FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/33UH/LVT/2019/0002**
Property	:	2–29 St Mary's Court, Church Street, Diss, Norfolk IP22 4DR
Applicant	:	Proxima GR Properties Ltd
Representative	:	Estates & Management Ltd [ref : Milton McIntosh]
Respondents	:	Michael Norman, and all other leaseholders whose names, flat numbers and contact details are recorded on the Schedule annexed to the application
Type of Application	:	for the variation of the service charge provisions in a lease or leases [LTA 1987, s.35]
Tribunal Members	:	G K Sinclair & G F Smith MRICS FAAV REV
Determination date	:	30th August 2019

DECISION
following a paper determination

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1. None of the parties having asked for an oral hearing, and the tribunal considering the application upon a consideration of the existing lease terms and the parties' respective written representations, for the reasons set out below the tribunal determines that the application be dismissed. If the applicant wishes to renew its

application in future it must think more carefully.

Background

2. In early 2018 a lessee drew to the attention of the managing agents that, although in clause 1 the lease defines the additional rent or management charge as the aggregate of a) the insurance premium b) one twenty-eighth (28th) of the total annual cost of maintenance of the television aerial and c) other service charges set out in Part 1 of the Third Schedule, in those parts of the lease dealing with the insurance premium and the other service charge costs the proportion payable is expressed as one twenty-ninth. The amount historically charged was thus said to be incorrect, and on further investigation the television aerial share in the definitions clause is left entirely blank in 12 leases, with the other 16 referring to one twenty-eighth.

3. With only 28 flats (although, curiously, they are numbered 2–29) this results – if the service charge provisions are applied correctly, to an under-recovery of most of the annual expenditure. An attempt was made in 2018 to persuade lessees voluntarily to enter into a deed of variation, with the lessor offering to pay each lessee £500 towards their own legal costs of advising on and executing the deed. Unfortunately take-up was low, with only a few expressing willingness to vary their leases as requested, with the vast majority either refusing to do so or not responding at all; hence this application under Part IV of the Landlord and Tenant Act 1987.

Relevant statutory provisions

4. As set out in detail in the applicant's written submissions, the tribunal derives its jurisdiction to vary residential long leases as sought here from section 35, in Part IV of the Landlord and Tenant Act 1987. The section provides as follows :

> 35 **Application by party to lease for variation of lease**
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> (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 –
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> (a) the repair or maintenance of –
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> (i) the flat in question, or
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> (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.

5. Section 38, which empowers a tribunal to order the variation of a lease, provides as follows :

(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 subsection (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 subsection (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.

(3) *[not relevant]*

(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.

6. No application has been made by any lessee under section 36.

7. In this case the applicant lessor seeks to rely upon section 35(2)(f), namely that the provision in the lease for the computation of the service charge is not satisfactory because the flats are required to pay a lower proportion than necessary to ensure full recovery of the management costs.

8. In its statement of case, at paragraph 23, the applicant lists the five step process by which the tribunal should approach its task, as explained in *Rossman v Crown Estate Commissioners*.[1] The various steps, or questions, are these :

a. Is the applicant entitled to apply to vary the lease under section 35(1)?
b. If so, has the applicant made out a ground under section 35(2)?
c. If so, should the tribunal exercise its discretion to vary the lease under section 38(1)?
d. If so, should the variation be one specified by the applicant, or one specified by the respondents in any application by them under section 36, or some other variation under section 38(4)?
e. If so, are there special reasons for not making the variation under section 38(6)?

9. The tribunal also notes that in a very recent decision by Judge Elizabeth Cooke in the Upper Tribunal[2] she commented at [13] that an application to vary a lease under section 35 will not succeed unless it can be shown that the lease "fails to make satisfactory provision" for the various matters listed in section 35(2) (a)-(g).

10. Observing that the word "satisfactory" is not defined in the Act, and her attention having been drawn to, and having regard for, the decisions in *Triplerose Ltd v*

1 LON/00BK/LVL/2011/0013

2 *The Mayor and Burgesses of the London Borough of Camden v Morath and ors* [2019] UKUT 193 (LC)

Stride[3] and *Cleary v Lakeside Developments Ltd*[4], Judge Cooke stated, at [16] :

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

Relevant lease provisions

11. The sample lease before the tribunal is that for flat 2, and is dated 14th March 1986. The ground rent was set at an initial £50 per annum, increasing every 20th year to the sum "which at such date equates to the sum of £50 at the 1984 value of money using the official cost of living index or equivalent measure." At the first such review date (January 2004), applying the RPI, the rent would have been reviewable to £105.42. A further review is due in January 2024 (but even if one were to apply the latest RPI figure for July 2019 the equivalent rent would be £166.69).

12. On top of the ground rent, the lessee is liable to pay an "additional rent" that comprises (a) the insurance premium payable on the property, (b) 1/28th of the total annual cost of maintenance of the television aerial system installed in the block by the landlord, and (c) other service charges set out in Part I of the Third Schedule.

13. Clause 4 concerns insurance of the flat and the block, and by clause 4.1 the lessee shall pay to the landlord 1/29th part of the aggregate insurance premium.

14. The lessee's obligations are set out in clause 5, and by 5.1 this includes payment of the rents (including the additional rent) reserved by the lease without deduction.

15. Paragraph 1 of Part I of the Third Schedule (which concerns the mechanism for calculating and payment of the service charge) provides that the lessee will pay by way of additional rent 1/29th part of the expenses and outgoings properly incurred by the landlord in respect of the heads of expenditure specified in Part II of the same Schedule. Part II, paragraph 4, refers to "the cost of employing and providing and maintaining accommodation whether or not in the block for such staff employed full-time or part-time in connection with the block as the landlord may from time to time at its discretion determine."

16. This application concerns the applicant's desire to amend or vary clause 4.1 and paragraph 1 of Part I of the Third Schedule so that each refers to a 1/28th share instead of a 1/29th share.

[3] [2019] UKUT 99 (LC)

[4] [2011] UKUT 264 (LC)

Discussion and findings

17. As had been directed, the applicant prepared and filed application bundles with the tribunal, none of the parties having sought an oral hearing. The only response was an emailed reply dated 24th April 2019 by Michael Norman (flat 6). He sought to argue that the application was deficient because this variation seeks only to vary the service charge provision, while that sought voluntarily in May 2018 was more extensive. He asks which has precedence?

18. The tribunal considered not only the lease but the official copy entries for the freehold title [NK50951]. Careful study of the Schedule of notices of leases in Part C revealed some confusion about the number of flats, and perhaps their identity. Entry number 6 on page [37] in the bundle refers to flat 6 (ground floor flat), and to a lease dated 23rd August 1985 for 99 years from 24th June 1985 [NK54997]. However, entry number 15 also refers to flat 6 (first floor flat), and to a lease dated 8th January 1986 for 99 years from 24th June 1985 [NK56852]. Both cannot be right. Entry numbers 13 and 22 also duplicate references to flat 26, with the first referring to a lease granted in December 1985 and the second to one in May 1986. Again, they have different title numbers.

19. The schedule contains no entry for either flat 7 or flat 24, but there is an entry for flat 1 (ground and first floor flat). This lease is dated 29th May 2009 and grants a term of 125 years from that date. Save for entry numbers 27, 28 & 29, which refer to leases granted in 2011, 2017 and 2018 for terms of 139 years from 24th June 1985 (and which are most likely non-statutory lease extensions of 40 years), all the remaining leases were granted in 1985 or 1986.

20. The above queries were raised with the parties on 26th July 2019, the outcome being confirmation from the applicant on 8th August 2019 that there is still a resident warden/manager but that in May 2009 a lease of flat 1 was granted by the lessor, Peverel Properties Ltd, to an associated company, Peverel Operations PD Ltd, for occupation by the resident manager.

21. However, also disclosed but not commented upon in any way is the existence of a deed of variation dated 24th May 2018 made between the applicant lessor and FirstPort Operations PD Ltd as tenant whereby the parties agreed from that date to enter into a new form of lease in substitution for the terms agreed in 2009. These terms differ markedly. The 2009 lease provided that the annual rent was a peppercorn, if demanded, plus the insurance rent. There was no obligation to contribute towards the service charge expenses.

22. By the 2018 deed of variation, however, the rent payable is that specified in the Particulars as that set out in Schedule 1 Part 2, or £101 per year until reviewed in 2025 and thereafter every twenty years plus an "additional rent", also referred to as the "Management Charge" and described as the aggregate of :
    a. The premium payable in respect of the insured risks calculated as set out in the Third Schedule hereto
    b. 1/29th of the total annual cost of the maintenance of the television aerial system installed in each block by the landlord in accordance with Clause 6.2 hereof
    c. Other service charges set out in Part 1 of the Third Schedule.

23. Paragraph 1 of Part 1 of the Third Schedule requires the tenant to pay to the landlord without any deduction by way of further and additional rent 1/29th of the expenses and outgoings properly incurred by the landlord in respect of the heads of expenditure specified in Part II of the Schedule.

24. On the same date, 24th May 2018, FirstPort Operations PD Ltd (the tenant) entered into a side letter to Proxima GR Properties Ltd (the landlord) expressed to be supplemental to the lease. This referred to the letter subsisting until the date on which there is no longer a requirement for the provision of the services of a residential house manager and until the house manager has physically vacated the premises (but subject to earlier determination), and also to a licence to occupy between the tenant and FirstPort Retirement Property Services Ltd, requiring the premises to be used as a dwelling of the resident house manager responsible for the general supervision of the development or estate of which the premises form part.

25. By paragraph 12 of the letter :

> During the continuation of this letter, the terms of the lease which are not consistent with the terms of this letter shall be suspended, and we will not be required to pay any sums due under the lease save for the ground rent reserved under the leases which for the avoidance of doubt will remain payable at all times and will be a liability on us as proprietor of the lease.

26. To repeat, while the deed of variation and side letter were disclosed, neither was commented upon; nor was any attempt made to draw them to the tribunal's attention.

27. The tribunal is familiar with many schemes designed for occupation by the elderly in which provision was made for the employment of a resident warden, the cost of whose accommodation would be recoverable as part of the overall service charge payable by lessees. In most cases the provision of a resident staff member has been regarded as uneconomic and the provision withdrawn, leaving many such schemes reliant upon an area manager visiting sites every few days, and with an out-of-hours telephone helpline managed by a national agency. The former warden accommodation will often either be let as an additional flat or retained for use as an office by the travelling area manager. In the former case, of course, a premium is payable to the lessor and then followed by annual rent and service charge payments.

28. In the tribunal's determination, absent any explanation from the applicant, this is a case where the staff accommodation was first let on a long lease on extremely favourable terms (but still with a liability to contribute to the cost of insurance) and then, in 2018, a deed of variation was agreed whereby the rent and lease terms became more generally aligned with those of the other 28 flats – as if with a view to terminating the resident manager service in the very near future and assigning flat 1 on the open market.

29. It therefore seems odd, at a time when the applicant is bringing this lease into line with the others, for it to be seeking to adjust the 1/29th share in the other 28 flats when it has introduced just such a provision in the lease for flat 1.

30. For how much longer does the applicant intend to maintain a resident manager at the block, occupying one of the 29 flats? Neither the tribunal nor the lessees are told.

31. Had it not been for the tribunal's diligence in examining the freehold title and seeking further information from the applicant, none of this would have come to light. The application was brought upon the basis that there are and always were only 28 flats. That is seen to be untrue. Under the 2009 lease the lessee of flat 1 was liable to pay a 1/29th share of the insurance premium but rent of only a peppercorn. Under the 2018 deed of variation a full ground rent is payable, plus an equal 1/29th share of the cost of maintenance of the television aerial, the insurance premium, and the other service charges. The side letter waives all but the now-enhanced ground rent – but for how long?

32. Had the application been to vary so that each flat let on a long lease should pay an equal share of the costs of insurance and all other service charge costs, but that while any flat was used to provide accommodation for a manager or warden (the cost incurred being recoverable as part of the service charge under paragraph 4 of Part II of the Third Schedule) it would be exempt from liability, then in the determination of the tribunal that would have been a more acceptable proposal.

33. While the applicant appears to be moving in the direction of preparing flat 1 for sale on more similar terms to those under which the other 28 are let, it seems very odd to be seeking to increase the liability of those others from 1/29th to 1/28th. Were such an enforced variation to take place then the 28 might very soon have cause to return to the tribunal to restore the *status quo ante*.

34. For these reasons the application is dismissed.

Dated 30th August 2019

Graham Sinclair
First-tier Tribunal Judge