



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

Case reference : **BIR/47UB/LVT/2020/0003**

HMCTS Code : **V:PAPERREMOTE**

Properties : **The flats at Garrington Road and Forge Avenue, Astons Fields, Bromsgrove, identified on the Schedule**

Applicant : **Citizen Housing Group Limited**

Representative : **Capsticks Solicitors LLP**

Respondents : **The leaseholders shown on Appendix 1**

Type of application : **An application for variation of leases under section 35 of the Landlord and Tenant Act 1987**

Tribunal : **Deputy Regional Judge D. Barlow
Vernon Ward BSc (Hons) FRICS**

Date of Decision : **17 September 2020**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined on the papers.

DECISION

We order that the leases of the Flats at Garrington Road and Forge Avenue, Astons Fields, Bromsgrove are varied in accordance with the terms of the draft order set out in **Appendix 2** below.

BACKGROUND

1. This application concerns three blocks of flats at Astons Field, Bromsgrove, constructed in 2005 to provide affordable housing. Flats 35-43 Garrington Road, are situated within a single block of 9 flats forming part of freehold title WR94038. Flats 39-47 Forge Avenue, are situated within a single block of 9 flats forming part of freehold title WR94501. Flats 48 and 49 Forge Avenue, are two maisonettes forming a single block situated on freehold title WR95903.
2. The Applicant is the registered freehold owner of all three titles and landlord of the Flat leases.
3. The Flat leases are all long term residential leases, granted for a term of 99 years commencing in 2005.
4. The Applicant landlord applied to vary the Garrington Road Flat leases under s35 of the Landlord and Tenant Act 1987 (“the Act”) to correct an error in the drafting that will allow for the landlord to recover the whole of the service charge costs incurred by the landlord.
5. The Applicant has also applied under s35 of the Act to vary the Forge Avenue Flat leases to ensure that the landlord can recover the whole of the service charge costs expenditure.

The Landlord and Tenant Act 1987

6. The Act provides:

s35 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—*

...

(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.

...

(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.

S 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.*

S38 (1)(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.

Details of the variations requested

7. In essence, the Applicants submission is that the Garrington Road Leases make provision for seven of the nine leases to pay a specified proportion of service charge provision of 1/11th and the other two leases 11.11% (roughly 1/9th). There are only 9 Flats within the Garrington Road block and the correct proportion to allow 100% recovery of the service charge costs should be a 1/9th proportion for all nine leases.
8. The Forge Avenue leases all provide for a specified proportion of 1/11th which is correct, but the definition of the “*Building*” for which incurred costs are recoverable, is by reference to “*the block of Flats...shown edged green on the plan..*”. The Forge Avenue lease plans incorrectly show only one of the two blocks on Forge Avenue Estate, edged green on each plan. This limits the landlord’s recovery to 9/11th of the service charge expenditure in respect of Flats 39-47 Forge Avenue and 2/11th of the service charge expenditure for Flats 48 and 49 Forge Avenue.
9. The Applicant also seeks a variation to bring the costs of general services provided to the “Estate” on which the blocks are situated, within the service charge provisions. The leases do not currently make specific reference to general Estate services.
10. The specific variations requested to address the defects in the leases are as follows:

Garrington Road Lease Variations

- (1) The expression “Service Charge Specified Proportion of Service Provision (Clause 7)” in the Particulars is to be deleted and replaced with the following wording:

*Service Charge Specified Proportion of Service Provision (Clause 7):
1/9th part*

- (2) Clause 7(5) shall be amended to include the words “*and the Estate*” after the words ‘and provision of services for the Building’ so that it reads as follows:

The relevant expenditure to be included in the Service Provision shall comprise all expenditure incurred by the Landlord in connection with the repair management maintenance and provision of services for the Building and the Estate and shall include (without prejudice to the generality of the foregoing):

Forge Avenue Lease Variations

(1) The definition of “Building” in the Particulars is to be deleted and replaced with the following wording:

Building: the blocks of flats erected on part of the Estate and shown edged green on the plan annexed hereto.

(2) The Plan attached to the lease is to be substituted for the new plan annexed to the application/order*

(3) Clause 7(5) shall be amended to include the words “*and the Estate*” after the words ‘and provision of services for the Building’ so that it reads as follows:

The relevant expenditure to be included in the Service Provision shall comprise all expenditure incurred by the Landlord in connection with the repair management maintenance and provision of services for the Building and the Estate and shall include (without prejudice to the generality of the foregoing):

*New lease Plans attached to the application show both Blocks situated on the Estate edged green.

11. The Garrington Road leases variation at paragraph (1) and the Forge Avenue leases variations at paragraphs (1) and (2) are intended to rectify the inadequate drafting of the leases which do not make satisfactory provision for recovery of 100% of the expenditure from the contributing lessees, thus engaging section 35(2)(f) of the Act - (“the Proportions issue”).
12. The variation to clause 7(5) of the Garrington Road leases (para. (2)) and the Forge Avenue leases (para. (3)), is requested because the Applicants contend that the leases do not make satisfactory provision for the recovery by the landlord of its covenanted expenditure on general Estate maintenance, thus engaging section 35(2)(e) of the Act - (“the recovery of Estate Expenditure issue”).
13. The terms of the leases are relevant to both the Proportions issue and the recovery of Estate Expenditure issue. The relevant terms are now set out.

The Lease

14. The form of lease used for Garrington Road and Forge Avenue, are for the purposes of this application, identical.
15. **Clause 5** contains the Landlord’s covenants. The paragraphs relevant to the service charge are to be found at paragraphs 5(3) and 5(4).

“5(3) That (subject to payment of rent and service charge....) the Landlord shall maintain repair redecorate and renew:

5(3)(a) the roof foundations and main structure of the Building and all external parts thereof.....

5(3)(b) the pipes sewers drains wires cisterns and tanks and other.....in under and upon the Building.....

5(3)(c) the Common Parts

5(4) That subject as aforesaid....the Landlord will keep the Common Parts of the Building adequately cleaned and lighted.”

16. **Clause 7** contains the service charge provisions. The relevant paragraphs are at clauses 7(1), 7(4) and 7(5).

“7(1)(b) “Specified Proportion” means the proportion specified in the Particulars.

7(1)(c) “the Service Provision” means the sum computed in accordance with sub-clauses (4) (5) and (6) of this clause.

7(1)(d) “the Service Charge” means the Specified Proportion of the Service Provision.

...

7(4) The Service Provision shall consist of a sum comprising:

7(4)(a) the expenditure incurred by the Landlordupon the matters specified in sub-clause 5 of this clause...

...

7(5) The relevant expenditure to be included in the Service Provision shall comprise all expenditure incurred by the Landlord in connection with the repair management maintenance and provision of services for the Building and shall include (without prejudice to the generality of the foregoing):

7(5)(a) the costs of and incidental to the performance of the landlord’s covenants contained in Clauses 5(2) 5(3) and 5(4)

...

7(5)(e) All additional improvements or services which the Landlord may from time to time in the future consider appropriate or necessary in the interests of good estate management”

17. The following defined expressions in the Particulars of the leases are of relevance:

“Estate: *The land buildings and amenity areas at Breme Park Bromsgrove Worcestershire comprised in above title numbers and shown edged blue on the plan annexed hereto.” **

“Building: *The block of flats erected on part of the Estate and shown edged green on the plan annexed hereto” ***

“Service Charge Specified

Proportion of Service

Provision (Clause 7):” [11.11%” Flats 37 and 43 Garrington Road]

[1/11th part” Flats 35, 36, 38-42 Garrington Avenue]

[1/11th part” Flats 39-49 Forge Avenue]

*The title number specified in the Garrington Road leases is WR 94038. The title numbers specified in the Forge Avenue leases are WR94501 and WR95903.

**The existing lease plans for Flats 39-47 Forge Avenue only show the extent of the Block containing those Flats edged green. The lease plans for Flats 48 and 49 Forge Avenue only show the extent of the Block containing those Flats edged green

18. The following definition in Cause 1 of the leases is also relevant:

“1.2((b) “Common Parts” *means the entrance landing halls lifts staircases corridors and other parts (if any) of the Building and any estate road parking area or garden appurtenant to it which are intended to be or are capable of being enjoyed or used by the Leaseholder in common with the occupiers of the other flats in the Building.”*

19. No objections have been received from the lessees of the Garrington Road estate. One objection has been received from Mr and Mrs Winney, the lessees of Flat 41 Forge Avenue. Mr and Mrs Winny object to the proposed variations on the grounds that when they purchased the Flat the service charges were payable for their group of flats only and that if two additional blocks of flats were included in their service charge the charges will increase considerably and devalue their property.

20. The Applicant has responded to the objection, submitting that the variations will not increase the overall costs of providing the services to Forge Avenue Estate. **There will be 11 flats sharing the costs so individual service charge contributions are unlikely to increase.** The Forge Avenue leases as drafted, intended that the individual service charge contributions would be 1/11, which

demonstrates an intention that the 9 flats and 2 maisonettes situated on the Forge Avenue Estate would form a distinct costs code. There is no prejudice, as the variation will provide for the 11 lessees of Forge Avenue Estate to share equally, the costs of maintenance of the two blocks situated on the Forge Avenue Estate.

21. Unhelpfully, the Applicant has not provided any explanation of how the service charge currently operates in relation to the Proportions issue and the recovery of Estate Expenditure issue. It is not clear if the landlord is currently recovering 100% of the Service Provision from the lessees, notwithstanding the current lease provisions, or is making up what could amount to a substantial shortfall, from its own funds. The Applicant's submissions highlighted above, in response to Mr and Mrs Winney's objection, suggest the former, and the purpose of the application is presumably therefore to regularise the current regime operated by the landlord.
22. There does not appear to be any evidence of substantial prejudice to any person who is not a party to the application that could not be compensated by an award of compensation under s38(1) of the Act, but as no submissions have been made by Mr and Mrs Winney or the other leaseholders concerning the value of any loss or disadvantage, the Tribunal is unable to consider the issue of compensation.

Tribunals deliberations on the Proportions issue.

Garrington Road leases

23. The Tribunal is satisfied that the definition "Service Charge Specified Proportion of Service Provision (Clause 7)" in the Garrington Road leases, does not currently allow for full recovery of the Service Provision. There are 9 leases within the Block, two of which (Flats 37 and 43) specify a proportion of 11.11%, which is roughly 1/9th. The other seven specify a proportion of 1/11th. The remaining definitions and expressions within the lease are consistent with an intention that the 9 leases within the Block would contribute equally to the Service Provision. There is no evidence of a contrary intent. The Tribunal is therefore satisfied that Flats 35, 36, 38-42 Garrington Avenue were intended to contribute an equal 1/9th proportion of the Service Provision and that the Garrington Road leases fail to make satisfactory provision for the landlord to recover the Service Provision expenditure in full. To achieve consistency, and allow for full recovery of the Service Provision expenditure, the Tribunal finds, for the above reasons, that the Garrington Road leases should be varied as set out in the draft Order at Appendix 2.

Forge Avenue leases

24. There are 11 Flats on the Forge Avenue Estate contained within two Blocks. The Blocks are situated on different titles. The larger Block, containing 9 Flats, 39-47

is on Title No WR94501 and the smaller Block containing two maisonette Flats, 48 and 49, is on Title No WR95903. The definition of the “Estate” within the leases is: “*the land and buildings and amenity areas..... comprised in above title numbers and shown edged blue on the plan annexed hereto.*” Both title numbers appear in the Particulars above the definition and the extent included within the blue edging on the lease Plan includes the registered extent of both titles.

25. The relevant expenditure included in the Service Provision is defined principally by reference to the cost of maintenance and repair of the Building, which is defined as: “*The block of flats erected on part of the Estate and shown edged green on the plan annexed hereto*”. The lease Plans for Flats 48 and 49 show the Block containing those 2 flats edged green. The lease plans for Flats 39-47 show the Block containing those 9 flats edged green. The specified proportion in all 11 leases is 1/11th which indicates an intention that all 11 lessees of the Forge Avenue Estate would contribute equally to the Service Provision expenditure. There is no evidence of any contrary intention.
26. Unfortunately, the limitation of the green edging on the lease Plan to include just the Block within which the flat is situated (rather than both Blocks) has the effect of limiting recovery to 9/11th of the Service Provision expenditure for Flats 39-47 and 2/11th of the Service Provision expenditure for Flats 48 and 49. The Tribunal is satisfied that the leases were intended to make provision for the 11 lessees on the Forge Avenue Estate to contribute equally to the Service Provision expenditure. That intention is inconsistent with the current lease Plans, and the leases therefore fail to make satisfactory provision for the landlord to recover the Service Provision expenditure in full. The Tribunal finds, for the above reasons, that the Forge Road leases should be varied as set out in the draft Order in Appendix 2.

Tribunal’s deliberations on the recovery of Estate Expenditure issue

27. The Tribunal did not inspect the Property but has viewed it on Google Earth and Street View. The external parts of the Garrington Road and Forge Avenue Estates, appear to exclusively comprise accessways from the surrounding estate roads and surfaced car parking areas. These areas are surrounded strips of cultivated landscaping. The Tribunal finds that the leases, as currently drafted, include the landlord’s expenditure on maintenance and repair of these areas within the Service Provision for the following reasons:
 - (a) The definition “**Common Parts**” includes “*and any estate road parking area or garden appurtenant to it which are intended to be or are capable of being enjoyed or used by the Leaseholder in common with the occupiers of the other flats in the Building*”

(b) Clause 7(4) provides that the “*Service Provision*” means the sum computed in accordance with sub-clauses (4) (5) and (6) of this clause.

(c) Clause 7(5)(a) includes the costs of and incidental to the performance of the landlord’s covenants contained in Clauses 5(2) 5(3) and 5(4)

(d) Clause 5(3) requires that the Landlord shall maintain repair redecorate and renew: Clause 5(3)(c) the Common Parts

28. Inclusion of the external areas of the *Estate* within the definition *Common Parts* indicates an intention to bring the accessways, car parking areas and cultivated areas within the Service Provision expenditure. There is no evidence of any general Estate expenditure that falls outside the Common Parts definition and the Tribunal is not therefore satisfied that the leases, as drafted, fail to make satisfactory provision for the landlord to recover expenditure on the external areas of the *Estate*.

Judge D Barlow

17 September 2020

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).

APPENDIX 1
SCHEDULE OF RESPONDENTS

Property Address	Owner name/Respondent	Date of Lease
Flat 35, Garrington Road, Astons Field, Bromsgrove, B60 3GF	Mr Andrew Coventry	01/03/2006
Flat 36, Garrington Road, Astons Field, Bromsgrove, B60 3GF	Mr Simon Reeve	28/04/2006
Flat 37, Garrington Road, Astons Field, Bromsgrove, B60 3GF	Mr L. Millership and Miss K. Troth	30/09/2005
Flat 38, Garrington Road, Astons Field, Bromsgrove, B60 3GF	Mr P. Thompson	12/06/2006
Flat 39, Garrington Road, Astons Field, Bromsgrove, B60 3GF	Mr P. Buckley	28/07/2006
Flat 40, Garrington Road, Astons Field, Bromsgrove, B60 3GF	Mr O. Mills	26/06/2006
Flat 41, Garrington Road, Astons Field, Bromsgrove, B60 3GF	Miss Hannah Delli-Bori	15/12/2006
Flat 42, Garrington Road, Astons Field, Bromsgrove, B60 3GF	Mr S. Webber and Mrs M. Webber	29/09/2006
Flat 43, Garrington Road, Astons Field, Bromsgrove, B60 3GF	Mr K. Higman	21/12/2005
Flat 39, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Mr P. Whitehouse and Mrs C. Whitehouse	20/12/2005
Flat 40, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Mr P. Whitehouse and Mrs C. Whitehouse	09/12/2005
Flat 41, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Mr D. Winney and Mrs S. Winney	03/11/2005
Flat 42, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Mr S. Wright and Mrs L. Wright	07/10/2005
Flat 43, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Mr J. Taylor	13/10/2006
Flat 44, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Emma Louch	14/12/2005
Flat 45, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Mr N. Harris	18/11/2005
Flat 46, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Mr J. Gittus	20/09/2005
Flat 47, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Mr M. Rutter	09/12/2005
Flat 48, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Mrs Clare Ann Wood	29/09/2005
Flat 49, Forge Avenue, Astons Field, Bromsgrove, B60 3GG	Miss K.A. Davitt	01/09/2006

APPENDIX 2

THIS ORDER relates to the leases of:

- 1) 9 leasehold flats at 35-43 Garrington Road, Astons Fields, Bromsgrove, B60 3GF (“the Garrington Road Leases”)
- 2) 11 leasehold flats at 39-49 Forge Avenue, Astons Fields, Bromsgrove, B60 3GF (“the Forge Avenue Leases”)

UPON the Tribunal considering an application by the Applicant to vary the terms of each of the Garrington Road Leases and the Forge Avenue Leases;

AND UPON the Tribunal being satisfied that, pursuant to section 35(2)(a), (e) and (f) of the Landlord and Tenant Act 1987, the leases fail to make satisfactory provision with respect to the repair and maintenance of the flats or the building containing them, the recovery by one party to each 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 the computation of service charges;

AND PURSUANT TO section 38(1) of the Landlord and Tenant Act 1987;

IT IS ORDERED THAT:

1. Garrington Road Leases:

- (1) The definition “Service Charge Specified Proportion of Service Provision (Clause 7)” in the Particulars of the lease is to be deleted and replaced with the following wording:
“Service Charge Specified Proportion of Service Provision (Clause 7): 1/9th part”

2. Forge Avenue Leases:

- (1) The definition “Building” in the Particulars of the lease is to be deleted and replaced with the following wording:
“Building: the blocks of flats erected on part of the Estate and shown edged green on the plan annexed hereto.”
- (2) The Plan attached to the lease is to be substituted for the new Plan annexed to this Order

3. HM Land Registry is directed to enter a note in the register of the leasehold titles of the Garrington Road Leases and the Forge Avenue Leases; and in the relevant reversionary freehold titles, confirming that the terms of the registered lease has been varied by an Order of the Tribunal dated 17 September 2020 and to file a copy of this Order under each title.