



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

**Case reference** : **LON/00AY/LVL/2019/0002**

**Property** : **7-8 Cavendish Parade, London SW4  
9DP (“Cavendish Parade”)**

**Applicant** : **Elmdon Real Estate LLP (“Elmdon”)**

**Representative** : **In person**

**1<sup>st</sup> Respondent** : **O & C Properties Ltd**

**Representative** : **In person**

**2<sup>nd</sup> Respondent** : **(1) Melissa Sue Marshall  
(2) John A Boothroyd**

**Type of application** : **To vary a lease**

**Tribunal member** : **Judge Angus Andrew**

**Date and venue of  
hearing** : **13 December 2019  
10 Alfred Place, London WC1E 7LR**

**Date of decision** : **23 December 2019**

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**DECISIONS**

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## **Decision**

1. I decline to vary the long leases of the flats and loft spaces in Cavendish Parade.

## **The application and the hearing**

2. On 21 February 2019 the tribunal received the landlord's application to vary the leases of flats 7A, 7B, 8A and 8B Cavendish Parade. The application was made under section 35 of the Landlord and Tenant Act 1987 ("the Act"). By the application the landlord sought to increase the Tenant's Proportion (as defined in the leases) from 1/9<sup>th</sup> to 1/6<sup>th</sup>. O & C Properties Ltd was named as the only respondent, in the original application.
3. There have been three case management hearings on 14 March 2019, 30 April 2019 and 6 November 2019. The net effect of the directions issued following those hearings was to extend the scope of the application to include the leases of 7C and 8C Cavendish Parade and to join Mrs Marshall and Mr Boothroyd as respondents to the application, Mrs Marshall being the lessee of 7C and Mr Boothroyd being the lessee of 8C. The application was also effectively varied to include a reduction in the Tenant's Proportion in the leases of 7C and 8C from 1/9<sup>th</sup> to zero.
4. The directions given on 6 November 2019 by Judge Tagliavini and Mr Taylor gave comprehensive directions for the preparation of the document bundle to be used at the hearing before me. Regrettably Elmdon did not comply with those directions despite my direction of 4 December 2019, which warned Elmdon that failure to provide a compliant bundle might result in either the application being struck out or the imposition of a costs sanction if the hearing had to be postponed. In particular, the majority of the official copy registers were out of date and there was no official copy of the registers of 8C Cavendish Parade.
5. I heard the application on 13 December 2019. At the hearing the landlord was represented by Jeremy Davies and Elgin Luta. Mr Davies is a responsible member of Elmdon, whilst Mr Luta is an employee. O & C Properties Ltd was represented by Oliver Croom-Johnson who is a director. Mrs Marshall and Mr Boothroyd did not attend the hearing and neither were they represented.
6. At the hearing I handed both Mr Davies and Mr Croom-Johnson copies of the Upper Tribunal decisions in *Cleary & Others v Lakeside Development Ltd* [2011] UKUT 264 (LC), *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) and *Camden v Morath and Others* [2019] UKUT 193 (LC).

## **Background**

7. Cavendish Parade comprises a commercial unit on the ground and part basement floors, two flats on the first floor, two flats on second floor and two loft spaces on the third floor. Mr Croom-Johnson told me that the two loft spaces known as 7C and 8C can only be accessed through hatches in the ceilings of flats 7B and 8B on

the second floor. Consequently, it is apparent that they cannot be used as independent flats separate from flats 7B and 8B.

8. In 2006 the freehold interest in Cavendish Parade was owned by Starway Properties Ltd. On 6 November 2006 Starway Properties Ltd granted six leases of the 4 flats and 2 loft spaces to Mukesh Haridas Andani. The leases of flats 7A, 7B, 8A and 8B were granted for premiums of £250,000. The leases of the two loft spaces were granted for premiums of £50,000. I do not know if there was any connection between Starway Properties Ltd and Mr Andani and I do not know the reason for the grant of the leases of the two loft spaces. The most obvious explanation is that Mr Andani wanted to acquire the potential development value in the loft spaces, but that is conjecture.
9. On 2<sup>nd</sup> May 2007 Starway Properties Ltd granted a long lease of the commercial unit on the ground and part basement floors to William Campbell-Jones in consideration of a premium of £1,640,000. Mr Campbell-Jones remains the lessee of the commercial unit which, I was told, is used as a bar.
10. All seven leases appear to be in similar form and contain service charge provisions that are commonly found in long leases. That is, the lessor maintains, repairs and insures the exterior, main structure and common parts of Cavendish Parade with each lessee contributing to the lessor's costs in the proportions specified in each of the seven leases. These proportions are at the heart of the application and the dispute between Elmdon and O & C Properties Ltd. In each of the seven leases the proportion is referred to as the "Tenant's Proportion". The tenant's proportion in the lease of the commercial unit is 3/9<sup>th</sup> whilst in each of the other six leases it is 1/9<sup>th</sup>.
11. Mr Croom-Johnson told me that Mr Andani was declared bankrupt more than five years ago. The leases of the four residential flats and two loft spaces were offered for sale at auction by Mr Andani's trustee in bankruptcy. O & C Properties Ltd purchased the leases of 7A, 7B, 8A and 8C Cavendish Parade. Mrs Marshall (or Mrs Hughes as she then was) purchased the lease of loft space 7C and Mr Boothroyd purchased the lease of loft space 8C. I do not know in any detail the circumstances under which Mrs Marshall and Mr Boothroyd purchased the leases of the two-loft spaces. All that I can say (on the basis of the official copy of the register entries of 7C) is that Mrs Marshall paid £375,000 for the lease of loft space 7C and that her purchase was funded by a mortgage from TSB Bank Plc.
12. Elmdon purchased the freehold reversionary interest in December 2013. The price paid is not recorded on the registers of the two freehold titles but the leasehold titles of the four flats and two loft spaces are noted on the charges registers.
13. Mr Croon-Johnson told me that he did speak to Mrs Marshall and he understands that she is in litigation with TSB Bank Ltd although nothing is known about the nature of that litigation. The position of Mr Boothroyd is unknown.
14. As a result of an informal agreement between Elmdon, O & C Properties Ltd and William Campbell Johns, Cavendish Parade is repaired and maintained by Elmdon and Mr Campbell Jones. Consequently, since its purchase of the

reversion in 2013 Elmdon has simply insured Cavendish Parade and has sought to recover the premiums through the service charge provisions of the seven leases. Demands have been sent to all the leases but Mrs Marshall and Mr Boothroyd have not paid their contributions. Elmdon could have taken enforcement proceedings against Mrs Marshall and Mr Boothroyd that might ultimately have resulted in the forfeiture of the loft space leases. It has not done that: instead it has, through these proceedings, sought to vary the leases of the four flats and two lofts spaces in the manner previously described.

15. Although not directly relevant to my decision it should be said that O & C Properties Ltd offered to increase the tenant's proportion in each of the four flat leases from 1/9<sup>th</sup> to 1/7<sup>th</sup> for the entirely logical reason that the commercial ground and part basement floors comprise three units. Elmdon however rejected that offer and insist on the tenant's proportions for each of the four flat leases being increased to 1/6<sup>th</sup>.

### **Statutory framework**

16. Section 35 of the Act reads, so far as relevant as follows: -

*“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 a leasehold valuation 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) - (d) ...*

*(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 the other party;*

*(f) the computation of a service charge payable under the lease.*

*(g) ...*

*(3) ...*

*(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 purpose 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 paragraph (a) and (b) would either exceed or be less than the whole of any such expenditure.

(5) – (8) ...”

17. Section 38 provides that if those grounds are made out, the tribunal may make an order varying the lease. It may order the variation applied for or some other variation. And it may make an order that one party to the lease should compensate the other for any loss or disadvantage to be suffered as a result of the variation.
18. To summarise, an application to vary will not succeed unless it can be shown that the lease “*fails to make satisfactory provision*” for various matters listed in section 35(2) (a)-(g), the relevant matter in this case being (e) and (f), namely the recovery by the landlord of expenditure incurred for the benefit of the tenant and the computation of the service charge.
19. The meaning of the word “satisfactory” and the circumstances in which a variation order should be made under either paragraph (e) or paragraph (f) are fully explored in the three Upper Tribunal decisions to which I have referred and it would be superfluous to add any further gloss on those decisions.

### **Reasons for my decision**

20. I decline to vary the six leases for each of two reasons. The first reason is that the service charge scheme contained in all seven leases and in particular the existing tenant’s proportions is both clear and satisfactory. I understand why Mrs Marshall and Mr Boothroyd may not wish to pay their service charge contributions but that does not make the existing lease provisions unsatisfactory. To borrow Judge Cooke’s wording from the Camden case the relevant service charge provisions under consideration “*are clear and reflect the bargain made*”. Under those provisions Elmdon is entitled to recover the whole of its service charge expenditure including the insurance premiums and consequently paragraph (f) is not engaged.
21. Secondly because O & C Properties Ltd bought the four flats on the open market on the clear understanding that it would only have to pay 4/9<sup>th</sup> of the lessor’s service charge costs in total. It would be seriously prejudiced if that proportion were increased to 4/6<sup>th</sup>. That prejudice could be offset by the payment of compensation under section 38(10) of the Act. However, neither party had considered that section and there was neither an application before me for

payment of compensation nor was there sufficient evidence that would enable me to calculate such compensation had I considered it appropriate.

22. Looking to the future I can see that an application for variation may succeed if the leases of the two loft spaces are brought to an end. Paragraph 35(f), as clarified by sub section 35(4), will then be engaged because Elmdon will not be able to recover the “*whole of any such expenditure*”. I would however add two caveats. The first is that the issue of compensation may still have to be considered. The second is that section 35 does not sit easily with a mixed-use building because this tribunal has no jurisdiction to vary the commercial lease of the ground and part basement floors, as Mr Luta acknowledged. Indeed, on reflection, there is an argument that this tribunal has no jurisdiction to vary the leases of the two loft spaces in that neither of those spaces could be properly described as “*a flat*” within the meaning of sub-section 35(a)(1), as that word is commonly understood. That however is for the future.

Name: Angus Andrew

Date: 23 December 2019

### **Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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.

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.

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.

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).