



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

Case reference : CHI/43UL/LVL/2022/0003 & 0004

Property : Flat 3 & 5, Taliesin Heights, Frith Hill Road,
Godalming, GU7 2EE

Applicant : Taliesin Heights Property Management
Company Limited

Representative : Moore Barlow LLP

Respondent : Mr Adrian Paul Muir

Representative :

Type of application : Application for the variation of a lease
Section 35 Landlord & Tenant Act 1987

Tribunal member(s) : Mrs J Coupe FRICS

Date of decision : 7 February 2023

DECISION

Summary Decision

The Tribunal finds that:

- i. The leases of Flat 3 Taliesin Heights, Frith Hill Road, Godalming, GUY 2EE and Flat 5 Taliesin Heights, Frith Hill Road, Godalming, GUY 2EE fail to make satisfactory provision for a matter as set out in the Landlord and Tenant Act 1987, s.35
- ii. The lease of Flat 3 Taliesin Heights, Frith Hill Road, Godalming, GUY 2EE and Flat 5 Taliesin Heights, Frith Hill Road, Godalming, GUY 2EE should be varied as sought by the Applicant.
- iii. These lease variations are to take effect as of the date of this decision.

The reasons for our decision are set out below.

The Application

1. This is an application made by the freehold proprietor, Taliesin Heights Property Management Company Limited ('THPMC'), of the property known as **Taliesin, Frith Hill Road, Godalming, GU7 2EE** ('the Property'). The Property is a purpose-built block of flats containing nine residential units held on long leases. The Property is registered at HM Land Registry under title number SY181402.
2. The Respondent is the long leaseholder of two flats within the Property:
 - i. Flat 3 Taliesin Heights, Frith Hill Road ('**Flat 3**'). The title to Flat 3 is registered at HM Land Registry under title number SY409365. The lease is dated 03.09.1971.
 - ii. Flat 5 Taliesin Heights, Frith Hill Road ('**Flat 5**'). The title to Flat 5 is registered at HM Land Registry under title number SY410340. The lease is dated 06.09.1971
3. The Applicant seeks a variation to the long leases of Flat 3 and Flat 5 pursuant to section 35(2)(a) of the Landlord and Tenant Act 1987 ('LTA 1987') on the grounds that the leases fail to make satisfactory provision in respect of the repair and maintenance of the building containing the flat.

The Applicant's case

4. The Applicant is a Resident's Management Company comprising each long leaseholder within the Property. Accordingly, the sole source of income from which to fund repairs and maintenance of the Property is as provided for by the leases of the flats in the Property.
5. The leases of Flat 3 and Flat 5 are in identical terms and, at Clause 3(e) each provides:

'IN accordance with the said general scheme and for the benefit of the Lessors and the lessees of the remainder of the flats on the said estate the Lessee HEREBY COVENANTS with the Lessors and the Company and the lessees for the time being of the other flats on the estate and with each of them that the Lessee will from time to time and at all times hereafter during the said term:

...

(e) contribute and pay on demand a proportionate part of all costs charges and expenses from time to time incurred in performing and carrying out the obligations and each of them under Part VI of the said Schedule in connection with the Building and/or estate ...'

6. Part VI, paragraph 1 of the Schedule to both leases provides:

'Subject to the due performance by the Lessee of his obligation to contribute to the costs charges and expenses of the Company as herein provided:

(1) The Company will whenever reasonably necessary maintain repair decorate and renew: (a) the external walls and structure and in particular the foundations gutters and rainwater pipes of the building ...'

7. The Applicant states that the leases, as currently drafted, are defective in so much as they only provide for retrospective collection of funds from the lessees, that is, after any expense has been incurred. Clause 3(e) does not permit the Applicant to demand in advance, funds required for necessary or anticipated expenditure.

8. The Applicant claims such provision is unsatisfactory in respect of repair and maintenance of the Property on the following grounds:

- a. The Applicant is responsible for carrying out repairs and maintenance to the Property which, inevitably, require the expenditure of money.
- b. The only source of such money is the lessees.
- c. Under the current lease terms the Respondent is only required to pay for costs already incurred.
- d. Accordingly, the Applicant is required to expend the funds prior to demanding a share from the Respondent.
- e. Where such funds are not already held by the Applicant, the Applicant has no means of funding any required works.

9. The Applicant refers to this as an *"unworkable circular situation"*. Where the Applicant holds insufficient funds to meet the costs of works, such work cannot be carried out. Where there is no incurred expenditure, the Applicant is prevented from demanding funds from the Respondent. Without funds from the Respondent, the Applicant is unable to carry out the required works.

10. The Property is experiencing water ingress, as a result of which reparatory works are required. The Applicant, under the terms of each lease, is obliged to carry out these works. However, with insufficient funds held in the service charge account, the Applicant has no means of meeting this financial commitment. Additionally, the Applicant advises that urgent safety works are required to the balconies of the flats, without which the lessees have been advised to cease using the balconies. The Applicant advises that such works will be subject to consultation, as required under section 20 of the Landlord and Tenant Act 1985.
11. The Applicant argues that prior to placing contracts for either of these major works sufficient funds are required. Under the terms of the lease such expenditure must have been incurred prior to the Respondent being obliged to pay their appropriate share of the costs. The alternative method of funding being a voluntary contribution from each leaseholder, based on an estimate of the cost of the works.
12. As at the date of application and with the exception of the Respondent, each lessee has made a voluntary contribution equal to one ninth of the anticipated costs of the major works. The Respondent has declined to make such a payment. Accordingly, the Applicant is unable to raise sufficient funds in order to commit to a works contracts and, in doing so, fulfil the Applicant's repairing and maintenance obligations.
13. The Applicant proposes a variation to the Respondent's leases, the purpose of which is to enable the Applicant to demand payment in respect of prospective expenditure, thereby ensuring the Applicant has the financial means to meet cost commitments.
14. The Applicant advises that each of the other lessees have voluntarily agreed to enter in a Deed of Variation amending their respective leases to include the words "*to be incurred*" as suggested in the proposed variation.
15. The Respondent has been invited to agree the same variation but declined to do so. The Applicant considers such refusal to be unreasonable and advises that it will seek costs from the Respondent.

Variation Sought

16. The Applicant seeks a variation of the leases of both Flat 3 and Flat 5 so that Clause 3(e) reads (amended text in bold underlined):

"IN accordance with the said general scheme and for the benefit of the Lessors and the lessees of the remainder of the flats on the said estate the Lessee HEREBY COVENANTS with the Lessors and the Company and the lessees for the time being of the other flats on the estate and with each of them that the Lessee will from time to time and at all times hereafter during the said term:

...

*(e) contribute and pay on demand a proportionate part of all costs charges and expenses from time to time incurred **or to be incurred** in performing and carrying out the obligations and each of them under*

The Respondent's case

17. The Respondent contends that the proposed variation is unnecessary and objects on the following grounds:
- a. Flat 3 was purchased in 2001 and Flat 5 in 2005. No issues with the lease were identified either during conveyancing or throughout the mortgage applications.
 - b. Since 2001 major and minor repairs have been affected.
 - c. On occasion, works are 'batched' to spread the cost of scaffolding a site with difficult access.
 - d. As a Director of THRMC during the periods 2004-2008 and 2014-2020, no concerns were ever raised with him about the lease nor was any suggestion of modification ever made. Works during such periods were undertaken.
 - e. In 2021, a s.20 Notice pursuant to the Landlord and Tenant Act 1985 ('LTA 1985') was issued. The Respondent disputed the subsequent demand for payment and thereafter felt pressurised by the Applicant's representative to make settlement. By way of alternative, the Respondent proposed that the Applicant recommence the s.20 consultation process. However, the Applicant declined and, instead, requested a variation of the lease, to which the Respondent objected.
 - f. The Respondent sought an explanation and financial support to obtain independent legal advice. The Respondent also questioned why the Applicant was not taking the opportunity to fully modernise the lease rather than expend funds on a sole variation. No explanation was provided.
 - g. The Respondent argues that estimates are subject to negotiation.
 - h. The proposed variation will enable the Directors of THRMC to circumvent the s.20 LTA 1985 consultation process and demand any monies "*they see fit*".
 - i. Service charge funds are being expended on the proposed lease variation and Tribunal application when such funds should be spent on maintenance of the Property.
 - j. At a meeting with a Director of THRMC on 31 March 2022, no resolution was reached as the Director was committed to the proposed variation.
 - k. An offer, made by way of a letter dated 8 April 2022, which included a proposal to allow the works to proceed without the need for a lease variation was rejected by the Applicant.
 - l. The Respondent argues that he has behaved reasonably in trying to avoid the situation and that he is being unfairly pressurised into accepting a lease variation which is "*costly unnecessary and potentially harmful*".

The Tribunal's decision and reasons

18. The grounds on which an application may be made under s.35 LTS 1987 to vary a long lease of a flat are set out in s.35(2). They are, that the lease fails to

make ‘*satisfactory provision*’ with respect to one or more of the specified matters. One such matter is the ‘*repair or maintenance of the building containing the flat in question, the building containing the flat, or 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*’ (s.35(2)(a)(i-iii).

19. Under the terms of the lease the freeholder is obliged to carry out repairs and maintenance to the Property. Such works involve the expenditure of money. As a lessee owned company, the only source of income available to the freeholder to meet these costs is the service charges, as contributed by the leaseholders. Under the current terms of the lease, a leaseholder is only obliged to pay for those costs already incurred. In other words, the freeholder is required to expend the money before it can recover the sums through the service charge. However, the freeholder is unable to incur the expenditure before holding the required funds. Accordingly, the Tribunal agrees with the Applicant that the situation is “*unworkable*” in certain circumstances.
20. Where advance contributions have voluntarily been made by the lessees or where sufficient funds are already held, contracts for repair and maintenance can be placed and the current situation avoided. However, where insufficient funds are held and a Respondent chooses not to make a voluntary contribution, as is their entitlement, the freeholder could, as in this instance, find themselves in a catch twenty-two situation, whereby they are unable to place work contracts and thereby fulfil their repairing obligations.
21. The Respondent argues that, historically, there have been no problems with the collection of service charges in relation to major works or the payment of invoices so incurred. However, the Respondent does not explain whether, historically, sufficient service charge funds had already been held for any such works or whether lessees voluntarily paid demands when so requested. Irrespective of which, the Respondent does not address in his submissions the situation whereby insufficient funds are held and the lease prevents the company from demanding service charges in advance of the expenditure being incurred.
22. The Respondent relies on a statement that neither his conveyancing solicitors nor his mortgage lenders took issue with the terms of the lease. The Tribunal does not consider the due diligence of the Respondent’s solicitors or the lending criteria of his mortgage provider relevant to the application before it.
23. The Respondent is concerned that the Applicant intends to rely on the proposed variation to sidestep the s.20 LTA 1985 consultation process. Such a concern is unwarranted. The provisions of s.20 LTA 1985 apply to both the current lease and, if approved, a varied lease. The company is obliged to meet all statutory obligations in this regard.
24. The Respondent states that where the Applicant proposes to affect a variation, the opportunity should be taken to modernise the entire lease. The Tribunal finds that the fact that the Applicant has chosen to propose only a sole variation to the lease and not to simultaneously consider additional amendments is irrelevant to this application.
25. The Tribunal finds that the Respondent’s statement that the variation is “*costly unnecessary and potentially harmful*” unproven. The Tribunal finds

that the Applicant has demonstrated that the lease fails to make satisfactory provision with respect to repairs and maintenance.

26. The Tribunal is therefore satisfied that the lease of Flat 3 and Flat 5 fails to make satisfactory provision with respect to the repair and maintenance of the building as defined under s.35(2)(a).
27. Given the above finding in respect of section 35, the Tribunal has jurisdiction to vary the leases. Under section 38 LTA 1987 the Tribunal “*may*” make an order varying the specified leases unless section 38(6) applies. The variation may be that proposed by the Applicant or, such variation as the Tribunal thinks appropriate.
28. Section 38(6) provides that a Tribunal shall not make an order 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.*
29. Section 38(10) empowers the Tribunal to order that compensation be paid to a party in respect of any loss or disadvantage that the Tribunal considers that a party is likely to suffer as a result of the variation. In this instance, the Respondent has failed to demonstrate any loss or prejudice that would arise as a consequence of the Tribunal making an order of variation. Accordingly, the Tribunal makes no order of compensation.
30. The Tribunal is satisfied that the current lease provisions are insufficient and unsatisfactory and, accordingly, that they fail to make satisfactory provision with respect to the repair or maintenance of the building. Accordingly, The Tribunal finds it appropriate to vary the lease of Flat 3 and Flat 5 so as to enable the freeholder to demand service charge funds in regard to costs ‘to be incurred’.
31. The Respondent should be reassured that lessees are afforded the protection of section 27A of the Landlord and Tenant Act 1985 whereby costs must be reasonably incurred, and, furthermore, that the consultation requirements of s.20 of the Landlord and Tenant Act 1985 apply, irrespective of any variation.
32. The Tribunal approves the use of the wording of the variation proposed by the Applicant and orders that Clause 3(e) of the Respondents lease of Flat 3 and Flat 5 be varied in the following terms:
 - (e) *contribute and pay on demand a proportionate part of all costs charges and expenses from time to time incurred or to be incurred in performing and carrying out the obligations and each of them under Part VI of the said Schedule in connection with the Building and/or estate ...’*

33. The Tribunal orders that the variation specified above is to take effect as of the date of this Decision.
34. Further, the Tribunal orders that the Applicant shall ensure that this order is registered at HM Land Registry in respect of each of the Respondent's leasehold titles.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

SCHEDULE

Sections 35, 37 & 38 of the Landlord and Tenant Act 1987

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 $\frac{3}{4}$ 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.

37.— Application by majority of parties for variation of leases.

(1) Subject to the following provisions of this section, an application may be made to the appropriate tribunal in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.

(2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats which are in the same building, nor leases which are drafted in identical terms.

(3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.

(4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.

(5) Any such application shall only be made if—

(a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or

(b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.

(6) For the purposes of subsection (5)—

- (a) in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and
- (b) the landlord shall also constitute one of the parties concerned.

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.

IN THE MATTER OF SECTION 35 OF THE LANDLORD AND TENANT ACT 1987

IN THE MATTER OF:

FLAT 3 TALIESIN HEIGHTS, FRITH HILL ROAD, GODALMING, GU7 2EE and
FLAT 5 TALIESIN HEIGHTS, FRITH HILL ROAD, GODALMING, GU7 2EE

BETWEEN:

TALIESIN HEIGHTS PROPERTY MANAGEMENT COMPANY LIMITED

Applicant

- and -

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- **ADRIAN PAUL MUIR**

Respondent

ORDER

UPON the applications and for the reasons described in the accompanying decision notice

IT IS ORDERED that the Respondents' leases be varied as follows:

- (1) with effect from 7 February 2023 the Respondent's lease of Flat 3 registered under title number SY409365, is amended as set out in paragraph (3) of this order;
- (2) with effect from 7 February 2023 the Respondent's lease of Flat 5 registered under title number SY410340, is amended as set out in paragraph (3) of this order;
- (3) clause 3(e) be amended to read "*contribute and pay on demand a proportionate part of all costs charges and expenses from time to time incurred or to be incurred in performing and carrying out the obligations and each of them under Part VI of the said Schedule in connection with the Building and/or estate ...*"

The Applicant shall ensure that this Order is registered at HM Land Registry in respect of each leasehold title.