FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/00MG/LVL/2020/0001**
Property	:	**13 Hinsley Walk, Bletchley, Milton Keynes, MK3 6FE (also known as Plot Number 150)**
Applicant	**:**	**Trinity (Estates) Property Management Limited (Manager for the Head Landlord)**
First Respondent	**:**	**Stonewater Limited (Head Lessee & Landlord of Under Lessee)**
Representative	**:**	**Shakespeare Martineau LLP**
Second Respondent	**:**	**Ms Jordan Barrows (Under Lessee of the Shared Ownership Lease)**
Date of Application	**:**	**6th March 2020**
Type of Application	:	**To vary a lease or leases (s35 Landlord and Tenant Act 1987)**
Tribunal	**:**	**Judge J R Morris**
Date of Decision	**:**	**16th October 2020**

DECISION

Decision

1. The Tribunal orders that pursuant to section 38 of the 1987 Act the Tribunal orders the following variation to the Head Lease:
   In respect of the Service Charge Percentage in the Particulars of the Lease relating to the interior of the Block, the words "and 150" are deleted and the word "and" is inserted between "143" and "144"

2. The Tribunal also orders that pursuant to section 35(10) of the 1987 Act the amount of the Internal Block Charge shall not be payable by the First and Second Respondent to the Applicant for the years ending 30th November 2017, 2018, 2019 and 2020, by way of compensation for the disadvantage caused by the Variation to the Head Lease.

Reasons

Background

The Leases

3. From the Application Form and supporting documents to this Application the parties make the following background points in respect of this application for variation:

   a) By a lease referred to here as the "Head Lease" dated 3rd December 2007 between (1) Bryant Homes Central Limited, (2) Trinity Estates Property Management Limited, (the Applicant, referred to in the Head Lease as the "Company") and (3) Jephson Homes Housing Association plot numbers 105-110 (Inclusive), 128, 130-132 (inclusive), 139-141 (inclusive), 143, 144 and 150 were let for a term of 150 years from 1st January 2001. A copy of the Head Lease was provided.

   b) It is understood that the Head Lease was assigned to the First Respondent, Stonewater (2) Limited, in 2014 (following a merger between Raglan Housing Association and Jephson Housing Association).

   c) Jephson Homes Housing Association, now Stonewater (2) Limited, the First Respondent, granted subleases to the individual plots on a shared ownership basis, one of which was granted in respect of plot 150 otherwise known by its postal address of 13 Hinsley Walk, Milton Keynes, MK3 6FE i.e. the Property. The sublease of the Property is referred to here as the "Shared Ownership Lease". The Shared Ownership Lease is dated 11th November 2009 and between (1) Jephson Homes Housing Association and (2) Kerry Gregory and is for a term of 99 years from 28th November 2007.

   d) The Shared Ownership Lease was assigned to Ms Jordan Barrows, the Second Respondent, in March 2017.

e) The First Respondent is charged a Service Charge by the Applicant in accordance with Schedule 7 of the Head Lease. The service charges incurred by the First Respondent are passed on to the Second Respondent, who occupies the Property pursuant to Clauses 2 and 3 of the Shared Ownership Lease.

f) The Service Charge Percentage as it relates to the interior of the Block is defined in the Head Lease as *"… 5.5556% per Unit excluding units 105, 106, 128, 143, 2144 and 150 in relation to the interior of the Block*" ("the Internal Block Charge").

The Previous Case

4. On 19th January 2020 the Respondents of this Application sought a determination under section 27A of the Landlord and Tenant Act 1985 (CAM/00MG/LIS/2020/0003) as to whether the part of the Service Charge referred to as the Internal Block Charge was payable in respect of the Property for the years ending 30th November 2017, 2018, 2019 and 2020. This is referred to hereafter as the "Previous Case".

5. It was common ground between the parties that the Service Charge Percentage as defined in Clause 1 of the Head Lease requires all units to pay "*5.5556% per Unit excluding Units 105, 106, 128, 143, 144 and 150 in relation to the interior of the Block*" and that therefore the First Applicant has no liability to pay the Internal Block Charge in respect of the Property (Unit 150) under the Head Lease as drafted. Since under Clauses 2 and 3 of the Shared Ownership Lease the Second Respondent was only liable to pay the Service Charge under the Head Lease neither the First of Second Respondent is liable to pay the Internal Block Charge.

6. The Respondents submitted in the Previous Case that the Leases had been taken on the clauses as drafted i.e. excluding unit 150 from paying the Internal Block Charge; Paragraph 4 of Schedule 7 did not allow the lease to be varied so as to require unit 150 to pay the Internal Block Charge; and estoppel by convention did not apply to the years in issue.

7. The Applicant submitted in the Previous case that this exclusion is unfair and is a clear error in the Head Lease as drafted and that the Respondents should pay the Internal Block Charge. The reasons given were that:
   a) the Property is accessed via a communal area comprising a staircase and an external entrance door on the ground floor, which it shares with the neighbouring flat and which pays a contribution.
   b) The Property is the only flat which has a communal area to which it does not contribute to the maintenance which cannot be what the Landlord intended when the Head Lease was drafted.
   c) Only the flats that have their own external door do not contribute to the maintenance of internal common parts because they do not have the benefit of the internal services.

8. The Applicant put forward four submissions:

1) The omission of the Property from paying the Internal Block Charge is an error on the face of the Head Lease.
2) The Lease allowed the Respondent to vary the service charge and make the Applicants liable for the internal Block Charge under Paragraph 4 of Schedule 7.
3) If the first two submissions do not apply then the Lease should be varied pursuant to section 35 of the Landlord and Tenant Act 1987.
4) The Respondents should not be able to re-claim the Internal Block Charge already paid by reason of an estoppel by convention. The Internal Block Charge had been paid since 2007.

9. By a Decision dated 28th July 2020 the Tribunal determined that the Internal Block Charge was not payable by the First or Second Respondents for the years in issue in respect of the Property. With regard to the submissions the tribunal determined, giving reasons which are set out in that Decision, that:
   1) The basic principle is that a lease is to be followed and, in this instance, the Head Lease is unequivocal.
   2) None of the circumstances itemised in Paragraph 4 of Schedule 7 of the Head Lease applies to removing the Property from the list of those Units excluded from paying the Internal Block Charge.
   3) An Application to vary the Head Lease had been made.
   4) The Tribunal was of the opinion that it could only consider whether an estoppel by convention existed in respect of the years in issue and it found that any convention ceased on the assignment to the Second respondent. Therefore, the estoppel did not apply to the years in issue.

The Present Application

10. As mentioned above, on 6th March 2020 the Applicant made an Application to vary the Head Lease under section 35 of the Landlord and Tenant Act 1987 so as to make it an express term that the First Respondent is required to contribute 5.556% towards the Internal Block Charge. In effect to delete the Property, referred to in the Head Lease as Unit 150, from the Service Charge Percentage definition referred to in Paragraph 1 of Schedule 7 and set out in Clause 1, the Particulars to the Lease, which states "*5.5556% per Unit excluding Units 105, 106, 128, 143, 144 and 150 in relation to the interior of the Block*" (i.e. "the Internal Block Charge"). Where appropriate this is referred to as the "Present Application".

11. On 7th May 2020 the Procedural Judge issued Directions noting that the Lease Variation Application would require substantial Directions, preparation and third-party involvement. Accordingly, it was appropriate to stay the Lease Variation Application and examine the question of payability as a preliminary issue:
   a) if under the current terms of the Head Lease a service charge is payable in respect of the Property for the Internal Block Charge, the Lease Variation Application will be redundant and the Tribunal can make a determination as to the reasonableness of the relevant charges.
   b) if no such service charge is payable, the Tribunal may arrange a case management conference to consider the directions referred to above in respect of the Lease Variation Application.

12. As the Decision in the Previous Case dated 28th July 2020, determined that the Internal Block Charge was not payable by the First or Second Respondents for the period in issue in respect of the Property, the Tribunal lifted the stay on Application Number CAM/00MG/LVL/2020/0001 and issued Directions on 31st July 2020.

13. From the Statements of Case provided in the Bundle for the Previous Case it appeared that the variation to the Head Lease required by the Applicant is that the words "and" should be inserted between the numbers "143" and "144" and the word "and" and the number "150" should be deleted from the Service Charge Percentage definition in Schedule 7 which currently states "*5.5556% per Unit excluding Units 105, 106, 128, 143, 144 and 150 in relation to the interior of the Block*". It also appears that if the Head Lease was varied in this way in order to require Unit 150 (the Property) to pay the 5.5556% of the Internal Block Charge, the Shared Ownership Lease would not need to be varied to give the effect the Applicant desires. This is because the Shared Ownership Lease passes on the Service Charge of the Head Lease in its entirety directly to the Under Lessee. Any variation in the Head Lease in this case is therefore automatically reflected in the Shared Ownership Lease. Hereinafter referred to as the "Proposed Variation".

14. It further appeared that the variation desired by the Applicant would affect the Applicant and the Respondents but would not affect any other persons, in that the percentage payable by the other Units would not be altered by the variation.

15. On the basis of this, contrary to what is common in these cases, the Tribunal Judge did not consider a case management conference was required and was of the opinion that the matter could be dealt with by consideration of the papers alone. It was added that if either party wanted an oral hearing, they were to make such request to the Tribunal in writing giving reasons prior to 21st September 2020. No request was received.

16. In addition, the Applicant is concerned that the Respondents should not be able to claim reimbursement of the Internal Block Charge paid since 2007, and therefore the Applicant requested the Variation to be effective from the date of grant of the Head Lease which was 3rd December 2007.

17. The Tribunal Judge noted in the Directions that the legislation does not make any provision for the time when the variation should commence. In the circumstances the view was taken that a variation, if determined, would take effect from the date of the order. The Applicant is of a different opinion; therefore, the parties should address this as an issue in their Statements of Case.

Description of Development, Property & Contributions

18. No inspection was made but from the parties' Statements of Case the Property is part of a purpose-built residential development known as 'Phase 2 Bletchley

Park' ("the Development") and comprises 9 houses and 33 flats in 11 Blocks. There are 18 flats which share internal communal areas.

19. The Property is a first floor flat built over a garage and is accessed via a communal area comprising a staircase and an external entrance door on the ground floor which it shares with the neighbouring Plot 149, the postal address of which is flat number 11 Hinsley Walk.

20. The 18 flats that are accessed via a communal external entrance door are by plot number: 107, 108, 109, 110, 130, 131, 132, 133, 138, 139, 140, 141, 145, 146, 147, 148, 149 and 150.

21. There are 5 flats that are accessed via their own external doors which are by plot number: 105, 106, 128, 143 and 144.

22. The Property is one of 18 properties at the Development that use a communal external entrance door and common areas. Except for the Property, the lessees of all the other flats have covenanted to contribute 5.5556%each towards the costs of the services carried out in connection with the internal common areas (the Internal Block Charge). The aggregate of these proportions is therefore 94.4452%.

23. As currently drafted the Head Lease exempts the current owner of the Property from having to contribute anything towards the Internal Block Charge. As a result, the Applicant is unable to recover 100% of its expenditure in respect of the Internal Block Charge.

24. The Applicant submits that the Head Lease fails to make satisfactory provision with respect to the matters set out in section 35((2)(f) of the Landlord and Tenant Act 1987.

25. The Tribunal noted that relevant provisions of the leases were as follows.

The Head Lease

(1) The following provisions of the Head Lease are relevant to the case:

(2) The Head Lease relates to Plots 105, 106, 107, 108, 109, 110, 128, 130, 131, 132, 138, 140, 141, 143, 144 and 150 and Garage number 150

(3) Under paragraph 2 of Schedule 4, the First Applicant covenants "*To pay the Service Charge in the manner specified in Schedule 7*"

(4) Under paragraph 11 of Schedule 7, the First Respondent is to pay *"…on account of the Service Charge on each 1st January and 1st July (or such other half yearly dates as shall be notified in writing to the tenant) on half of the Provision Service Charge…*"

(5) Under paragraph 12 of Schedule 7:
"If the Service Charge for any Service Year shall:

12.1 exceed the Provisional Service Charge payment made on account the excess shall be paid by the Tenant to the Company within ten working days after written demand or at the option of the Company on the next day for payment by the Tenant

12.2 be less than such payments on account the overpayment shall be allowed by the Company to the tenant as a credit against payments to become due or (in the Service Year ending on or after the expiry of the Term) shall be repaid by the Company to the Tenant"

(6) The "Provisional Service Charge" is defined in paragraph 1 of Schedule 7 as: "*the amount which in the opinion of the Company shall from time represent a fair and reasonable estimate of the Service Charge for the Service Year in question Provided that should it appear necessary or appropriate to adjust the Provisional Service Charge during the Service Year the provision Service Charge may be increased or decreased (as the case may be) by the Company at any time.*"

(7) The "Service Charge" is defined in paragraph 1 of Schedule 7 as: "*the service charge Percentage of the Annual Expenditure*"

(8) The "Annual Expenditure" is defined in paragraph 1 of Schedule 7 as: "*the aggregate expenditure incurred or to be incurred by the Company during a Service Year in or incidentally to providing or in respect of all or any of the Services (after giving credit for any Insurance money received under any policy*)"

(9) The Service Charge Percentage is defined in Clause 1 of the Lease as:
"3.0303% per Unit in relation to the exterior of the Block
5.5556% per Unit excluding Units 105, 106, 128, 143, 144 and 150 in relation to the interior of the Block (referred to in this Decision as the "Internal Block Charge")
6.6667% in relation to the Garage, Unit 150 only
3.7037% per Unit excluding Unit 150 in relation to the Parking Spaces
2.8571% per Unit in relation to the Estate".

(10) Paragraph 4 of Schedule 7 states:
"*If at any time during the Term the property comprising the Block and/or the Estate and/or the Common Parts is increased or decreased on a permanent basis or the benefit of any of the heads of Services is extended on a like basis to any adjoining or neighbouring property or if as a result of the final measuring of the Demised Premises or other units in or the numbers of the Demised Premises or other units in the Block and/or the Estate or if some other event occurs a result of which is that any of the service charge percentages are no longer appropriate to the Demised Premises the relevant service charge shall be varied by the Company in a fair and reasonable manner in the light of the event in question with effect form the date of service of written notice by the Company to the Tenant of such event and specifying the variation and all references to the relevant service charge percentage shall be construed as so varied*"

(11) Paragraph 18.2 of Schedule 4 states:
On the occasion of every transfer of the Demised Premises or of a Unit for the unexpired portion of the Term and in every under-lease which may be granted to insert a covenant by the assignee, transferee or under lessee (as the case may be) directly with the Company to observe and perform the covenants conditions and obligations on the part of the Tenant appearing in the Lease…

Shared Ownership Lease (Underlease)

(12) The following provision of the Shared Ownership Lease (Underlease) are relevant to the case:

(13) Clause 2 of the Underlease states:

…PAYING…. a sum equal to that expended by the Landlord in complying with its covenants in the Superior Lease to pay the Yearly Rent and Service Charge and other monies reserved under the Superior Lease which may from time to time be due from the Landlord to the Superior Landlord pursuant to the terms of the Superior Lease

(14) Clause 3 states:

3.1.3 To pay as additional rent without any deduction or set off on demand the Yearly Rent and Service Charge and other monies reserved under the Superior Lease which may from time to time be due from the Landlord to the Superior Landlord pursuant to the terms of the Superior Lease PROVDED THAT where such monies shall not be immediately ascertainable by the Landlord payment by the Leaseholder shall be based on reasonable estimates provided by the Landlord with subsequent adjustment to accord with actual payments made by or due from the Landlord to the Superior Landlord pursuant to the terms of the Superior Lease

3.1.4 To pay as rent and by way of indemnity to the Landlord all monies due pursuant to Clause 3.1.3 hereof where the Leaseholder shall have failed to make payment to the Superior Landlord or the Superior Landlord shall have demanded the same from the Landlord

Statements of Case

26. In accordance with Directions the Applicant and Respondents provided statements of case.

Applicant's Case

27. The Applicant referred to the Previous Decision and the relevant parts of the Head Lease. In particular Paragraph 2 of Schedule 4 which requires the First Respondent "*To pay the Service Charge in the manner specified in Schedule 7*". The Service Charge is defined in Schedule 7 as "the Service Charge Percentage of the Annual Expenditure" which is set out in the Particulars as:
"3.0303% per Unit in relation to the exterior of the Block

5.5556% per Unit excluding Units 105, 106, 128, 143, 144 and 150 in relation to the interior of the Block (referred to in this Decision as the "Internal Block Charge")
6.6667% in relation to the Garage, Unit 150 only
3.7037% per Unit excluding Unit 150 in relation to the Parking Spaces
2.8571% per Unit in relation to the Estate".

28. The Applicant stated that it is a party to the Head Lease in its capacity as Management Company and it was appointed by the then Landlord to carry out the management and maintenance obligations at the Development. The Applicant said it had no capital interest in the Development and held the Service Charge in trust for the Tenants at the Development under section 42 of the Landlord and Tenant Act 1987.

Justification for the Variation

29. The Applicant submitted that there was an anomaly in respect of the Internal Block Charge. 18 flats including the Property, are accessed via a communal external entrance door into a communal area, including a staircase off which each flat including the Property has its own front door. All these flats except the Property contribute 5.5556% of the costs associated with the Internal Block Charge which include cleaning and maintenance, fire and emergency lighting maintenance and a contribution towards the internal redecoration fund. The aggregate of the contribution made by the 17 flats is 94.4452%. If the Property were to contribute 5.5556%, the same amount as the other flats, this would be a 100%.

30. The five flats which do not contribute to the Internal Block Charge all have their own external entrance doors.

31. Since 2007 the Applicant has calculated the First Respondent's contribution as if the Head Lease had stipulated that the Property pay 5.5556% rather than the defective 'nil' and the First Respondent and its predecessors have until now paid the amount without challenge. The Applicant said that the First Respondent was aware of this in that every year a budget service charge was sent identifying the contributions of each flat which showed the Property as contributing 5.5556% of the Internal Block Charge. Copies of the Head Lease were provided together with an example service charge budget for year ending 30th November 2008.

32. The Applicant referred to the Previous Case in which it was found that none of the circumstances itemised in Paragraph 4 of Schedule 7 of the Head Lease applies to removing the Property from the list of those Units excluded from paying the Internal Block Charge.

33. The Applicant therefore said that it had to apply to make the Variation Application in order to correct what it submitted was a clear error. Without this variation the Applicant is left in an impossible position. The costs would have to be apportioned between the 17 Tenants.

34. The Applicant said it sought to rely upon Section 35(2)(f) of the Landlord and Tenant Act 1987 in "*that the lease fails to make satisfactory provision with respect … to the computation of a service charge payable under the lease*"

35. The Applicant referred to the Upper Tribunal case of *Brickfield Properties Limited v Paul Botten* [2013] UKUT 133 (LC) at paragraph [4]
"Thus, if after the Transfer Date the provisions of the leases were operated in accordance with their existing terms Daejan would not be able to recover 100% of the costs of management etc of the remaining six blocks but instead would only be able to recover 85.55% thereof. This is just such a circumstance as is envisaged in section 35(2)(f) and (4) of the Landlord and Tenant Act 1987 as amended (as to which see below) as being circumstances in which an application can be made to the LVT to vary the leases so as to ensure that the aggregate of the amounts recoverable should equal the whole of the relevant expenditure rather than be less than this whole."

36. The Applicant said that this statement indicated that the present situation was inequitable and that the Tribunal should exercise its discretion. It added that it was fair and reasonable for the First Applicant to contribute towards the Internal Block Charge as it clearly benefited from the services carried out under this heading.

Justification for Backdating

37. The Applicant sought for the variation to be backdated to the date of commencement of the term of the Head Lease because it would be appropriate and just to do so in all the circumstances. In *Brickfield Properties Limited v Paul Botten* the Upper Tribunal held that a tribunal has a broad discretion and power to backdate the variation and that there is nothing in the wording of the statutory provisions to indicate that a variation can only take effect prospectively. Reference was made to paragraph [26]:
"However as regards paragraph (f) of section 35(2), if a landlord is entitled from a certain date to recover less than (or perhaps more than) 100% of the expenses of providing the services etc, then this inappropriate level of recovery is the defect. The purpose of the statute is to cure the defect. There is nothing in the statute to indicate an intention to leave the defect in place for an indeterminate period until the date of an application to the LVT or perhaps until the date of the decision of the LVT – i.e. there is nothing in the statute indicating an intention only to cure the defect prospectively from one of these later dates rather than to deal with the defect from the time that it arises."

38. The Applicant said that the First Respondent had conducted itself from 2007 until 2019 as if the Head Lease was varied in the manner applied for and therefore it would be unconscionable for the First respondent now to claim the Internal Block Charge should be recalculated for a period during which the Head Lease was not varied. Reference was made to paragraph [33(3)] of *Brickfield Properties Limited v Paul Botten:*
"The lessees had enjoyed the services etc during the relevant period. The lessees would obtain an unintended windfall if the variation was not backdated."

39. The Applicant added that the notion of an unintended windfall is of particular significance in this case as the First Respondent has over the years no doubt received full reimbursement from its subtenant at the time, in respect of the Internal Block Charge.

40. The Applicant submitted that there is no prejudice to the First Respondent in not receiving back payment and referred to paragraph [34] of *Brickfield Properties Limited v Paul Botten:*
"Similarly the loss to the lessees of this unintended windfall cannot in my view constitute the type of "loss or disadvantage" which is contemplated in section 38(10) and in respect of which compensation should be paid – or if it does fall within such "loss or disadvantage" the Tribunal should not think fit to order compensation in respect of this loss of the windfall. Were it otherwise the power to vary the lease so as to deal with the defect contemplated in section 35(4) would be of little or no value, because the party applying for the variation (which could be the landlord, but also be the tenants in a case where a landlord was entitled to more than 100% of the costs of the services etc) could only obtain the necessary amendment, so as to bring the recovery to 100% of the relevant costs, on payment of a sum by way of compensation which would in effect wipe out the benefit of curing the defect."

Justification regarding Compensation

41. The Applicant submitted that having always contributed to the Internal Block Charge the First Respondent will not face a loss as a result of the variation sought requiring compensation to be paid. Reference was made to paragraph 58 of *Triplerose Limited v Stride* [2019] UKUT 99 (LC):
"We agree that there are benefits in having a lease structure which provides fully and fairly for the recovery of service charges and that the inadequate arrangements in the present lease would discourage prudent and well-informed purchasers. The proposed variation of the lease would remove this detrimental effect (at least insofar as the subject flat is concerned) and, in our opinion, would increase the value of the lease to a degree."

42. As such the Applicant stated that the variation works to the advantage of the Tenants including the First Respondent who owns a number of flats at the Development which contribute to the Internal Block Charge.

First & Second Respondent's Case

Re Justification for the Variation

43. The First and Second Respondents stated that the terms of the Head Lease were accepted on the basis that the Property was excluded from paying the service Charge relating to the internal Block Charge. The First Respondent was not in the knowledge that a shortfall was created by being excluded from the Internal Block charge, that information was solely in the knowledge of the Applicant and the Landlord.

44. The First Respondent accepted that it paid the service charge including the Internal Block Charge without dispute. This was presumably because the

officers of the First Respondent's predecessor made the incorrect assumption that the Applicant was making service charge demands in accordance with the Head Lease. Due to the effluxion of time the First respondent is unable to explain why this error was not picked up sooner. It would be unreasonable for the Applicant to take advantage of its own error.

45. As soon as the Second Respondent commenced occupation of the Property, she raised the issue with regard to the internal Block Charge with the First Respondent. it was clear that she had relied upon the service charge information in the Shared Ownership Lease and the Head Lease and as a result noted she would not be responsible for the Internal Block Charge.

46. The Respondents also stated that, based on an advertisement for 11 Hinksey Walk, a two-bedroom flat that shares the common parts with the Property, the service charge is far lower than that being charged for the Property.

47. The First Respondent approached the Applicant on 30th July 2019 regarding the payment of the Internal Block Charge by the Second Respondent and was offered an ex gratia payment of £100.00 by way of compensation.

48. The Applicant subsequently sought to validate the levying of the internal Block Charge against the property by seeking to vary the Head Lease provisions under Clause 4 of the Seventh Schedule. It is only now that the Applicant seeks to vary the Head Lease.

49. The Respondents stated that the Second Applicant should not be penalised for the Landlord's error by bearing the cost of the shortfall which they are in a position to cover.

50. The Respondents noted that the Applicant rereferred to the Upper Tribunal decision in *Triplerose Limited v Stride* [2019] UKUT 99 (LC). In that case even though the service charge contributions created a shortfall nevertheless this was not sufficient to deem the lease as unsatisfactory and require variation merely because it was poorly drafted. Therefore, the Applicant cannot rely on this argument.

51. The Applicant has previously offered a reduced contribution of 2.914% to the Internal Block Charge which has been rejected. Such amount would still leave a shortfall demonstrating that the Applicant and the landlord are in a position to cover any shortfall.

Re Justification for Backdating

52. Any variation, if determined, should be made from the date of the Order. There would be no question of the First Respondent receiving a windfall as it is only seeking recovery of the Internal Block Charge paid by the Second Respondent from the date of the assignment of the Shared-ownership Lease to her.

53. The First Respondent expressed surprise that the Second Respondent was hardly mentioned in their case as it is the Second Respondent who would be

prejudiced by the variation and it would be unfair and unreasonable if the Second respondent was prejudiced as a result of the error.

54. The Respondents noted the Applicant referred to the Upper Tribunal decision of *Brickfield Properties Limited v Paul Botten*. In response the Respondents stated that in that case the landlord had attempted to agree variations with the leaseholders without success and only then went to the tribunal. The present case is different in that for two years the Applicant claimed there was no error and only when it conceded there was, went to the tribunal without any consultation with the Respondents.

Re Justification regarding Compensation

55. If the Tribunal determines that a variation is appropriate then the Respondents seek compensation for the increased level of Service Charge by imposition of the internal Block Charge. The Second Respondent would suffer loss by the variation due to the Applicant and Landlord's error as envisaged by secton 38(10) of the Landlord and Tenant Act 1987.

Applicant's Reply

56. The Applicant made the following points in reply to the Respondent's Case:

1) The Applicant was unable to comment on the apportionment of the Service Charge which was assessed by the Landlord when the Head Lease was drafted or the arrangements are made between the First and Second Respondent regarding the Service Charge.

2) The acceptance of the Head Lease terms was a matter for the First Respondent's predecessor.

3) Any error in the Head Lease was not that of the Applicant.

4) The Applicant is not able to comment on when the Second respondent raised the issue with the First respondent only that it was raised with the Applicant on 21st May 2019.

5) The Applicant noted that the difference between the service charge paid by the Second Respondent and 11 Hinlsey Walk is based on a Rightmove advertisement. The Applicant referred to the Service Charge matrix for the year ending 2017 in which 11 Hinlsey Walk and the property paid the same Service Charge.

6) The Applicant stated that it had charged the Property an Internal Block Charge since 2007.

7) The Applicant stated that since the issue was first raised it has not shied away from the difficulties that the matter raised and has sought to resolve it.

8) The Applicant's contractual relationship is with the First respondent and therefore has no involvement with the re-charging arrangements with regard to the Service Charge.

9) The Second Respondent would not suffer any prejudice as she would continue to receive the benefit of the services carried out.

Decision

57. The Tribunal found that the proposed variation of the Head Lease would under the terms of the Shared Ownership Lease mean that the Second Respondent would pay the Internal Block Charge and so be affected by the variation. Therefore, the Tribunal considered the position of both Respondents when making its determination as well as the Applicant.

58. The Applicant submitted that the variation came within Section 35(2)(f) of the Landlord and Tenant Act 1987 in "*that the lease fails to make satisfactory provision with respect … to the computation of a service charge payable under the lease*".

59. In deciding whether or not the Proposed Variation should be made the Tribunal identified four issues:
    1. Whether the Head Lease failed to make satisfactory provision for the computation of a service charge under section 35(2)(f) of the 1987 Act;
    2. Whether the Proposed Variation as drafted made the satisfactory provision required.
    3. Whether the Proposed Variation should commence at the date of the Order or be backdated to the commencement of the Lease or other intermediate date.
    4. Whether the Proposed Variation would be likely substantially to prejudice any respondent to the application, or any person who is not a party to the application and that an award would not afford adequate compensation, or that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

60. The Tribunal considered all the evidence submitted on each issue.

1. Satisfactory Provision

61. The Tribunal noted that the effect of the Proposed Variation required by the Applicants was to require the Respondents to pay a share of the Internal Block Charge with regard to the Property, which it is exempted from in the present Head Lease (and hence the Shared Ownership Lease).

62. The Applicant submitted that the Property shared a common area, the maintenance costs of which were met by the Internal Block Charge of the Service Charge. All flats in a similar position at the Development contributed to the Internal Block Charge, including the flat with which the Property shared the common area. However, under the Head Lease the Property did not contribute. The only other flats that did not contribute were those that did not have a shared common area and therefore nothing to maintain.

63. The Applicant submitted that this was an error which led to a shortfall in the amount that could be collected in respect of the Internal Block Charge. The Property had been added to a list of exempted flats which did not have a shared common area and should not have been included in that list. As a result, the Head Lease did not make satisfactory provision for the computation of a service charge pursuant to section 35(2)(f) and the related paragraph (4) of the 1987 Act.

64. Leases as initially drafted, sometimes intentionally and sometimes unintentionally/erroneously, differentiate between the contributions to be made by leaseholders of flats to the service charge. Some will make provision for altering the contributions where, for one reason or another, such as the expansion of a development, the initial contribution, as stated in the lease, is inappropriate or unfair. The more detailed and complex the contributions e.g. separate contributions for the maintenance and repair of external and internal common areas, the more likely the alteration provisions will need to be engaged. Where these provisions are not included in the lease then an application has to be made to vary the lease under the 1987 Act.

65. Here Paragraph 4 of Schedule 7 of the Head Lease does allow for an alteration in the amount of the service charge contribution in specified circumstances. However, as set out in paragraphs [82] to [86] of the Previous Decision, none of these circumstances apply in this case. Therefore, resort has to be made to the 1987 Act.

66. There are a number of examples of leases where the differentiation is unintentional or erroneous. For example, where the ground and upper floors of a building are converted and service charge contributions accordingly set. Subsequently a further floor is added or the basement is converted or the existing flats are subdivided and/or leases are granted at different times and in different forms.

67. In *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) (*Triplerose*) one of the flats was subdivided and the leases of flats were granted at different times and in different forms. As a result, the contributions for items in the service charge differed. Under the service charge provisions of the respective leases, all four leaseholders were liable for the insurance premiums, three were liable for a quarter each of the costs of structural repair and maintenance, two were liable for one third each of the internal decoration and two were liable for a quarter each of the management charge. The leases were all different and the reason for the proposed variation was to rationalise the service charge arrangement.

68. In *Cleary v Lakeside Developments Limited* [2011] UKUT 264 (LC) (*Cleary*), the case for the lessor was that the cost to the lessor of employing a manager, which was borne by the lessor, with contributions from two of the lessees, was unsatisfactory and the proposed variation was that all lessees should contribute.

69. In both cases it was held that the fact that different tenants make different contributions does not of itself make the lease unsatisfactory. The situation

was a result of the contractual arrangements freely entered into between lessor and lessees. Although, it was accepted that there might be circumstances where the lack of adequate contributions could render the lease unsatisfactory there was no evidence to show the differences between the leases on the particular facts at the time of the applications that the service charge arrangement was unsatisfactory. Evidence was required.

70. The Tribunal therefore considered whether there was evidence that the Head Lease did not make satisfactory provision for the computation of a service charge.

71. The Tribunal found that the Internal Block Charge was paid by 17 of the flats by reason of them having a shared entrance area, 11 of which (Plot Numbers: 107, 108, 109, 110, 130, 131, 132, 138, 139, 140 and 141) were included in the Head Lease. The Head Lease also included the 5 flats (Plots: 105, 106, 128, 143 and 144) which did not pay the Internal Block Charge by reason of them having their own external doors. Although the Property (Plot 150) shared an entrance area it was in the list of flats that did not pay the Internal Block Charge. Notwithstanding this the First and Second Respondents' predecessors and the First Respondent were invoiced and paid the Internal Block Charge until May 2019.

72. The Tribunal finds that until the Assignment to the Second Respondent in March 2017, the Applicant, the First and Second Respondents' predecessors and the First Respondent accepted that the Property should pay the Internal Block Charge by reason of it having a shared entrance.

73. The number and types of flat included in the Head Lease indicates the original parties were not negotiating individual leases. They had no reason to suppose that Plot 150 was receiving preferential treatment by being exempt from the Internal Block Charge and that the Applicant's predecessor would pay Unit 150's contribution. The Tribunal is of the opinion that the original parties to the Head Lease and the Shared Ownership Lease (the Underlease) believed that when they entered the agreements on 3rd December 2007 and 11th November 2009 respectively that they were entering an agreement by which all the flats with a shared entrance area would contribute to the Internal Block Charge and that this would include the Property. In addition, that they would have no reason to doubt that the aggregate of the contributions would cover a 100% of the costs. They were not entering an agreement in which they believed the Property would not contribute. Therefore, the inclusion of the Property in the list of exempted flats was an error.

74. If the error had been found by the parties earlier the Applicants would have sought a correction of the Lease and the First and Second Respondent's Predecessors and the First Respondent would have stopped paying the Internal Block Charge long before it was raised by the Second Respondent.

75. Unlike *Triplerose* and *Cleary* the variation is not intended to rationalise mixed service charge provisions negotiated at different times but a means of correcting an error and an affirmation of what the parties have assumed was

an existing situation. The error meant *that the lease fails to make satisfactory provision with respect … to the computation of a service charge payable under the lease.*

76. The Tribunal finds support for the view that Section 35 of the Landlord and Tenant Act 1987 is intended to correct errors such as where 100% of a service charge cannot be recovered due to a defect in the lease from the Upper Tribunal case of *Brickfield Properties Limited v Paul Botten* [2013] UKUT 133 (LC) (*Brickfield*) at paragraph [4] as quoted by the Applicant. The circumstances of this case are further reflected at paragraph [26] which states: *"The purpose of section 35 is to enable a party to apply to the LVT for a variation of the lease in circumstances where the lease fails to make satisfactory provision with respect to certain matters. In other words, the purpose is to cure a defect in the lease. It is possible that the drafting of a particular lease plus the circumstances which arise in that particular case combine together to produce a situation where it is foreseen that at some future date there will arise a defect in the lease, which is not presently apparent. However, in my view it is much more likely that the relevant defect arises first and has existed for a time before a party recognises the existence of the defect and seeks to do something about it.*

77. The Respondents submit that the case is not applicable because the Applicant had disputed that there was an error. The Tribunal noted that when the provision in the lease was pointed out to it in May 2019 the Applicant initially appeared to be somewhat incredulous that the error could have passed unnoticed for so long and sought to find a way of correcting the situation by offering a £100.00 compensation and later offering a reduced percentage contribution of 2.914% before applying for a variation. The Tribunal does not find that these attempts vitiate against it determining that the Head Lease is defective.

2. The Proposed Variation

78. The Tribunal found that the Proposed Variation would remedy the error and make satisfactory provision for the computation of the service charge.

3. Proposed Variation Commencement Date

79. The Tribunal then considered the date upon which the Proposed Variation should be commenced. The Applicant requested that it should be backdated to the commencement of the Head Lease. The Respondents were of the opinion that the commencement date should be the date of the order and so in Directions the Tribunal asked the parties to address the point.

80. The Applicant referred the Tribunal to the latter part of paragraph [26] of *Brickfield* quoted earlier in this Decision which states that section 35 is to cure defects which allow a landlord to inappropriately recover more or less than 100% of a service charge. In addition, with regard to section 35(2)(f) there is nothing to say that the correction should only be prospective. The Applicant also said that the First Respondent had conducted itself from 2007 until 2019 as if the Head Lease was varied in the manner applied for and therefore it

would be unconscionable for the First Respondent to now claim the Internal Block Charge should be recalculated for a period during which the Head Lease was not varied. It referred to paragraphs [33(3)] and [34] of Brickfield submitting that if the variation was not backdated the Respondents could potentially obtain the back payments and enjoy an unwarranted windfall as they had benefited from the services provided.

81. The Respondents submitted that the order should commence from the date of it being made. The Respondents said they were only seeking recovery of the Internal Block Charge paid by the Second Respondent from the date of the assignment of the Shared-ownership Lease. It would be unfair and unreasonable if the Second Respondent was prejudiced as a result of the error.

82. The Tribunal considered whether it had jurisdiction to backdate and found that it had, based on His Honour Judge Huskinson's helpful analysis of the 1987 Act in paragraphs [28] to [30] as follows:

> *28. I note the wide words of section 35(1) regarding the nature of the order varying the lease which a party can apply for, namely an order to vary the lease "in such manner as is specified in the application." There are also wide words in section 38(1) which grant the power to the LVT to make an order varying the lease, namely the power is to make an order varying the lease "in such manner as is specified in the order." Also section 38(4) provides that this variation may either be the variation specified in the relevant application "or such other variation as the tribunal thinks fit." There is nothing in the wording of these provisions to indicate that the order varying the lease can only be an order varying the lease prospectively from some particular date, such as the date of the application to the LVT or the date of the LVT's order.*
>
> *29. Accordingly there is nothing in the statute to indicate that the order varying the lease (or the order that the parties vary it made under section 38(8)) can only have prospective effect from some particular date, e.g. the date of application to the LVT or the date of the LVT's order. Indeed, far from there being some such limitation as to the nature of the variation that can be ordered, the statute expresses the nature of the variation which can be applied for and which can be ordered in wide words.*
>
> *30. There is a further indication that there is no limitation upon the effective date from which a variation can be applied for under section 35(1) or can be ordered under section 38. This indication is to be found in section 39(5) which provides that where an order is made for the cancellation or modification of a variation, then the cancellation or modification is to take effect from the date of the making of the order for the cancellation or modification of from such later date as may be specified in the order. The presence of a constraint upon the effective date of an order under section 39(5) and the absence of any equivalent restriction upon the effective date of an order making a variation under section 38 serves to confirm that the statutory draftsman did not intend*

there be a date restriction upon the effective date of an order varying a lease made under section 38.

83. The Tribunal determined that the Proposed Variation to the Head Lease shall commence from the date of its commencement of 17th March 2007. The reasons for doing so are:

a) The error in the Head Lease was in its initial drafting. For the Proposed Variation to be from a date after the commencement of the Head Lease would not be commensurate with the effect of the Internal Block Charge in respect of the other flats that were to pay it or the purpose of the correction which is to remedy the defective drafting.

b) In addition, the Applicant, the First and Second Respondents' predecessors' and the First Respondent had from 2007 to 2017 paid the Internal Block Charge in the same manner as the Proposed Variation. There was no evidence to indicate that throughout the period the services had been provided and paid for through the Internal Block Charge. Therefore, the order being from the date of the commencement of the Head Lease confirms the situation that has existed since the date, irrespective of any intention by the Respondents not to claim back payments.

4. Prejudice and Compensation

84. The Tribunal then considered whether pursuant to section 38(6) of the 1987 Act the Proposed Variation causes any prejudice to the Second Respondent.

85. The Tribunal finds that the Proposed Variation will require the First Respondent and, through the Shared Ownership Lease, the Second Respondent to pay the Internal Block Charge in return for services provided to maintain the common entrance area. As the Second Respondent will in future receive the benefit of those services determines that the Proposed Variation causes no prejudice.

86. Lastly, the Tribunal considered whether under Section 35(10) of the 1987 Act, compensation is payable in respect of any loss or disadvantage suffered by the Respondents.

87. The Tribunal finds that according to the wording of the Head Lease, the Internal Block Charge was not payable and the Second Respondent was aware of this and raised the matter with the First Respondent who subsequently raised it with the Applicant. Following this disclosure, the Applicant sought to correct the error. Although the Applicant, the First and Second Respondents' predecessors and the First Respondent were or ought to have been aware of the error taking into account that the Internal Block Charge was paid since 2007, the Second Respondent was not. However, the Proposed Variation now makes her liable for the Internal Block Charge from the date the Property was assigned to her as it has effect from the commencement date of the Head Lease.

88. The Tribunal finds that the Respondents would be disadvantaged by being required to pay the Internal Block Charge for the years ending 30th November 2017, 2018, 2019 and 2020 during which time they believed that the Internal Block Charge was not payable. Based upon the reading of the Head Lease the Second Respondent would have been advised that the amount of the Internal Block Charge was not payable. As a result, she would not have made any provision for such payment. The Tribunal therefore orders that the amount of the Internal Block Charge should not be payable by the First and Second Respondent to the Applicant for those years, by way of compensation for that disadvantage. If all or part of the Charge has been paid then the amount shall be credited to the Respondents for the year ending 30th November 2021 onwards in accordance with paragraph 12.2 of Schedule 7 of the Head Lease.

Conclusion

89. The Tribunal so orders the Proposed Variation to be made and attaches the Order hereto.

90. The Tribunal orders that the Internal Block Charge should not be payable by the First and Second Respondent to the Applicant for the years ending 30th November 2017, 2018, 2019 and 2020 by way of compensation.

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 – THE LAW

The Law

The relevant law is contained in the Landlord and Tenant Act 1987 sections 35 and 38.

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.

(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.

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.