FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**BIR/17UK/LVT/2019/0001**
Property	**:**	**Bretby Hall, Bretby Park, Burton-on-Trent, Staffordshire DE15 0QQ**
Applicants	**:**	**Mr & Mrs C Pratt (1)** **Mr C J Hulme (2)**
Representative	**:**	**Mr D Dovar (Counsel)**
Respondents	**:**	**Bretby Hall Freeholders Ltd (1)** **Bretby Hall Management Company Ltd (2)** **Bretby Park Estate Management Company Ltd (3)**
Representative	**:**	**Mr J Howlett (Counsel) instructed by Nelsons, Solicitors**
Type of application	**:**	**Application for a variation of a lease under section 35 of the Landlord and Tenant Act 1987**
Tribunal member	**:**	**Judge C Goodall LLB** **Mrs A Rawlence MRICS**
Date and place of hearing	**:**	**15 October 2019 at Derby Magistrates Court**
Date of decision	**:**	**22 January 2020**

FINAL DECISION

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Background

1. This case concerns a property at Bretby Hall, Burton-on-Trent Derbyshire ("the Property"). It is a historic building currently converted into 30 units of residential accommodation.

2. The upkeep and management of the Property is the responsibility of the Respondents in this case, who, in general terms, are entitled to collect the costs they incur from lessees of the Property through a service charge.

3. The Applicants in this case are the current lessees of units 13 and 17. They applied for an order varying their leases on the grounds that both section 35(2)(e) and section 35(2)(f) of the Landlord and Tenant Act 1987 ("the Act") applied.

4. On 3 December 2019, the Tribunal issued its first decision in this case ("the Initial Decision"). It should be read in full for an understanding of its conclusions, but in essence the Tribunal decided:

    a. section 35(2)(e) did not apply;

    b. the parties agreed that section 35(2)(f) is engaged, and the Tribunal was therefore entitled to make a variation order;

    c. there was no logical or rational basis to justify the existing percentage contributions payable by the lessees of the Property. The percentages used in the leases seemed to be somewhat random;

    d. to achieve a logical and fair apportionment the service charge could be apportioned by the square footage occupied by each flat.

5. In considering what variation order to make, we therefore concluded that we should make a variation so that the percentage figure we adopted for Units 13 and 17 would be based upon a rationale that, when fairly applied to all other Units, would result in the total service charge proportions totalling exactly 100%.

6. We also concluded in the Initial Decision that the correct interpretation of the leases was that the Cottage Lessees were not obliged to contribute towards what we defined as Common Parts Costs.

7. We decided that we did not have sufficient information to be able to calculate a new percentage to adopt for units 13 and 17 and in the Initial Decision, we therefore invited the parties to provide further information and to make proposals for us to consider in relation to the variation.

8. Both parties have now submitted their proposals and further submissions. Neither has asked us to hold a further hearing. This decision is therefore the final decision on the application dated 30 April 2019.

The further submissions

9. The Applicants jointly provided an analysis of the annual expenditure on Common Parts costs, calculating them to be approximately 11% of the annual service charge costs. The floor area of the Cottages is 18.4% of the total floor area of the Property, so 2.2% of the individual lessees service charge percentage needed to be removed from each of the Cottage Leases. The submission set out the impact upon all lessees of this calculation. If adopted, the First Applicant's percentage would be 5.2% (down from the existing lease percentage of 6.16% but higher than 5.07%, the percentage payable if an apportionment based solely on floor area were to be adopted). The same figures for the Second Applicant showed an increase to 1.89% from 1.84% in the lease.

10. The Respondents proposed an alternative solution. Accepting that the existing lease proportions showed recovery of only 96.69% of the service charge (shortfall 3.31%), they said they had secured agreement to put in place four lease variations, being:

    a. The lessees of units 18 and 30 had each agreed to the insertion of 1.5% into their leases as their payable percentages (total 3%);

    b. The lessee of unit 8 had agreed to an increase in the percentage figure in that lease from 1.71% to 1.91% (an increase of 0.2%);

    c. The lessee of unit 10 had agreed to an increase in the percentage figure in that lease from 0.97% to 1.08% (an increase of 0.11%).

11. The Respondents' submission drew the Tribunal's attention to the case of *Morgan v Fletcher* [2009] UKUT 186 (LC). The submission was that that case was authority for the proposition that the Tribunal did not have authority to vary a lease under section 35(2)(f) in the interests of fairness.

12. The Respondents also pointed out that the Applicants had freely entered into their leases in which the fixed percentage figures were contained and should not be entitled to require a change to a contract freely entered into.

Discussion and Determination

13. *Morgan v Fletcher* was a case in which there were eight residential flats in a pair of large semi-detached houses in Cathedral Road in Cardiff. The lessor also owned one of the flats. The service charge proportions totalled 116% of the expenditure incurred by the lessor. The lessor therefore entered into a variation of lease with himself so that he paid only 1/96th of the expenditure in respect of the flat that he owned, and another lessee's proportion was reduced

to 3/96th. The effect was that the lease percentages totalled exactly 100%, but largest flat in the building had to pay 16 times the service charge of the lessor.

14. Six of the lessees applied to vary the leases. The LVT considered that the arrangements put in place by the lessor were unsatisfactory, and it varied the six lessee's leases by reducing the percentages payable by the lessees. The lessor appealed.

15. The question at the appeal was whether the Upper Tribunal could make a variation order, as the jurisdiction to make an order depended upon whether the lease "fails to make satisfactory provision" with respect to the computation of a service charge (see section 35(4) of the Act). The lessor's argument was that the only circumstance under which a lease failed to make satisfactory provision for the computation of a service charge is if the aggregate amounts exceeded or were less than 100%. As the recoverable service charge was 100%, following the variations the lessor had put in place, the LVT could not vary the lease.

16. The Upper Tribunal considered the circumstances surrounding the passing of the Act in order to interpret it. The Act closely implemented the recommendations of the Nugee Report 1985, in which the authors considered that variation of a lease is justified where the scheme set out in the leases is seriously defective, and the defects have a direct bearing on the upkeep and fitness for human habitation of the flats in the block.

17. His Honour Judge Jarman said in paragraphs 17 and 18 of the decision:

> "17. ... the authors of the report and the promoters of the then bill had in mind two situations which it was intended to avoid. The first is that the aggregate of service charges payable in respect of a block of flats amounts to more than 100 per cent of expenditure, thus giving the lessor a surplus over monies expended. The second situation is where the aggregate is less than 100 per cent, thus producing a shortfall. That is a situation which fails to promote the proper maintenance of the block.
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> 18. Each of those situations is avoided if the service charges payable aggregate to 100 per cent. The view may be taken that is it is also desirable, or just as desirable, to avoid a situation where the contributions are unfairly disproportionate such as in the example cited by the respondents or indeed the facts of the present case. But in my judgment that is a mischief of a different nature to that contemplated by the report and the promoters of these provisions. It relates to fairness as between tenants, rather than to whether the lessor makes a profit or has an incentive to maintain the block ... ."

18. Judge Jarman's conclusion was that as the aggregate service charge did total 100%, there was no jurisdiction to vary the leases. It could not be said that the

leases failed to make satisfactory provision with respect to the computation of the service charge. He did not consider that he was entitled to take fairness into account.

19. Turning now to the impact of *Morgan v Fletcher* to this case, as it is binding authority upon us, we have to resile from our view expressed in the Initial Decision that any variation order we make should reflect what we consider to be a "fair" allocation of service charge proportions. But we still think we are entitled (in theory) to make an order, as the parties accept that section 35(2)(f) is engaged.

20. We do not think that the current unsatisfactory proportions in the lease are having an effect upon the upkeep and maintenance of the Property. This has not been suggested by any party and was not apparent on our inspection.

21. The focus of our decision should be on resolving the shortfall in the contributions towards the service charge, so that the contributions to the service charge total 100%.

22. We invited the Respondents to consider a section 36 or a section 37 application, indicating that we did not think the current proportions were fair, and following our findings in paragraph 117 of the Initial Decision. The Respondents have resisted our suggestions to look more holistically at the allocation of service charge cost at the Property, and that is an option that they are entitled to exercise.

23. The First Applicant currently pays 6.16% of the service charge cost and the Second Applicant 1.84%. They are the only applicants, and so the only lessees against whom we might make an order. The only order that we could make in respect of the Applicants' leases that would resolve the shortfall would be to increase their service charge proportion. As we said in paragraph 121 of the Initial Decision, we do not intend to make such an order. It would be perverse.

24. The Respondents' proposal to vary four other leases so that the aggregate recoverable service charge is 100% resolves the issue that this Tribunal faces.

25. Our conclusion is that the law severely constrains us from making the order sought by the Applicants. The jurisdiction under section 35 of the Act does not work well to resolve what may arguably have been unfair decisions on apportionment that were nevertheless freely entered into in a binding contract.

26. Our decision is therefore that we make no order varying the Applicants' leases.

27. We were invited by the Respondents to delay the issuing of this order until the deeds of variation proposed by them had been entered into. We see no benefit in this. Should the Respondents decide not to implement their proposal, the

shortfall that would still exist would be their problem to resolve, not the Applicants. We cannot see any situation arising whereby we could reduce the Applicants' service charge proportion bearing in mind the conclusions we have reached in this decision, and short of a willingness by other lessees and/or the Respondents to revisit this issue jointly.

Costs

28. In section E of his application form, the First Applicant applied for an order under section 20C of the Landlord and Tenant Act 1985 that any costs incurred by the Respondent should not be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by any tenant or other person specified in the application. In essence, the Applicants have not succeeded in this application, and we cannot see that it would be just and equitable for either of the Applicants to be excused their contribution towards the Respondents costs that they seek to recover through the service charge. We reject that application.

29. The First Applicant also applied for an order under paragraph 5 (we think he probably meant paragraph 5A) of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 for an order reducing or extinguishing liability to pay litigation costs as an administration charge. Both parties have indicated that they intend to pursue costs claims against the other under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules").

30. Bearing in mind Rule 13(5) of the Rules, we direct that both parties must, if they intend to pursue applications under Rule 13, provide a written statement to the Tribunal and to each other within 28 days after the date this decision is sent to the parties indicating the amount of costs that they seek, how that is calculated, and explaining the basis upon which that party says that Rule 13 is engaged. If such applications are received, the Tribunal will make further directions regarding the disposal of any such applications.

31. With regard to the para 5/5A application made by the First Applicant, this application is stayed until the Respondents indicate to the Applicant(s) whether they intend to seek costs as an administration charge under a provision in the lease. If the Respondents do so intend, it would save further costs to all parties for this application to be dealt with at the same time as any Rule 13 costs applications. It would therefore be administratively sensible for the Respondents to make any claim for costs under the leases from the Applicants within the next 28 days so that they can be dealt with at the same time as any Rule 13 costs applications. We urge them to do so, but consider that we cannot compel them to.

Appeal

32. Any appeal against this decision must be made to the Upper Tribunal (Lands Chamber). Prior to making such an appeal the party appealing must apply, in writing, to this Tribunal for permission to appeal within 28 days of the date of issue of this decision (or, if applicable, within 28 days of any decision on a review or application to set aside) identifying the decision to which the appeal relates, stating the grounds on which that party intends to rely in the appeal, and stating the result sought by the party making the application.

Judge C Goodall
Chair
First-tier Tribunal (Property Chamber)