation was that all lessees should contribute.

53. In both cases it was held that the fact that different tenants make different contributions does not of itself make the lease unsatisfactory. The situation was a result of the contractual arrangements freely entered into between lessor and lessees. Although, it was accepted that there might be circumstances where the lack of adequate contributions could render the lease unsatisfactory there was no evidence to show the differences between the leases on the particular facts at the time of the applications that the service charge arrangement was unsatisfactory. Evidence was required.

54. The Tribunal therefore considered whether there was evidence that the Leases were unsatisfactory in not specifying Clause 6(c) in Clause 3(1).

55. The Tribunal found that the Lease is satisfactory in that both Clauses are clear.

56. The Applicants submit that it is not that the words of the Lease regarding a service charge are unclear it is that they are entirely absent and therefore the provisions are unsatisfactory. This omission goes beyond an unequal burden and as such it is a disproportionate burden upon the Applicants as Freeholders and Lessors.

57. The Applicants submit that although the Leaseholders do not have to pay for the work their only means of requiring that the work be done is to bring an action against the Lessor for breach of the Lease. The difficulties of this are that the Lessor may be absent as occurred in respect of the previous Lessor. It was not possible to serve any notices upon the Lessor to require the Lessor to carry out and pay for any works under Clause 6(c).

58. The Applicants also submitted that the Lease is unsatisfactory in that the Decision of the First-tier Tribunal in the enfranchisement proceedings stated that the absence of a service charge provision enabling recovery of the costs in maintaining the structure and exterior of the building gave no incentive for the Lessor to carry out such work and the rent was poor recompense.

59. In addition, in her witness statement Ms Vaughan stated that a number of items of repair were required. She said that the resources of the Applicants as the Freeholders, and therefore in the position of the Lessor, were insufficient to carry out these works. The Applicants had added that if they were insolvent then any new Freeholder/Lessor would be in the same position. The Applicants submitted that the failure to address these matters presented a risk of neglect which is likely to significantly adversely affect the value of the flats and hence the Lessees' investments.

60. The Tribunal considered whether there was sufficient evidence to show that the service charge provisions were unsatisfactory and unworkable justifying the variation of the Lease. It addressed the Applicants' submissions of:
    - Lack of any service charge provisions and disproportionate obligations;
    - Lack of incentive for the Lessor to comply with Clause 6(c) due to Clause 3(1);
    - Limitations of breach of Lease enforcement action;

- Lack of funding leading to risk of insolvency and want of repair resulting in reduction in value of Property and Flats.

Lack of Any Service Charge Provisions and Disproportionate Obligations

61. There is no legal requirement that all the parties to a lease should either contribute proportionately to a service charge or have proportionate obligations. The Tribunal found that in all the cases referred to there is agreement in the view expressed in *LBC v Morath* that the law has a general resistance to the temptation to interfere in or improve contractual arrangements freely made. Indeed, Leases of this kind are invariably drafted by the Lessor and there is the principle that they will be construed strictly in relation to the drafter and successors in title. It is not known why Clause 3(1) was limited to Clause (6)(d) and (e). If it was an error then no attempt has been made to correct it in the past 15 years. When the Property was first let the absence of reference to Clause 6(c) in Clause 3(1) must have appeared attractive to a Lessee. The mere fact of its omission does not of itself mean the service charge provisions are unsatisfactory. It is for the Applicants to show through evidence that the lack of proportionality with regard to the service charge contributions and obligations are unsatisfactory.

Lack of Incentive

62. The Tribunal found that there was little incentive under the Lease for the Lessor to carry out the obligations under Clause 6(c) if the costs could not be recovered through the Service Charge. The Tribunal agreed with the previous tribunal which determined the enfranchisement proceedings that the rent is insufficient for any Lessor of the Property to consider it recompense for the obligations under Clause 6(c). Also, the Leases of 999 years mean the Lessor would not see the work under Clause 6(c) as benefiting the reversionary interest, as it is so far in the future.

Limitation of Enforcement

63. There being no reciprocal motivation for the Lessor to comply with Clause 6(c), the Tribunal considered what means the Lessees had of ensuring that the structure and exterior of the building is maintained. The Tribunal was of the opinion that the sole enforcement action is for breach of lease which has, in the past in this case, had its limitations, as evidenced by the absenteeism of the previous Lessor. However, this is now unlikely to be a problem as the Applicants are both the Freeholders and Lessees in occupation and there is little risk that they would not meet their obligations under Clause 6(c) to protect their investment.

Lack of funding and risk of insolvency, want of repair and reduction in value

64. The Tribunal considered the sequence of risks put forward by the Applicants regarding funding and repair and resultant reduction in value of the Property and individual Flats. Ms Vaughan listed the works that were required and stated that the Applicants alone did not have the funds to carry them out.

65. The Tribunal was of the opinion that the Applicants must have known the terms of the Lease when they obtained the Freehold including the obligations of the Lessor. They should therefore have taken into account the subsequent cost of complying with Clause 6(c). No expert evidence has been adduced as to the works that are said to be required now and their related costs. Nor has there been any explanation to show that the cost split three ways was significantly more manageable than if it were divided by five.

66. It is agreed that there is a risk that if the Applicants had insufficient resources the property may fall into disrepair. If that were to occur, then, as noted by the tribunal determining the enfranchisement proceedings, there would be a risk to the value of the flats and the Lessees investments. This risk is likely to be greater with a limited company than in the case of individuals for whom the personal repercussions of being declared bankrupt are generally more significant than the winding up of a company.

67. The Tribunal finds that the current state of repair as described by Ms Vaughan and as shown by the photographs does not support a view that substantial works are required which cannot be funded by the Lessor and which would result in a reduction in value of the Property. The Tribunal might have thought differently if the Property required re-roofing and evidence of the cost of those works and the detrimental effect on the Property and its value was adduced.

Conclusion re Issue 2

68. The Tribunal found that the wording of the Lease with regard to Clause 3(1) with regard to Clause 6 as it stands is clear. The Tribunal found that notwithstanding the apparent lack of incentive for the Lessor to comply with Clause 6(c) it was enforceable through an action for breach of the Lease. The Tribunal found that there was insufficient evidence to show that the Applicants did not have enough funds to comply with their obligations as Freeholders and Lessors of the Property, taking into account the repair works that were identified. Also, there was insufficient evidence to show that the works identified, if not carried out, would reduce the value of the Property or the individual Flats to justify requiring the Respondent Lessees to pay a contribution for which they would not otherwise be liable.

69. The Tribunal therefore determines that the Lease is not to be varied so that "(d) and (e)" are deleted from Clause 3(1) of the Lease.

Substantial Prejudice and Compensation

70. The Tribunal found that on the granting of a lease to Flat 1A in like terms to those granted to Flats 1, 2, 3, and 4, the variation came within section 32(2)(f) and (4). The variation meant that the Lease corresponded to the actual situation. The Tribunal found that the Respondents were not prejudiced as they were paying a sum equal to the other Lessees and that no compensation was payable.

71. Having decided that "(d) and (e)" is not to be deleted from Clause 3(1) of the Lease the Tribunal decides that the question of prejudice and compensation does not fall to be determined with regard to that part of the Application of Variation.

Judge JR Morris

APPENDIX 1 - RIGHTS OF APPEAL

1. If a party wishes to appeal the 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 2 – THE LAW

The Law

The relevant law is contained in the Landlord and Tenant Act 1987 sections 35 and 38.

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 2002 and 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.

(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; and

(b) if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.

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 tribunal with respect to the leases specified in the application, the tribunal may (subject to subsections (6) and (7)) make an order varying each of 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) A tribunal shall not make an order under this section effecting any variation of a lease if it appears to the tribunal —

(a) that the variation would be likely substantially to prejudice—
(i) any respondent to the application, 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.