FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AU/LVT/2015/0011**
Property	:	**47 Aberdeen Road, London, N5 2XD**
Applicant	:	**Frances Bridget Smith**
Representative	:	**In person**
Respondent	:	**Naomi Victoria Cornelius-Reid (Flat A)** **Martin Stuart Gray & Anouska Lauren Cargill (Flat B)** **Kurt Paul Steinmetz (Flat C)**
Representative	:	**No appearance. Mr Steinmetz made written representations.**
Type of application	:	**Variation of a lease by a party to the lease**
Tribunal member	:	**Judge Robert Latham**
Date and venue of hearing	:	**27 January 2016 at 10 Alfred Place, London WC1E 7LR**
Date of decision	:	**4 February 2016**

DECISION

The Tribunal declines to make an Order pursuant to section 35 of the Landlord and Tenant Act 1987 varying the leases.

Introduction

1. On 14 October 2015, Ms Francis Smith ("the Lessor") issued three applications pursuant to Section 35 of the Landlord and Tenant Act 1987 ("the Act") to vary the leases in respect of three properties, namely 63 Edbrooke Road W9 2DE, 47 Aberdeen Road N5 2XD and 66 Hillfield Avenue N8 7DN. Because each of these applications related to different properties, with different leases, in different boroughs, the Tribunal allocated them to different Case Officers.

2. On 19 January 2016, this Tribunal issued our decision in respect of *63 Edbrooke Road* (LON/00BF/LVT/2015/0010). On 27 January, the two other applications were listed before me, namely the current application in *47 Aberdeen Road* at 10.00 and *66 Hillfield Avenue* (LON/00AP/LVL/2015/0007) at 14.00. Each application stands to be determined on its own facts. However, an identical issue of law is raised in each case.

3. All the parties had been provided in advance with a copy of my decision in respect of *63 Edbrooke Road.* At the hearing, Mrs Smith provided a copy Leasehold Valuation Tribunal (LVT) decision given on 9 February 2007 in *Flats 1-8 Baden House* (CHI/00AH/LVT/2006/0005). She also informed the Tribunal that she had previously made an application in respect of a property which she owns in Scrubs Lane, in which an LVT had varied the lease to make provision for the lessor to recover the reasonable costs incurred of employing surveyors and managing agents. I have subsequently obtained the decision in *41 Scrubs Lane*, NW10 which was issued on 10 February 2010 (LON/00AN/LDT/2009/8). Both these decisions pre-date the decision of the Upper Tribunal in Cleary *v Lakeside Developments Ltd* [2011] UKUT 264 (LC) which is dated 7 July 2011.

4. These applications raise important points of principle. In any modern lease, express provision will normally be made for the lessor to be able to employ managing agents and to recover the reasonable costs from its lessees. Is a Tribunal entitled to vary an old lease where such provision is not made? Are there circumstances in which a Tribunal would be entitled to infer such a term in order to give the contract business efficacy? In addressing these issues, this Tribunal is obliged to have regard to the guidance given by the Upper Tribunal. If this guidance is to be revisited, this is a matter for the Upper Tribunal.

This Application

5. By Clause 2(14) of their leases, the three lessees at 47 Aberdeen Road ("the property") are required to:

> "During the said term to pay and contribute an amount equal to the proportion that the rateable value of the of the Demised Premises has to the rateable value of the building as a whole of the expense of making repairing maintaining amending supporting rebuilding cleansing and decorating all roads roofs and the main supporting timbers thereof the exterior parts of the building and the foundations and load bearing walls thereof and sewer drains

pipes watercourses water pipes party wall fences and party structures (where such sewer drains pipes watercourses water pipes party walls fences and party structures used by the Lessee in common with the Lessor or the tenants or occupiers of the other flats in the Building) (hereinafter called "the Common Parts") such proportion in the case of any difference or dispute to be determined by the Surveyor for the time being of the Lessor (whose reasonable decision shall be final and binding) and to be paid on demand (together with interest at 4% above Barclays Bank Base Rate from time to time if such payment is not made within Twenty one days if demanded) and to keep the Lessor and/or other Lessees each indemnified against all such costs and expenses as aforesaid Provided that prior to the commencement of any such works or repair or maintenance the Lessee shall if required by the Lessor pay to the Lessor in advance of the lessor carrying out such works such sum as the Lessor may reasonably require on account of the cost thereof but in any event the Lessee shall pay to the lessor the sum of £100 on account of such costs and expenses on the 25th December in each year."

6. By Clause 2(15) of their leases, the lessees of Flats B and C are required (extract taken from the Lease of Flat C at p.86) to:

> "During the said term to pay and contribute an amount equal to one half of the expense of maintaining decorating and cleansing the main entrance passageway and staircase used by the Lessee in common with the Lessee or tenant or occupier of Flat B in the Building such payment to be paid on demand (together with interest at 4% above Barclays Bank Base Rate from time to time if such payment is not made within Twenty one days if demanded) and to keep the Lessor and/or other Lessees each indemnified against all such costs and expenses aforesaid Provided that prior to the commencement of any such works or repair and maintenance the Lessee shall if required by the Lessor pay to the Lessor in advance of the lessor carrying out such works such sum as the Lessor may reasonably required on account of the cost thereof but in any event the Lessee shall pay to the Lessor the sum of £50 on account of such costs and expenses on the 25th December in each year."

7. In her application, the Lessor seeks a variation to add the additional words in each of these clauses:

> "and an additional sum in respect of any administration charges incurred by the Lessor including employees wages surveyors or managing agents fees."

8. On 20 October, the Tribunal gave Directions. The Procedural Judge identified the issues that this Tribunal would be required to determine, namely:

> (i) Should the Tribunal order the proposed variation to be made to the leases?
>
> (ii) Does the proposed variation fall within the grounds set out in section 35(2) of the Act, that is to say, does the lease fail to make satisfactory provision for one of the matters set out in that section? A copy of the section was annexed to the Directions.
>
> (iii) If it does make an order varying the leases, should the Tribunal order any person to pay compensation to any other person? Reference was made to Section 38(10) to the Act.

9. The Procedural Judge was satisfied that the application could be fairly and conveniently determined on the basis of written representations. However, any party had the right to request an oral hearing. By 10 November, any lessee who opposed the application was required to send the lessor a statement in reply to the application and any other document upon which the lessee sought to rely. No lessee has filed a statement in response.

10. On 10 December, a Procedural Judge reviewed the papers and gave further Directions. The Judge was concerned (a) that the draft variation may be unsatisfactory because there was no limitation to the Lessor's right to charge administration charges; the application not disclosing the grounds for such a substantial variation; (b) that the application should be served on any mortgagee; and (c) whether the application had not been properly served on Mr Steinmetz. Finally, she directed that the application should be determined at an oral hearing which was fixed for today.

11. The Procedural Judge directed that Mr Steinmetz should be served at his flat at the property as this was the address on the Land Registry office copy and the provenance of the address given in the application form was not known. Mr Steinmetz has subsequently confirmed that he does reside at the address given in the application form, namely Flat 8 Marina One, 10 New Wharf Road, King's Cross, N1 9RT. This is the address that should be used by the Tribunal.

12. On 5 January, the lessor served the Tribunal and the lessees with an amended draft variation of the Lease, which had been prepared by a Solicitor. The lessor now seeks to add the additional words to each of the two clauses:

> "and
>
> (b) The costs fees and disbursements reasonably and properly incurred of:
>
> a. Managing agents employed by the Lessor for the carrying out and provision of the services referred to above; and
>
> b. Accountants employed by the Lessor to prepare and audit the service charge accounts; and
>
> c. Any other person, firm, business or company reasonably and properly retained by the Lessor to act on behalf of the Lessor in connection with the Building or the provision of the services referred to above
>
> (c) Any VAT payable by the Lessor in respect of any of the items mentioned above except to the extent that the Lessor is able to recover such VAT.

13. On 7 January, Ms Cargill wrote to the Tribunal, on behalf of the lessees requesting a postponement of the final hearing which had been fixed for 27 January on the grounds that the lessees were in the process of acquiring the freehold. On 15 January, a Procedural Judge refused this application.

The Hearing

14. The Hearing was attended by Mrs Smith. None of the lessees attended. Mr Steinmetz submitted written representations which reached the Tribunal at 11.02 on the morning of the hearing.

15. On 11 December 2015, the Tribunal notified the three mortgagees of this application. None of the mortgagees have applied to be joined or made any written representations.

16. The amended variation raises four issues, namely the recovery of the costs incurred by the lessor in respect of:

    (i) The employment of managing Agents. Mrs Smith confirmed that this was the substantive issue that she was raising.

    (ii) The Preparation and Audit of service charge accounts: Mrs Smith informed the Tribunal that this is no longer a matter of primary concern. There has been no issue relating the liability of the lessees to pay the service charges demanded. However, there has been a problem of late payment.

    (iii) The employment of "any other person, firm, business or company reasonably and properly retained by the Lessor to act on behalf of the Lessor in connection with the Building or the provision of the services referred to above". The Tribunal was concerned about the potential breadth of this variation. Mrs Smith was unable to explain why this variation was therefore required. She stated that this was merely a "tidying up clause" which had been suggested by her solicitor.

    (iv) The recovery of VAT: Mrs Smith accepted that the lessor was currently entitled to recover VAT from the lessees where this could not otherwise be recoverable by the lessor by the lessor. No variation is required.

The Law

17. Sections 35 and 38 of the Act are appended to this decision. *Cleary v Lakeside Developments Ltd* related to 44 Oakley Street, a terraced property which had been divided into 6 flats, one on each floor. The leases of two of the flats had been varied by deed to permit the landlord to employ managing agents. The landlord now sought to vary the remaining leases to include the additional clause:

    > "(25) to pay on demand as part of the service charges hereunder any reasonable management fee of any Managing Agents, Surveyors or agents duly appointed by the lessor in connection with the performance of the lessor's covenants under this lease together with value added tax thereon at the appropriate rate."

18. A Leasehold Valuation Tribunal ("LVT") had approved the variation accepting that it fell within section 35(2)(e) (recovery of expenditure incurred by one party for the benefit of the other party) and section

35(2)(f) (computation of service charges). The LVT had regard to the fact that two of the flats 2 and 6 were liable to pay the charges.

19. The Upper Tribunal allowed the tenant's appeal and refused the variation. At the appeal hearing, the landlord's Counsel, Mr Justin Bates, conceded that the application could not be brought within the scope of section 35(2)(f). The President, George Bartlett QC, stated (at [18]) his reason for this conclusion:

> "For (f) to apply the requirements of section 35(4) must be met. The first requirement, (a), is that the lease provides for a service charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord. None of the leases the subject of the application, however, provides for a proportion of the management fees to be payable as a service charge."

20. The Upper Tribunal therefore considered whether the application could be brought within the scope of section 35(2)(e). It is important to note how the parties put their respective cases. The tenants' case is summarised at ([21])

> "21. Mr Cleary's case, as before the LVT, was that there was nothing before the LVT to show that the new covenant would be of benefit to the lessees. It mattered not to the lessees whether the functions of management were performed by the lessor itself or by a managing agent. The fact that the lessor was a corporate body was irrelevant. The cost of delegating management functions to an agent should fall on the lessor. Neither of the cases relied on by the lessor in support of its case justified the LVT in reaching the decision that it did, and a substantial part of the functions listed in the lessor's statement of case were for its benefit and not for the benefit of the tenants. Miss Robertson's case was that she had purchased her flat in full knowledge that the lease did not include provision for management charges. She had paid a premium for the lease with this in mind. Mr Christiansen said that the application was simply an attempt to transfer value from the lessees to the lessor. Each lessee bought his or her lease knowing what the lease provided for. To change this position created a transfer of value between the parties."

21. The landlord's case is summarised at [22] – [23]:

> "22. Mr Bates submitted that the lack of limiting words in section 35(2)(e) showed that it was not a limited power. It was for the LVT to determine as it saw fit whether a variation should be made on this ground having regard to all material circumstances. The relevant circumstances in the present case were (i) that the leases of flats 1, 3, 4 and 5 make no provision for the recovery of the costs of management; (ii) that flats 2 and 6 are liable to contribute towards those costs; and (iii) that the landlord does in fact employ a manager, at a cost of £200 a year per unit, who carries out a wide range of tasks. It was open to the LVT having regard to these circumstances to conclude that the variation should be made.
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> 23. Mr Bates said that it was not an irrelevant consideration that the landlord was a body corporate. The fact was that a body corporate can only discharge management functions through agents or employees, and he referred by way of example to *London Borough of Brent v Hamilton* LRX/51/2005."

22. The President concluded that the variation sought could not be brought within the scope of section 35(2)(e) (emphasis added):

> "26. What the LVT had to be satisfied about was that that each of the four leases failed to make satisfactory provision with respect to the recovery by the lessor of expenditure incurred by it for the benefit of the lessee. The case for the lessor was that at present the cost to the lessor of employing a manager are borne by the lessor, with contributions from two of the lessees. It is this which is said to be unsatisfactory and the new provision is designed to change. It is important to note that it was not part of the lessor's case that the lessor was entitled by implication to include the management fees as part of the tenant's one-sixth share of the insurance and repair costs or the 20% share of the cleaning and lighting costs. Had that been the case, there would have been an argument, in my view, that, by leaving it to implication, about which there could be disagreement, the lease was unsatisfactory and an explicit provision was appropriate. But it was not part of the lessor's case that the management fees reflected what the lessor was entitled to charge in any event. The list of tasks produced went far beyond those associated with the performance of the covenants in respect of which the lessor was entitled to charge."
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> 27. The case for the lessor, as I have said, was that at present the cost to the lessor of employing a manager are borne by the lessor, with contributions from two of the lessees. There is, however, nothing unsatisfactory about that in itself. It is the result of the contractual arrangements freely entered into between lessor and lessees. In the case of two flats the lessor and the lessees have agreed, in provisions expressed slightly differently, that the lessee should be obliged to pay a contribution towards the cost of management. But it is notable that in the most recent lease modification, that contained in the surrender and lease of flat 1, no such provision was included despite the fact that the lease provisions were substantially altered in other respects. If the absence of a management fee provision was unsatisfactory Lakeside could have ensured that it was included. The surrender and lease was entered into on 31 August 2006, two years only before the application was made to vary its terms and the terms of the other three leases. 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.
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> 28. The effect of the variation would be to require each of the four tenants to pay £200 a year, whereas nothing is now payable under the lease. The lessor's obligations under the lease would remain the same. Contractually the lessees would be paying £200 without any entitlement in return. Not surprisingly they are not in favour of being obliged to do so. Mr Bates suggested that if the lessees made the contribution sought there would be a greater incentive to the lessor to ensure that a qualified and appropriate manager was appointed. But there was no evidence that this would happen, and as a theoretical possibility it is obviously not sufficient to show that the leases currently do not make satisfactory provision.
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> 29. I should add that there is nothing in the Lands Tribunal case of *Mahmood v Sinclair Gardens Investments (Kensington) Ltd*, referred to by the LVT and relied on by the lessor, to suggest that the variation sought in the present case could or should be made. The facts in that case were that the lease contained a repairing covenant on the part of the lessor but it was made "subject to the

lessee paying his proper proportion of the costs thereof". However, there was no provision in the lease whereby the lessee was made liable to pay this proper proportion of the costs – so that it was manifestly unsatisfactory in this respect, and the Tribunal (HH Judge Huskinson) directed a variation to be made to correct this defect. In contrast there is not in the leases that are the subject of the present application anything to suggest that the management costs to which the proposed variation relates were intended to fall on the tenants, and there is no reason why they should do so.

30. I note also that in the LVT *Bath* case [*Flats 1-8 Baden House*] the tribunal varied leases so as to provide for the payment by the lessees of an annual sum for the costs and expenses of management. It concluded that it was in the interests of the lessees for management of the building to ensure that the tasks associated with its insurance and maintenance should be carried out properly and that this should be done in order to maintain the value of the lessees' investments as well as the amenities of the property. The level of income generated was such that it presented a risk of future neglect. That was a fully reasoned decision based on the evidence that the LVT had before it. I can see that there may be circumstances where the financial position of the lessor may make the absence of a lessee's covenant to pay for the cost of management unsatisfactory. This could be the case, for instance, where there was an RTM company with no other source of income. But evidence would be needed to show that there was a particular need in the circumstances of the case. In the present case, in my judgment, there was no evidence on which the LVT could conclude that the absence of such a provision was unsatisfactory.

31. The LVT determined that no compensation should be paid under section 38(1) of the Act (under which it had power, if it thought fit, to make an order for the provision of compensation in respect of any loss or disadvantage that any lessee was likely to suffer as a result of the variation). It said (see above) that "no proper evidence" had been advanced by the lessees to show that the new clause "would necessarily result" in the diminution in value of their leases or as to the extent of such diminution in value. It is not, of course, the case that a loss or disadvantage is only to be measured in terms of the diminution in value of a party's interest in the property, and it is on the face of it hard to see how a requirement that the lessees should have to pay £200 a year for something for which they at present pay nothing would not be a loss or disadvantage requiring the payment of compensation. However, as I am satisfied that the LVT was wrong to direct the variation, this matter does not arise for determination".

The Background

23. The property at 47 Aberdeen Road was constructed in about 1900. It was converted into three flats in about 1988. The three leases were granted between 1988 and 1991 for terms of 125 years from 24 June 1988. At this time, Highbury was an up and coming area, where a developer would have seen the commercial opportunity from converting a terraced house into three flats with a view to disposing not only of the leasehold, but also the freehold interests. The long term management of the property would not have been the primary concern of such a developer.

24. Ms Smith acquired the freehold interest on 25 July 1991 (p.32 of the Bundle). The Lessees acquired their interests between 2005 and 2013:

(i) Flat A: Garden Flat. The lease is dated 14 January 1991 (p.44). Ms Cornelius-Reid acquired the leasehold interest on 29 April 2005 (p.35). She resides at the flat.

(ii) Flat B: Upper Ground Floor. The lease is dated 27 January 1989 (p.61). Mr Gray and Ms Cargill acquired the leasehold interest on 2 October 2013 (p.38). Mrs Smith suggested that they are not currently residing at the flat and is let as "night's accommodation".

(iii) Flat C: First Floor and Garage. The lease is dated 3 October 1988 (p.79). Mr Steinmetz acquired the leasehold interest on 16 September 2011 (p.41). He does not reside at the flat and lives in King's Cross.

25. Each lessee pays a ground rent of £150 pa. The rent increases by £25 every twenty five years. The lessor's obligations to repair and maintain the property are specified in Clause 3(b). The lessor is obliged to keep in repair the structure and exterior of the property and to decorate the same. The lessor is further required to insure the property (Clause 3(d)). The lessees are required to decorate the interior of their flats (Clause 2(5). The lessees are each required to pay the costs incurred by the lessor in carrying out its obligations, which is to be apportioned according to the rateable value of the flats (Clause 2(14).

26. The lessor further covenants to maintain, clean and decorate the common parts which are enjoyed by Flats B and C (Clause 3(b)). The lessees of Flats B and C are each required to pay 50% of these costs (Clause 2(15).

27. Ms Smith owns some ten properties. She used to manage them with her husband who died in April 2015. She has discovered that the leases in respect of three properties in her portfolio have no clause expressly providing for the employment of managing agents and for this cost to be passed on to her tenants through the service charge account. She wishes to employ managing agents. She feels unable to carry out the management functions herself. In respect of the other properties that she owns, managing agents charge some £300 to £350 per annum for each flat.

28. In her application forms in respect of all three properties, she specifies the grounds for her applications in these terms:

> "There is no provision in the lease for the lessees to pay any administration charges, managing agents or surveyors fees incurred in the proper management of the building. Management to date has been on an ad hoc basis by the freeholder who now wishes to place the management on a proper footing and to instruct managing agents to deal with the same."

29. Ms Smith informed the Tribunal that the ground specified by Section 35(2) upon which she contends that the lease fails to make satisfactory provision is:

> (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".

30. Mrs Smith purchased the freehold of the property with her late husband. He used to manage the property. He became ill in the early 2000s. Between 2010-2013, the properties were managed by agents, Prickett and Ellis. They did not charge a management fee. They rather relied upon administration charges in respect of sales and leasehold extensions.

31. Mrs Smith is now past retirement age. She does not have the experience to manage the property. The obligations imposed on landlords by Parliament are now more onerous whether in respect of asbestos, fire risks and health and safety. The cost of keeping the property in repair has been relatively low. However, the time will shortly be coming when a new roof and more significant repairs are required. Section 20 Notices would need to be served in respect of such works. She would wish to appoint managing agents and recover the cost from the lessees. This would be in the interests of the lessees as this would mean that the property would be managed more professionally. This would particularly benefit those lessees who do not occupy their flats. The leases when granted would not have been considered to be defective. However, there is now a need to bring the leases in line with modern practice.

32. Mrs Smith relies upon the LVT in *Flats 1-8 Baden House*. The LVT allowed a variation permitting the landlord to recover the cost of managing agents. The LVT relied in Section 35(2)(e) and was satisfied that since the leases made no provision for the recovery of any costs of management, there was little difficulty in holding that they did not make satisfactory provision for its recovery. The LVT was satisfied that the cost of management was incurred for the benefit of the lessees. Although it was not a difficult building to manage, the tasks associated with its insurance and maintenance must be carried out properly. It was in the interests of the lessees that this should be done in order to maintain the value of their investment as well as the amenities of the property.

33. The LVT was further satisfied that no compensation was appropriate. It was satisfied that the variation was for the benefit of the lessees. First, they ensured the future proper management of the property. Secondly, they would make the properties more acceptable to potential mortgagees, and thus make the lessee's leases more marketable. The additional costs payable by the lessee were more or less balanced out by these advantages.

34. No lessee has filed any Statement in Response to this application. In his e-mail, dated 27 January, Mr Steinmetz highlights three aspects of the decision in respect of *63 Edbrooke Road*:

(i) Were a variation to be ordered, the issue of compensation would arise;

(ii) This issue would only arise were the Tribunal to be satisfied that the lease fails to make satisfactory provision in respect of one of the grounds specified in Section 35(2) of the Act.

(iii) The lessor is seeking to impose these variations unilaterally, without the agreement of the lessees.

40. Ms Smith now wishes to engage managing agents and pass on the cost to the lessees. The cost would be some £300 to £350 pa for each lessee. She accepts that she currently is unable to pass on the cost and would have to bear it herself. If so, the situation reflects the terms of the bargain into which she willingly entered more some 25 years ago.

41. Were the Tribunal to make the variation sought, the question of compensation under section 38(10) would arise. Section 38(6) of the Act precludes this Tribunal from varying a lease if it appears that a variation is likely to substantially prejudice any party and that an award under subsection (10) would not afford him adequate compensation. The lessees would be entitled to be compensated for the additional financial burden that they would bear as a result of the variation. Ms Smith has not suggested how they could be afforded adequate compensation.

42. The issue of compensation would only arise were Ms Smith to satisfy me that the variation sought falls within the scope of section 35(2). I would need to be satisfied that the variations sought, whether in the original application or as amended, fall within the scope of the Act in that the leases fail to make satisfactory provision with respect to one or more of the following matters, namely sub-paragraph (e) (the recovery of expenditure incurred by one party for the benefit of the other).

43. This issue was addressed by the President in *Cleary v Lakeside Developments Ltd.* The complaint of Ms Smith is that she must bear the cost of employing managing agents. I agree that there is nothing unsatisfactory about this in itself. This is the result of the contractual arrangements freely entered into between lessor and lessees.

44. I therefore decline to make the variation sought. I am not satisfied that it falls within the scope of section 35(2) of the Act. Even were I to be so satisfied that it was, the lessees would be entitled to compensation under section 38(10). I do not accept that the additional costs payable by the lessee would be more or less balanced out by these advantages of the property being properly managed and the flats being made more marketable. The lease currently makes adequate provision for the property to be maintained in a proper state of repair. There is no evidence that potential purchasers or mortgagees are discouraged by the current terms of the lease. None of the mortgagees have made any representations. The changes are sought to ease the burdens faced by Mrs Smith in managing the property, which largely involves the collection of rents, service charges and insurance premiums.

45. I have regard to the decision in *Flats 1-8 Baden House* and *41 Scrubs Lane NW10*. I note that the President in *Cleary v Lakeside Developments Ltd* was referred to the LVT decision in *Flats 1-8 Baden House* and he makes reference to it in his judgment. In *41 Scrubs Lane NW10,* the LVT allowed a variation allowing the lessor to recover "the reasonable expenses incurred by the lessor of employing surveyors and managing agents". The LVT again relied on Section 35(2)(e). The reasoning in these two decisions

was not accepted by the President in *Cleary*. I am bound by the guidance provided by the Upper Tribunal in *Cleary*, albeit that I must apply it to the particular facts of this case.

46. The variation sought by Ms Smith could prove to be in the common interests of both lessor and lessees were they to lead to the more effective management of the property and a higher quality of repair and maintenance. The problem is that Ms Smith is not seeking to introduce these changes with the agreement of her lessees, who would have to pay higher service charges. She is seeking to impose them unilaterally.

47. I remind myself of the observations of the President at [26] of his decision in *Cleary v Lakeside Developments Ltd.* I note that in the current application, as in *Cleary*, it is not Ms Smith's case that the lessor is entitled, by implication, to recover the cost of employing managing agents under the lease as currently granted. I suspect that the President had in mind the decision of the Court of Appeal in *Embassy Court Residents' Association v Lipman* (1984) 271 EG 545, in which it was held, on the facts of that case involving a tripartite lease and a freehold acquired by a tenants' management company, that it was necessary to imply a term that the administrative expenses incurred by a management company could be recovered from individual lessees. These expenses included the cost of employing managing agents. On the particular facts of that case, the term was implied to give business efficacy to the transaction. The tenants' management company had no funds of its own.

48. Under the current leases, Ms Smith, as lessor, is obliged to keep in repair the structure and exterior of the property. If the roof is in disrepair, it is not necessary for Ms Smith to carry out the repairs herself. By implication, she would be entitled to employ a builder and pass on the cost through the service charge. Were she to require expert advice as to the extent of the works required, she would be entitled to instruct a surveyor and pass on the costs to the lessee. Again, there is no need for the lease to make express provision for this; it can be implied to give business efficacy to the agreement.

49. Whether this principle would extend to engaging managing agents is a point which I have not been asked to determine; it is not the basis of Ms Smith's application. Were a Tribunal to be required to determine this question, it would be entitled to have regard to the fact that the task of repairing and maintaining a terraced property converted into three flats is quite different from repairing and maintaining a traditional block containing a much larger number of flats with more extensive common parts. Ms Smith is in a quite different position from the tenants' management company in *Embassy Court Residents' Association.*

50. The lessees are currently negotiating with Mrs Smith to acquire her freehold interest. They have paid £1,500 for a joint valuation report which is being arranged by Prickett & Ellis, Surveyors. Mrs Smith received the valuation report three days ago. It has yet to be passed to the lessees. No

statutory notice has yet been served. Collective enfranchisement may provide the best solution for both lessor and lessees in the current case.

Robert Latham
Tribunal Judge

4 February 2016

RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

Annexe: Sections 35& 38 of the Landlord and Tenant Act 1987

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 3 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.