



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

Case Reference : **CAM/11UE/LVT/2019/0005**

Property : **The Alders, Alder Road, Denham, Uxbridge
Middlesex UB9 4AY**

Applicant (Tenants) : **The Alders RTM Company supported by the
leasehold owners of flats 7, 8, 9, 11, 12, 14 &
16 The Alders**

Representative : **ARKO Property Management Ltd**

Respondent : **The leaseholders of flats 1-6, 10 & 15
The Alders**

Date of Application : **29th May 2019**

Type of Application : **To vary the lease by parties to the lease
(s35 Landlord and Tenant Act 1987)**

Tribunal : **Judge JR Morris**

Date of Decision : **6th January 2020**

DECISION

Decision

Pursuant to Section 38 of the Landlord and Tenant Act 1987 the Tribunal orders the following variations of the Leases:

1. In Paragraph 6 of the Third Schedule

The words:

An addition of ten per centum of the cost of all the foregoing contributory services to cover the costs of management.

Shall be deleted and replaced with:

The costs, fees and disbursements reasonably and properly incurred of managing agents employed by the Landlord for the carrying out and provision

and management of the Contributory Services or, where managing agents are not employed, a management fee for the same

2. **Clause 10** shall be added to the Lease as follows:

The Tenant shall pay interest to the Landlord at a rate of four per centum per annum above the base rate from time to time of HSBC Bank plc or if that base rate is no longer used or published, a comparable commercial rate reasonably determined by the Landlord, (both before and after any judgement) on any rent, insurance rent, the provision of Contributory Services or other payment due under this lease and not paid within seven days of the date it is due. Such interest shall accrue on a daily basis for the period from the due date to and including the date of payment.

3. **No order for compensation is made.**

Reasons

Background

4. The Applicant is a Right to Manage Company and seeks to vary the Leases of all the flats in The Alders, Alder Road, Denham, Uxbridge, UB9 4AY ("the Property") under section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act"). Section 35 is in Annex 2 of this Decision.
5. The Tribunal did not inspect the Property but from the description given in previous decisions it is a purpose built three storey building constructed in the 1960s, comprising 15 flats, with appurtenant land consisting of a car park to the front of the building and gardens to the rear.
6. Directions were issued on 20th August 2019 which identified the following issues:
- Should the tribunal order the proposed variation to be made in the leases if they fail to make satisfactory provision?
 - 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 that section?
 - If it does make an order varying the leases, should the tribunal order any person to pay compensation to any other person (see section 38(10) to the 1987 Act)?
7. The Directions required the Applicant to send by 6th September 2019 a copy of the Application, with any accompanying documents, the Directions, the Tribunal's covering letter and its statement of case to the Respondents and any persons known or believed likely to be affected by the proposed variation of the Leases (e.g. the freehold owner and any mortgage lenders and guarantors), and inform them that they may apply to the tribunal to be joined as a party whether as an applicant or a respondent.

8. The Applicant was also required to confirm to the Tribunal by 9th September 2019 whether there are any persons known or believed likely to be affected by the proposed variation, whether they have been notified of the Application, whether they have been sent the Directions and whether they have been made aware that if they wish to be joined as a party they must inform the Tribunal.
9. By a letter dated 5th September 2019 the Applicant confirmed that it had complied with Directions in respect of the interested parties who they knew were affected by the proposed variations. These were 15 Leaseholders, 5 Mortgage Lenders and the Freeholder. The names and addresses of these persons were provided to the Tribunal together with copies of the covering letter sent with the documents required to be served.
10. In an email dated 20th November 2019 the Applicant's Representative confirmed to the Tribunal that no replies had been received from the Leaseholders or interested parties in response to the letter of 5th September 2019.
11. The Directions stated that the case had been allocated to the paper track (i.e. the determination would be made on the basis of written representations) and that a hearing would only be held if a party requested it. No request was made.
12. The case was subsequently set down to be determined on or after 29th November 2019.
13. A Bundle of documents was provided which contained the Applicant's Statement of Case, together with a copy of the proposed Deed of Variation. Copies of the Leases and Deeds of Variations (if any) and entries on the Land Register following the most recent Assignment of each flat except one. Although the Deed of Variation in respect of Flat 9 was not provided nevertheless it was recorded on the copy of the Land Registry Entry provided. The copy of the Land Registry Entry for Flat 4 for the last assignment but one. The last assignment appears to have been to Sarah Catherine Mills and Luke Michael Purcell.

The Leases

14. All fifteen Leases were found to be in the same form and in particular they all contained the same provision regarding the remuneration for management and no provision for interest in the event of late payment of the service charge.
15. Eleven of the Leases had been varied. The Deeds of Variation were all in the same form and for the same purpose, namely to extend the term of the Lease.
16. Details of the Leases, Variations and last Assignments (the date when the assignment was registered is given) are as follows:

Flat	Deed & Current Title No.	Date	Term	Parties
1	BM19390			
	Lease	23/01/1962	99 years from 24/06/1961	The Alders Limited (1) Gordon Charles Clapson (2)
	Assigned	09/08/1976		Mary Oborn
2	BM287617			
	Lease	28/10/1962	99 years from 24/06/1961	The Alders Limited (1) Sydney George Preece (2)
	Variation	8/10/2003	Extended to 189 years	The Alders Limited (1) Lynne Marion Yates (2)
	Assigned	06/10/2006		Paul Douglas Watson
3	BM296151			
	Lease	24/03/1962	99 years from 24/06/1961	The Alders Limited (1) James Percy Norris (2)
	Variation	06/10/2004	Extended to 189 years	The Alders Limited (1) Darren Wayne Addison & Laressa Anne Jones (2)
	Assigned	02/07/2013		Matthew Yeoman & Divya Harendra Shah
4	BM296654			
	Lease	29/05/1962	99 years from 24/06/1961	The Alders Limited (1) Patrick Anthony McCormak (2)
	Variation	06/10/2004	Extended to 189 years	The Alders Limited (1) Richard John Victor Bryant (2)
	Assigned	08/03/2013		Fred Clark & Holly Rosanna Mulvihill subsequent assignment to Sarah Catherine Mills and Luke Michael Purcell
5	BM20583			
	Lease	17/07/1962	99 years from 24/06/1961	The Alders Limited (1) Margaret Forbes Bonar (2)
	Assigned	15/08/2011		Seyed Ghasem Shobeiry & Seyed Mohammad Ala Shobeiry
6	BM308398			
	Lease	20/12/1961	99 years from 24/06/1961	The Alders Limited (1) Ruth Mary Couser (2)
	Variation	23/01/2006	Extended to 189 years	The Alders Limited (1) Leigh Emma Walker (2)
	Assigned	26/07/2016		Christopher John Wall & Sara Mitra Sayeg
7	BM18976			
	Lease	04/10/1961	99 years from 24/06/1961	The Alders Limited (1) Anthony Stephen Close (2)
	Assigned	27/11/1981		George Harrington Locke
8	BM295612			
	Lease	27/07/1962	99 years from 24/06/1961	The Alders Limited (1) Harold Norman Hoskins (2)
	Variation	13/09/2004	Extended to	The Alders Limited (1)

			189 years	Joan Crane (2)
	Assigned	27/10/2004		Richard John Serle
9	BM296907			
	Lease	24/04/1962	99 years from 24/06/1961	The Alders Limited (1) Irene Elizabeth Dovey & Hugh Oliver Dovey (2)
	Variation (No copy)	06/11/2004	Extended to 189 years	The Alders Limited (1) Richard David Serle (2)
	Assigned	29/08/2004		Paul Carey
10	BM297029			
	Lease	15/09/1961	99 years from 24/06/1961	The Alders Limited (1) Mary Tibbitts (2)
	Variation	06/10/2004	Extended to 189 years	The Alders Limited (1) Peter James Broomfield (2)
	Assigned	12/07/2012		Neil Francis Reuby
11	BM321942			
	Lease	28/08/1962	99 years from 24/06/1961	The Alders Limited (1) Harold Norman Hoskins (2)
	Variation	25/08/2006	Extended to 189 years	The Alders Limited (1) Michael Kenneth Morgan & Merle Ruth Morgan (2)
	Assigned	21/03/2007		Merle Ruth Morgan
12	BM296141			
	Lease	04/09/1961	99 years from 24/06/1961	The Alders Limited (1) Edward Reeves Edwards & Edith Mary Edwards (2)
	Variation	06/10/2004	Extended to 189 years	The Alders Limited (1) Charles Herbert Allen & Sheila Maud Allen (2)
14	BM296273			
	Lease	24/06/1966	99 years from 24/06/1961	The Alders Limited (1) Geoffrey Joseph Reynolds & Eileen Mary Reynolds (2)
	Variation	06/10/2004	Extended to 189 years	The Alders Limited (1) Ian Bannister (2)
15	BM366321			
	Lease	06/03/1967	99 years from 24/06/1961	The Alders Limited (1) Stephen Charles Moreton- Pritchard & Catherin Havilah Lapping (2)
	Variation	17/11/2011	Extended to 189 years	The Alders Limited (1) Edna Elizabeth Mary Borrell (2)
16	BM301784			
	Lease	23/06/1967	99 years from 24/06/1961	The Alders Limited (1) Anthony Frankham Lamburn (2)
	Variation	21/04/2005	Extended to 189 years	The Alders Limited (1) Violent Gertrude Venner (2)
	Assigned	18/12/2015		John Malcolm Stilwell & Maron

				Elizabeth Stilwell
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17. A copy of the Land Registry Entry Number BM282734 of the Freehold held by The Alders Limited was provided.

Preliminary Issue

18. The Application Form only referred to the Leaseholder of Flat 1 as being a Respondent because it had been intended that the Applicant would seek to vary one lease under section 35 and then to apply to vary all the other leases on the same basis under section 36. It was subsequently realised that section 36 was not appropriate and therefore the Applicant requested that the Application be amended under Rule 6(3)(c) of the Tribunal Procedure (First-tier Tribunal) (property Chamber) Rules 2013 (“the 2013 Rules”) so that the Application is to amend all the Leases of all the Leaseholders.
19. The Directions took account of this application to amend the Application and required the Applicants to serve all documentation on all the Leaseholders and interested persons and to confirm that this had been done. The Applicants confirmed that they had complied with the Directions.
20. The Tribunal determined that it was in the interests of justice to grant this application to amend. It would not have been proportionate to have required the Applicant to incur the time and expense of issuing a fresh application to include all the Leaseholders when the Directions were able and did in fact take account of the application to amend and included all the Leaseholders in its requirements.
21. In reaching this decision, the Tribunal had regard to rule 3(2) of the 2013 Rules which includes the provision that:
- (2) Dealing with a case justly and fairly includes*
- (a) dealing with the case in ways which are proportionate to the importance of the case, complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;*
- (b) avoiding any unnecessary formality and seeking flexibility in the proceedings;*
22. Therefore, the Tribunal treats this as an Application by the Applicant to amend all the Leases of all the Leaseholders.

The Variation

23. The Leases include an obligation upon the Leaseholders to each pay an equal sum which the Landlord shall have expended for the contributory services, i.e. the service charge. In summary the service charge provisions of the Leases are that the Leaseholders shall pay a sum in advance on account of the anticipated cost of these services. If at the end of the year the amount payable on account is less than the actual costs the Leaseholder shall pay to the Landlord the

balance on demand and if the actual costs are more than the estimated amount the surplus shall go towards the contribution due for the next year.

24. The contributory services (“the contributory services”) are set out in the Third Schedule of the Lease and in brief comprise:
1. The expenses of maintaining repairing decorating renewing the main structure of the building, the gas water pipes, drains, electricity cables and wires and the common parts of the Block.
 2. The costs of cleaning and lighting the common parts of the Block
 3. All rates and taxes
 4. The cost of insurance
 5. The cost of the provision of a Sinking Fund
 6. 10% of the cost of all the contributory services to cover the costs of management.

25. The Applicant seeks to vary the Leases referred to by deleting Paragraph 6 of Schedule 3 of the Lease which currently reads:

An addition of ten per centum of the cost of all the foregoing contributory services to cover the costs of management.

26. And replacing it with:

6. *The costs, fees and disbursements reasonably and properly incurred of:*
- (i) *managing agents employed by the Landlord for the carrying out and provision and management of the Contributory Services or, where managing agents are not employed, a management fee for the same;*
 - (ii) *accountants employed by the Landlord to prepare and audit the service charge accounts; and*
 - (iii) *any other person reasonably and properly retained by the Landlord to act on behalf of the Landlord in connection with the Block or the provision of the Contributory Services.*

27. The Applicant also seeks to vary the Leases referred to by adding a new clause 10 to the Lease:

10. *The Tenant shall pay interest to the Landlord at a rate of four per centum per annum above the base rate from time to time of HSBC Bank plc or if that base rate is no longer used or published, a comparable commercial rate reasonably determined by the Landlord, (both before and after any judgement) on any rent, insurance rent, the provision of Contributory Services or other payment due under this lease and not paid within seven days of the date it is due. Such interest shall accrue on a daily basis for the period from the due date to and including the date of payment.*

Reasons for the Variation

Paragraph 6 of Schedule 3

28. The Applicant in the Statement of Case stated that the effect of the present Paragraph 6 of Schedule 3 is to cap the management fee to 10% of the cost of the contributory services. This has resulted in a fee which is far below the reasonable industry norm of management fees.
29. By way of illustration the cost of the annual contributory services amounted to approximately £14,300.00 which according to paragraph 6 allowed for a management fee of £1,430.00 which equates to a charge of £79.44 plus VAT per flat. It was submitted that the normal fee for the area would be around £250.00 plus Vat for each flat per annum.
30. The Applicant's Representative had not adduced evidence of management fees in the area by way of quotations. However, the application referred to the decision of a differently constituted tribunal, Case Reference CAM/11UE/LSC/2019/0025 pursuant to section 27A of the Landlord and Tenant Act 1985, dated 19th September 2019, in respect of the Property. This decision provided evidence of the total cost of the contributory services for each year from 2013 to 2019, 10% of which gave a total management fee chargeable under the Leases and 1/15th of the total management gave the unit fee as follows:

Year	Total Cost of Contributory Services	Total Management Fee under Lease of 10%	Unit Fee
	£	£	£
2013	9,164.00	916.40	61.09
2014	11,641.00	1,164.10	77.60
2015	11,135.37	1,113.54	74.23
2016	9,835.00	983.50	65.56
2017	11,055.00	1,105.50	73.70
2018	9,570.00	957.00	63.80
2019	25,295.00	2,529.50	168.63

31. It was accepted that if the Landlord was in control of the management then it might be argued that the provision is reasonable in so far that the Landlord would be obliged to provide management at that cost and no more. If there were a shortfall then the Landlord would have to fund it.
32. It was added that such a clause might be reasonable if a landlord sought to recover in-house management costs and that the Applicant's Representative believed that this was the intention at the conception of the Lease.
33. However, it was submitted that clause 6 did not make satisfactory provision in relation to the provision of the management service where the role of the Landlord in this respect was carried out by a Right to Manage Company.

34. The Applicant's Representative said that, firstly, under Clause 1(7) and Schedule 3 of the Lease it was intended that the services should be managed. Secondly, that Section 35(2)(d) of the 1987 Act applies as the management of the services and installations and the collection and administration of the service charges is a service which is reasonably necessary to ensure that occupiers of the flats enjoy a reasonable standard of accommodation.
35. However, although the Leaseholders are entitled to receive the management service, nevertheless, the Right to Manage Company cannot recover all the costs of providing that service. This is because, as stated in Section 35(2)(e) of the Landlord and Tenant Act 1987, the Lease fails to make satisfactory provision with respect to *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 a number of persons who include that other party.*
36. The Right to Manage Company is a non-profit making trading company which has no assets or income of its own with which to fund any shortfall in providing the management service. The Applicants go on to state that there would be a shortfall if a managing agent was employed because 10% of the cost of the contributory services would not cover a managing agent's fees. They say "it has been impossible to find a managing agent willing to provide the service for such a massively reduced fee".
37. The Applicant's Representative stated that the problem has been exacerbated by the ability of the Right to Management Company to substantially reduce the cost of the contributory services making 10% of the costs an even lower sum than when the Landlord was responsible for the Services.
38. In fact, the Right to Manage Company has employed a managing agent and the shortfall in respect to the fees has been paid via an informal arrangement between 13 of the 15 Leaseholders. The Leaseholders of Flats 1 and 5 do not agree with this informal agreement and insist on the strict application of the provision of the Lease in relation to the cost of management.
39. The Applicant's Representative submitted that it was Parliament's intention when passing the "Right to Manage" legislation to give tenants the ability to appoint the managing agent of their choice. The Right to Manage Company in this case is not able to do this because it cannot recover the full cost due to the provisions of the Lease. Therefore, it must either seek to manage the Property itself or return the right to manage back to the Landlord negating the purpose of the legislation.
40. The Applicant's Representative noted that they had been referred to the case of *Triplerose v Stride* [2019] UKUT 099 (LC) in the Directions. It was sought to distinguish the case as follows:
 1. In *Triplerose v Stride* the application was to vary a lease with differing service charge provision for each flat to make them all the same whereas in this case the provisions are all the same and the variation will apply to all Leaseholders.

2. In *Triplerose v Stride* the Applicants were also the freeholder as members of a company and so had a financial interest in the property. Their objection to the lease in its unvaried form was that they had to contribute to the repair and maintenance and a tenant who was not a member of the freehold company did not. The Applicants sought a variation so the tenant did have to contribute. In this case the Applicant is a Right to Manage Company which has no freehold interest, no assets or income of its own and whose sole role is to manage the Property and should be entitled to recover the costs of doing so.

Addition of Clause 10

41. The Applicant also seeks to add Clause 10 to the Lease to assist it in recovering unpaid Service Charges. The Applicant's Representative referred to Section 35 (2) and (3A) of the Landlord and Tenant Act 1987. Its reason was that as a Right to Manage Company it had not right of forfeiture. It was therefore submitted that it was equitable to charge a reasonable interest proposing 4% above base rate.

Compensation under Section 38(10) Landlord and Tenant Act 1987

42. The Applicant's Representative then addressed the issue of compensation for the variation of the Lease. It stated that if an order for compensation was made it would not be able comply as the Applicant has no assets or income. It would have to declare itself insolvent and be dissolved which it was contested would be contrary to what the legislation intended. The Leaseholders would suffer through no fault of their own due to a badly worded lease.

Decision

Variation to Paragraph 6 of Schedule 3

43. The Tribunal addressed the proposed variation to Paragraph 6 of Schedule 3 noting the case of *Triplerose v Stride* [2019] UKUT 099 (LC) (*Triplerose*) with particular reference to the passages quoted from the decision of the then President, George Bartlett QC in *Cleary v Lakeside Developments Limited* [2011] UKUT 264 (LC) (*Cleary*).

Variation of Paragraph 6(i)

44. Firstly, the Tribunal considered whether it should order the proposed variation of Paragraph 6(i) if the Leases fail to make satisfactory provision. It found that the management of the Property was a service which was for the benefit of all the occupiers. It is in the interests of the Leaseholders that the Property is managed *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 Leaseholders' investments as well as the amenities of the property* (paragraph 30 of *Cleary* quoted at paragraph 26 of *Triplerose*).

45. The Tribunal is of the opinion that it is reasonable for the management role to be carried out by a managing agent. A landlord or a managing company, may itself have the ability to carry out the managing agent's role or, as a company, have the capacity to do so through in-house personnel. Alternatively, the landlord or managing company may employ an external managing agent. Where a right to manage company acquires the right to manage pursuant to the Commonhold and Leasehold Reform Act 2002 Part 2, section 91 appears to anticipate that the company will employ a managing agent. By whomever the management role is carried out, it would be expected that the lease would make provision for the services to be remunerated.
46. The Tribunal found that Paragraph 6(i) made provision for the matters referred to above and therefore finds it should order the proposed variation to be made in the Leases if they fail to make satisfactory provision.
47. Secondly, the Tribunal considered whether the proposed variation fell 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 that section.
48. In this case Paragraph 6 of the Third Schedule of the Leases makes provision for a management service to be provided and remunerated to ensure that the tasks associated with the contributory services of insurance and maintenance should be carried out properly.
49. The Tribunal found that this is a service which comes within section 35(2) (d) and (e) of the 1987 Act. The question then arises whether the Leases make satisfactory provision for these services. It seems to be accepted that the Leases give satisfactory authority for these services to be provided. The issue is that the Leases do not make satisfactory provision for this service to be remunerated. This is because Paragraph 6 of the Third Schedule puts a cap on the cost of management services of 10% of the cost of all the contributory services.
50. The Tribunal noted that in the case of *Triplerose* the decision of George Bartlett QC in *Cleary* at paragraph 30 had been referred to which is considered to be relevant here:

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.

51. Although in this case it is not the absence of a lessee's covenant to pay for the cost of management but that the covenant does not cover the cost, nevertheless it is potentially no less unsatisfactory.

52. The Tribunal considered the evidence adduced by the Applicant. The Tribunal referred to the Decision by a differently constituted Tribunal of 19th September 2019, Case Reference CAM/11UE/LSC/2019/0025 which was mentioned in the Application. In that case the total costs of the contributory services for each year from 2013 to 2019 were set out in a schedule including the amount of 10% of the total management fee, 1/15th of which gave a unit fee. The Tribunal has extracted these figures and put them in a table in the “Reasons for the Variation” section of this Decision above. The Tribunal was then able to use its knowledge and experience to determine whether the provision in respect of remuneration was unsatisfactory based on past years.
53. The Tribunal is of the opinion that this is a relatively small residential block and accepted that there is an optimum charge below which it would not be economic for a managing agent to carry out the work. From its knowledge and experience the management fees which the Leases permit are significantly below the fee a managing agent would charge for managing the Property. The Tribunal therefore finds that the fixed management charge set in the Leases of 10% of the Contributory Services is unsatisfactory and order that the Leases be varied by replacing Paragraph 6 with the proposed Paragraph 6(i).
54. The Tribunal makes no judgement as to what specifically is a reasonable fee. The variation refers to a reasonable fee being charged and section 27A of the Landlord and Tenant Act 1985 enables either a landlord or a tenant to apply to a tribunal to determine a reasonable fee. The tribunal only determines that based upon the evidence of the cost of the contributory services since 2013 limiting the fee to 10% of that cost is an unsatisfactory provision.
55. The Tribunal then considered the proposed variation of Paragraph 6 by the addition of Paragraphs 6(ii) and 6(iii).

Variation of Paragraph 6(ii)

56. Firstly, the Tribunal considered whether it should order the proposed variation of Paragraph 6(i) if the Leases fail to make satisfactory provision. It found that as with the management of the Property, accountancy was a service which was for the benefit of all the occupiers. Also, Paragraph 6 (ii) made provision for the appointment and remuneration for an accountant and therefore finds the proposed variation should be made if the Leases fail to make satisfactory provision.
57. Secondly, the Tribunal considered whether the leases fail to make satisfactory provision as required by section 35(2) of the Landlord and Tenant Act 1987. The Tribunal found that Case Reference CAM/11UE/LSC/2019/0025, mentioned above, also referred to another decision made by a differently constituted tribunal in respect of the Property. This was Case Reference CAM/11UE/LSC/2012/0052, which was a decision also made pursuant to section 27A of the Landlord and Tenant Act 1985. This earlier decision addressed the issue of whether the Leases provided satisfactorily for the appointment and remuneration of an accountant finding that they did at paragraph 50 as follows:

50. *The Tribunal finds that as the lease requires the auditing of service charge accounts, it is reasonable to pay an auditor to do so.*
58. The more recent 2019 decision referred to the earlier 2012 decision because in the 2019 decision the parties had sought to put in issue the payability under the terms of the Leases of service charges relating to the accountancy fees when the issue had already been determined by the 2012 decision. The 2019 tribunal had regard to paragraph 7.192.1 of Woodfall: Landlord and Tenant which states that:
- A decision on a point of law by the tribunal does not create a binding precedent requiring any subsequent tribunal to follow it, so that in a case involving different parties a subsequent tribunal would be entitled to depart from it having scrutinised it with appropriate care, believed it to be wrong. However, where the subsequent case involves the same parties or their predecessors in title as the earlier case, the doctrine of issue estoppel applies, so that the decision in the earlier case cannot be challenged in subsequent proceedings unless there are special circumstances.*
59. This Tribunal is of the opinion that the Applicant is the same as in the 2012 and 2019 cases and so also are some of the Respondents, (or they are the successors in title) therefore the Tribunal determines that the parties are estopped from disputing that the Leases provided satisfactorily for the appointment and remuneration of an accountant.
60. Even if this were not so, no evidence has been adduced to show the necessity of varying the Leases as set out in the proposed paragraph 6(ii). Having carefully considered the matter, this Tribunal finds that the 2012 tribunal was correct in its interpretation of the Leases and is of the opinion that the Leases provide satisfactorily for the appointment and remuneration of an accountant.
61. Therefore, the Tribunal does not order the proposed variation of 6(ii).

Variation of Paragraph 6(iii)

62. Firstly, the Tribunal considered whether it should order the proposed variation of Paragraph 6(iii) if the Leases fail to make satisfactory provision. No evidence has been adduced to show that such a general provision enabling any person to be retained to act on behalf of the Landlord in connection with the Block or the provision of the contributory services is necessary to the Lease.
63. Secondly, the Tribunal considered whether the proposed variation of paragraph 6(iii) was based upon any of the grounds set out in section 35(2) of the Landlord and Tenant Act 1987 in respect of which the Leases fail to make satisfactory provision. No evidence has been adduced to demonstrate that the Leases fail to make satisfactory provision with respect to one or more of the matters set section 35(2) of the Landlord and Tenant Act 1987 which the proposed variation will remedy.
64. Therefore, the Tribunal does not order the proposed variation of 6(ii).

Variation to Add Clause 10 of the Lease

65. Firstly, the Tribunal considered whether it should order the proposed variation by way of the addition of a Clause 10 to the Leases if the Leases fail to make satisfactory provision. The Tribunal found from its knowledge and experience that the proposed variation was common to leases encouraging tenants to pay the service charge promptly and compensating the landlord, or management company for the effects of late payment e.g. bank interest. In this instance there was an additional reason in that a Right to Manage Company has no right of forfeiture and therefore cannot take any further action than that set out in the proposed variation.
66. The Tribunal found that the proposed additional Clause 10 made provision for the matters referred to above and therefore finds it should order the proposed variation to be made in the Leases if they fail to make satisfactory provision.
67. Secondly, the Tribunal considered whether the proposed variation of Clause 10 was based upon any of the grounds set out in Section 35 (2) and (3A) of the Landlord and Tenant Act 1987 in respect of which the Leases fail to make satisfactory provision. The Tribunal found that the Leases made no provision at all and therefore orders the Leases be varied by the addition of the proposed Clause 10.

Compensation under Section 38(10) Landlord and Tenant Act 1987

68. The Tribunal then considered whether compensation was payable.
69. The Tribunal finds that the Leases without the variation have all the same provisions. The variations enabling the Landlord, whose management role has been taken over by the Applicant as a Right to Manage Company, to employ a managing agent and to charge interest on overdue service charges is of equal benefit to all the Leaseholders, whether they participated in the Right to Manage Company or not. The cost and obligation of the benefit is also shared equally by all the Leaseholders.
70. No Leaseholder has received a greater benefit or suffered a greater detriment than any other by the variation.
71. The Tribunal therefore determines that the variations do not substantially prejudice any of the Respondents.
72. Having determined that no compensation is payable it was no necessary for the Tribunal to make a decision with regard to the points raised by the Applicant as to whether or not a Right to Manage Company ought to be required to pay compensation.

Summary

73. Pursuant to Section 38 of the Landlord and Tenant Act 1987 the Tribunal orders the following variations of the Leases:

74. In Paragraph 6 of the Third Schedule

The words:

An addition of ten per centum of the cost of all the foregoing contributory services to cover the costs of management.

Shall be deleted and replaced with:

The costs, fees and disbursements reasonably and properly incurred of managing agents employed by the Landlord for the carrying out and provision and management of the Contributory Services or, where managing agents are not employed, a management fee for the same

75. Clause 10 shall be added to the Lease as follows:

The Tenant shall pay interest to the Landlord at a rate of four per centum per annum above the base rate from time to time of HSBC Bank plc or if that base rate is no longer used or published, a comparable commercial rate reasonably determined by the Landlord, (both before and after any judgement) on any rent, insurance rent, the provision of Contributory Services or other payment due under this lease and not paid within seven days of the date it is due. Such interest shall accrue on a daily basis for the period from the due date to and including the date of payment.

76. No order for compensation is made.

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 - Sections 35 & 38 of the Landlord and Tenant Act 1987

The relevant provisions are sections 35 and 38 of the Act which provide:

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.

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.

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