FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LVT/2022/0003**
Property	**:**	**Painter House, Sidney Street, London E1 2HU**
Applicant	**:**	**Tower Hamlets Community Housing Limited**
Representative	**:**	**Mr Edward Blakeney (Counsel) instructed by Capsticks Solicitors LLP**
Respondent	**:**	**The leaseholders of the 24 flats at Painter House, as listed in the schedule accompanying the application**
Representatives	**:**	**Mr Peter Mengerink** **Mr Paul Scicluna** **Mr Mohamed Basit**
Type of application	**:**	**Variation of leases pursuant to section 35 of the Landlord and Tenant Act 1987**
Tribunal	**:**	**Judge Jeremy Donegan** **Mrs Evelyn Flint FRICS (Valuer Member)**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**23 May 2023**

DECISION

Decisions of the Tribunal

A. The Tribunal varies the respondents' leases of the twenty-four flats at Painter House, Sidney Street, London E1 2HU ('Painter House') by substituting the word "*Block*" for "*Building*" throughout clauses 7(4), (5) and (7).

B. The terms of the variation are set out in the attached order.

Background and procedural history

1. The application concerns Painter House, which is one of two connected blocks in a mixed-use, purpose-built development registered under title number EGL482597 ('the Development'). The other block is Peter House, 279 Commercial Road, London E1 2PS ('Peter House'). The two blocks are attached and appear to be one property from the outside. However, they are vertically separated on the upper floors and have separate roofs. There is a large commercial unit ('the Commercial Unit') spanning the ground floor of both blocks and residential flats on the upper floors.

2. To the rear of the Development is a small communal garden/terrace, a bicycle shed, three refuse stores, an energy transformer chamber and seven parking spaces. These also form part of the freehold title. Peter House and the Commercial Unit each have their own entrances on Commercial Road, but the Painter House entrance is on Sidney Street. It is not possible to access the upper floors of Painter House from Peter House and vice versa.

3. The applicant is the freeholder of the Development and occupies the Commercial Unit, numbered 285 Commercial Road, as their head office. It also had exclusive use of the seven parking spaces.

4. Painter House is five-storey with twenty-four flats on floors one to five. Peter House is four-storey with fourteen flats on floors one to four. The flats are not all the same size.

5. All the Painter House flats are let on long leases. Only one of the Peter House flats (Flat 14) is let on a long lease. The other flats are let on assured tenancies. There is a lease of the transformer chamber but no lease of the Commercial Unit.

6. The respondents are the long leaseholders of the 24 flats in Painter House. The applicant seeks an order varying these leases under sections 35 and 38 of the Landlord and Tenant Act 1987 ('the 1987 Act'). It does not seek a variation of the Peter House lease.

7. The Tribunal application is dated 31 May 2022 and was accompanied by a detailed statement of case drafted by counsel, Mr Edward Blakeney. Directions were issued on 22 June 2022 and varied on 04 August, 16

September, and 11 November 2022. The application was listed for a face-to-face hearing on 12-14 April 2023.

8. Paragraph 12 of the 04 August directions provided:

"*Any leaseholder who objects to the application shall on or before 11 August 2022 complete the attached reply form, and serve a copy, with their reasons for objecting to the application and whether they want to take part in the proceedings*."

9. A collective response was filed by the leaseholders of Flats 4, 6, 7, 10, 11, 12, 14, 16, 18, 19, 20, 22 and 24 Painter House in early August 2022. This contains detailed objections to the application and was drafted by counsel, Mr Adam Swirsky, instructed on a direct access basis. The leaseholders of Flats 7, 10, 16, 18, 19, 20 and 24 also filed individual objections. The applicant served replies to the collective response and individual objections on 01 and 06 September 2022.

10. The leaseholders of twelve of the Painter House flats have objected to the application ('the Objecting Respondents'). The other twelve have not.

11. The relevant legal provisions are set out in the appendix to this decision.

The leases

12. The Painter House flats are let on shared-ownership leases. All but Flats 4, 9 and 11 are in the same form and were granted in 2007. The hearing bundle contains copies of various leases, including one for Flat 14. This was granted by the respondent (the "*Landlord*") on 19 March 2007 for a term of 125 years from that date. The name of the "*Leaseholder*" has been redacted. Page 5 includes the following definitions:

"Local Authority District	*:*	*London Borough of Tower Hamlets*
Title Number(s)	*:*	*EGL482597*
Property	*:*	*Plot 27 (Flat 14) Painter House Sidney Street London E1 2HU*

PARTICULARS AND DEFINITIONS

...

Estate	*:*	*The land and the premises situate within the land as shown registered under the title number above*
Block	*:*	*Painter House Sidney Street London E1 2HU*
Premises	*:*	*Plot 27 on the 3rd floor of the Block as shown edged red on the Plan and includes the fixtures*

...

Specified Proportion of Service Provision	*:*	*1/38th"*

13. As can be seen from these definitions, the *"Block"* is limited to Painter House whereas the "*Estate"* extends to all land/property within the freehold title (EGL482597).

14. Further definitions are to be found at clause 1(2), including:

> *"(b) "the Common Parts" means the lifts hallways entrances landings staircases balconies (save and excepting any exclusively serving any flat within the Block) dustbin enclosure boundary walls or fences and other parts of the Estate and any access areas steps pedestrian ways footpaths or accessway communal play and/or garden areas and car parking spaces (other than those demised) and the forecourts of the Estate and any other areas or facilities in the Block which are used or intended for use by the Leaseholders of the flats within the Block together with the Tenants of the Estate"*

In his opening submissions, Mr Blakeney suggested this definition includes the Commercial Unit and Parking spaces, as it comes within "*other parts of the Estate*". On his case, the words "*…which are used or intended to for use by the Leaseholders of the flats within the Block together with the Tenants of the Estate*" only apply to "*…and the forecourts of the Estate and any other areas or facilities in the Block…".*

15. The Leaseholder's covenants are at clauses 3 and 4 and include, at 3(5):

> *"Forthwith to repair and make good any damage to the Common Parts caused by the Leaseholder or the Leaseholder's family servants or licensees or by any other person under the control of the Leaseholder in such manner as the Landlord shall direct and to its reasonable satisfaction".*

16. The Landlord's covenants are at clause 5 and include the following obligations:

> *"(3) That (subject to payment of the Specified Rent and Service Charge and except to such extent as the Leaseholder or the tenant of any other part of the Block shall be liable in respect thereof respectively under the terms of this Lease or of any other lease) the Landlord shall maintain repair redecorate and renew (or procure the maintenance repair redecoration and renewal of): -*
>
> > *(a) The roof foundations balconies patio areas (if any) and main structure of the Block and all external parts thereof including all external and load-bearing walls with the windows and doors of the outside of the flats within the Block (save the glass in such doors and windows and the interior surface of the walls) and all parts of the Block which are not the responsibility of the Leaseholder under this Lease or any other Leaseholder under a similar lease or other premises in the Block (including for the avoidance of doubt) the Common Parts of the Block and the Estate Provided always the Landlord shall redecorate as necessary the outside doors of the Premises PROVIDED*

FURTHER that the Landlord shall not be liable for the maintenance or repair of any balconies or patio areas resulting from damage thereto caused by or as a result of default of the Leaseholder

...

(5) That every lease or tenancy of premises in the Block hereby granted by the Landlord shall contain covenants to be observed by the tenant thereof similar to those set out in the First Schedule hereto and (save in the case of any premises which may be let at full or fair rents) shall be substantially in the same form as this Lease".

17. Clause 6 contains various provisos, including:

"(4) The Landlord shall have power at its discretion to alter the arrangement of the Common Parts provide that after such alteration the access to and amenities of the Premises are not substantially less convenient than before".

18. The service charge provisions are at clause 7 and include:

"(4) The Service Provision shall consist of a sum comprising –

(a) the expenditure estimated by the Surveyor as likely to be incurred in the Account Year by the Landlord up on the matters specified in Clause 7(5) together with

(b) an appropriate amount as a reserve for or towards such of the matter specified in Clause 7(5) as are likely to give rise to expenditure after such Account Year being matters which are likely to arise either only once during the then unexpired term of this Lease or at intervals of more than one year including (without prejudice to the generality of the foregoing) such matters as the decoration of the exterior of the Building (the said amount to be computed in such manner as to ensure as far as is reasonably foreseeable that the Service Provision shall not fluctuate unduly from year to year) but

(c) reduced by any unexpended reserve already made pursuant to sub-clause (b) in respect of any such expenditure as aforesaid.

(5) The relevant expenditure to be included in the Service Provision shall comprise all expenditure reasonably 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)-

(a) the costs of and incidental to the performance of the Landlord's covenants contained in Clauses 5(2) and 5(3) and 5(4)

(b) the costs of and incidental to compliance by Landlord with every notice regulation or order of any competent

local or other authority in respect of the Building (which shall include compliance with all relevant statutory requirements)

(c) *all reasonable fees charges and expenses payable to the Surveyor any solicitor accountant surveyor valuer architect or other person whom the Landlord may from time to time reasonably employ in connection with the management or maintenance of the Building including the computation and collection of rent (but not including fees charges or expenses in connection with the effecting of any letting or sale of any premises) including the cost of preparation or the amount of the Service Charge and if any such work shall be undertaken by an employee of the Landlord then a reasonable allowance for the Landlord for such work*

(d) *any rates taxes duties assessments charges impositions and outgoings whatsoever whether parliamentary parochial or local or of any other description assessed charged imposed or payable on or in respect of the whole of the Building or in the whole of any part of the common Parts*

(e) *any administrative charges incurred by or on behalf of the Landlord including but not limited to:*

(i) *the grant of approvals under this Lease or applications for such approvals*

(ii) *the provision of information or documents by or on behalf of the Landlord*

(iii) *costs arising from non-payment of a sum due ot the Landlord and/or*

(iv) *costs arising in connection with a breach (or alleged breach) of the Lease*

(f) *description assessed charged or imposed or payable on or in respect of the whole of the Building or in the whole or any part of the Common Parts*

(6) *As soon as practicable after the end of each Account Year the Landlord shall determine and certify the amount by which the estimate referred to in Clause (7)(4)(a) shall have exceeded or fallen short of the actual expenditure in the Account Year and shall supply the Leaseholder with a copy of the certificate and the Leaseholder shall be allowed or as the case may be shall pay forthwith upon receipt of the certificate the Specified Proportion of the excess or the deficiency*

(7) *The Landlord will for the period that any premises in the Building are not let on terms making the tenant liable to pay a Service Charge corresponding to the Service Charge payable under the Lease provided in respect of such premises a sum equal*

to the total that would be payable by the tenants thereof as aforesaid by way of contribution to the reserve referred to in Clause (7)(4)(b) and the said reserve shall be calculated accordingly

(8) For the avoidance of doubt it is hereby agreed and declared that the provisions of Section 18 to 30 of the Landlord and Tenant Act 1985 as amended shall apply to the provisions thereof".

19. Confusingly clause 7(4), (5) and (7) refers to the "*Building*", which is not defined in the lease.

20. The lease of Flat 4 was also granted in 2007. This follows the wording of the Flat 14 lease, save the numbering has gone awry so the service charge provisions are at clause 28, rather than 7.

21. The leases of Flats 9 and 11 differ from the other Painter House leases in two crucial aspects. They both define the "*Block*" as "*The land as shown registered under the title number above*", being the entire freehold, rather than Painter House. Further, the "*Specified Proportion of Service Provision*" is defined as "*A fair proportion*", rather than 1/38th. The Flat 11 lease was granted in 2007 but the Flat 9 lease was not granted until 2014.

22. This means twenty-two of the twenty-four Painter House leases require the Leaseholder to pay 1/38th of the "*Service Provision*" and two require the Leaseholder to pay a fair proportion. It is unclear why they differ. An added complication is that the draft lease of 10 Painter House differs from the completed lease. The draft has the same definitions of the "*Block*" and "*Specified Proportion of Service Provision*" as the Flat 9 and 11 leases, but the completed version has the definitions in the other Painter House leases (see paragraphs 51 and 90, below).

23. The hearing bundle also contains the lease of 14 Peter House. This was granted by the respondent (the "*Lessors*") to Emily Kathryn Elizabeth Fitch (the "*Lessees*") after she exercised the right to buy this flat under the Housing Act 1985. The lease is dated 24 November 2014 and is for a term of 125 years from that date. The format is markedly different to the Painter House leases. The particulars refer to the "*Building*", defined as "*Peter House, 279 Commercial Road, London, E1 2PS*", rather than the "*Block*".

24. The definitions at clause 1 include:

> ""the *Common Parts*" *means all main entrances passages landings staircases (internal and external) gardens gates access years roads footpaths parking areas and garage spaces (if any) passenger lifts (if any) and other areas included in the Title above referred to or comprising part of the Lessors' Housing Estate and of which the Building forms part provided by the Lessors for the common use of residents in the Building and their visitors and not subject to any lease or tenancy to which the Lessors are entitled to the reversion"*

…

"the Lessors Housing Estate" means the property comprised in the Landlord's title number shown in Land Registry Prescribed Clause LR2.1" (EGL482597).

The Common Parts definition differs from that in the Painter House leases in several respects. Mr Blakeney highlighted the limiting words "*…provided by the Lessors for the common use of residents in the Building and their visitors and not subject to any lease or tenancy to which the Lessors are entitled to the reversion*". In his submission, these clearly exclude the Commercial Unit.

25. The Lessors' covenants are at clause 5 and include:

"5.2 Terms of Other Leases

That every lease or tenancy agreement of a flat in the Building hereto before or thereinafter granted by the Lessors contains or as the case may be shall contain regulations to be observed by the Lessee thereof in similar terms as those contained in Fourth Schedule substantially hereto and also covenants of a similar nature to those contained in Clause 4 of this Lease

5.5 Expenditure of Service Charges

Subject and conditional upon payment being made by the Lessee of the Interim Charge and the Service Charge at the time sand (sic) in the manner hereinbefore provided: -

(a) To maintain and keep in good and substantial repair and condition: -

(i) the main structure of the Building including the principal internal timbers and the exterior walls and the foundations and the roof thereof with its main water tanks main drains gutters and external rain water pipes (other than those included in this demise) or in the demise of any other flat in the Building)

…

(iii) the Common Parts

…".

26. The service charge provisions are in the Fifth Schedule and include:

"1. In this Schedule the following expressions have the following meanings respectively: -

(i) "Total Expenditure" means the total expenditure incurred or to be incurred or to be incurred by the Lessors in any Accounting Period in carrying out their obligations under Clause 5(5) of this Lease less sums expended from the monies set aside under Clause 5(5)(a) or this Lease and any other costs and expenses without prejudice to the

generality of the foregoing (a) the cost of employing managing agents (b) the cost of any accountant or surveyor employed to determine the Total Expenditure and the amount payable by the Lessee hereunder (c) a sum equal to the Lessor's reasonable costs and charges in effecting the administration and management of the Building and of the Common Parts and (d) an annual sum equivalent to the rent of any accommodation owned by the Lessors and provided by them rent free to any of the persons referred to in clause 5(5)(f) of this Lease

(ii) "the Service Charge" means any such reasonable proportion of Total Expenditure as the Lessors shall state is attributable to the Demised Premises

(iii) "the Interim Charge" means such sum to be paid on account of the Service Charge in respect of each Accounting Period as the Lessors or their managing estate agents shall specify at their discretion to be a faire and reasonable interim payment".

27. The Peter House lease differs significantly from the Painter House leases. The key differences for the purposes of this application are:

(a) the use of "*Building*" throughout, which is defined as Peter House, rather than the "*Block*",

(b) the service charge proportion is "*any such reasonable proportion of Total Expenditure*", rather than 1/38th or a fair proportion,

(c) the leaseholder only contributes to costs for the Building (Peter House) and Common Parts with no contribution to Estate costs, and

(d) there is no corresponding provision to clause 7(7) (Reserve contributions for parts not let).

28. The recitals in the Painter leases (both types) do not mention the number of flats in either block or the Development as a whole. Nor do they mention the Commercial Unit. There are no recitals in the Peter House lease.

29. The lease of the transformer chamber was granted by the applicant to EDF Energy Networks (LPN) plc on 06 March 2007 for a term of 99 years from that date. It does not contain service charge provisions.

Proposed lease variations

30. At paragraph 13 of its statement of case, the applicant proposed the following variations:

"13.1 The use of the word "Building" in clause 7 should be varied to read "Block"

13.2 The "Specified Proportion of Service Provision" should be varied to read –

13.2.1 *1/24th rather than 1/38th in respect of costs incurred in maintaining the Block; and*

13.2.2 *1/38th in respect of costs incurred in maintaining the Estate (other than the Block).*

13.2.3 *Alternatively, it should be varied to read "such reasonable proportion of the Total Expenditure as the Lessors shall state is attributable to the Demised Premises"."*

31. In his oral submissions, Mr Blakeney proposed another option for the "*Specified Proportion*" being 1/24th of Block costs and a fair proportion of Estate costs.

32. In his witness statement, Mr Peter Mengerink (one of the Objecting Respondents) requested an alternative variation pursuant to s.36 of the 1987 Act, specifying the service charge proportion for Commercial Unit in the respondents' leases. He suggested this proportion is calculated by an independent expert. There was no formal application for this variation.

The hearing

33. A face-to-face hearing took place at 10 Alfred Place, London WC1E 7LR on 12 and 13 April 2023. Mr Blakeney appeared for the applicant. Mr Mengerink appeared for the Objecting Respondents and was assisted by Mr Mohammed Basit (Flat 14) and Mr Paul Scicluna (Flat 18).

34. The Tribunal was supplied with a substantial hearing bundle (1,348 pages) that included copies of the application, directions, sample leases, statements of case, individual objections, and various witness statements. Mr Blakeney, Mr Mengerink and Mr Scicluna also supplied helpful skeleton arguments. The Tribunal granted a short adjournment during the first morning of the hearing, to give Mr Blakeney time to read one of the skeleton arguments he had not previously seen.

35. The hearing was listed for three days but concluded just gone 1:00pm on the second day. The Tribunal inspected the Development that afternoon, and reconvened the following day, in the absence of the parties, to make its decision.

36. In his opening submissions, Mr Blakeney took the Tribunal through the relevant statutory provisions and lease terms. Any party to a long lease can make an application to vary the lease under s.35(1) of the 1987 Act. To succeed, they must establish that the lease fails to make satisfactory provision with respect to one of the 'gateway' grounds at s.35(2).

37. The applicant primarily relies on s.35(2)(f), contending the Painter House leases fail to make satisfactory provision for the computation of service charges. It also contends the leases fail to make satisfactory provision for the recovery of service charge expenditure (s.35(2)(e)).

38. Section 35(4) provides:

"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."

39. In brief, the applicant contends it cannot recover 100% of the service charge expenditure at Painter House and both subsections are engaged. If it establishes one of these grounds, the Tribunal then has a discretion whether to vary the leases (s.38(1)) and, if so, on what terms. If it makes an order, it can award compensation under s.38(1). It cannot make an order where the variation would be likely to substantially prejudice the respondents (s.38(6)(a)(i)) and an award of compensation would not afford them adequate compensation. Mr Blakeney said there was no Court of Appeal authority on the exercise of the Tribunal's discretion and submitted that substantial prejudice and compensation should be considered together.

40. The substitution of "*Block*" for "*Building*" at clause 7 is largely uncontentious. This was agreed in the collective response, but one of the Objecting Respondents (Mr Jose Ocana of Flat 12) disputed the variation in his individual objection, stating:

"The landlord ask (sic) for a change to the word building. It should not be change for block as the definition of building as a structure with walls and roof is accurate and relevant to the lease. In my opinion we share a roof and walls in the building. Tower Hamlets Community Housing, itself, occupies the ground-floor of the building with their Head office."

41. As to the terms of any order and Mr Mengerink's proposed variation, Mr Blakeney acknowledged the Tribunal has a wide discretion. It can make an order in the terms sought by the applicant or such other order as it sees fit. However, any variation should be limited to the matters raised in the applicant's case.

The issues

42. The issues to be decided by the Tribunal are:

(a) whether the Painter House leases fail to make satisfactory provision for the computation of service charges,

(b) whether the Painter House leases fail to make satisfactory provision for the recovery of service charge expenditure,

(c) if either of these gateway grounds are made out, should an order be made varying the leases, including consideration of s.35(6),

(d) if so, what variation should be ordered and should a compensation order be made under s.35(10).

43. The applicant's case on issues (a) and (b) is summarised at paragraph 8 of its statement of case, where it says:

"It has recently come to light that, if the Applicant apportioned service charge in accordance with the wording of the Painter House leases there would be a deficit in the recoverable service charges. This is because:

8.1 The Painter House leases are drafted on the basis of there being a contribution to both Painter House and Peter House leases to all service charge costs.

8.2 The Painter House leases therefore set the contribution percentage at 1/38th (there being 38 flats in total when adding together those in Painter House and Peter House).

8.3 However, the percentage does not differentiate between estate costs and block costs.

8.4 Furthermore, the Peter House leases are drafted on the basis that those leases only contribute to parts of the estate provided for their common use. Nor do they contain any provision to contribute towards Painter House block costs.

8.5 Although the stated percentage in the Peter House lease is 'such reasonable proportion as the Lessor shall state', that is still limited to the type of costs to which they must contribute.

8.6 Therefore:

8.6.1 Painter House block costs have a recoverability of 24/38ths,

8.6.2 Peter House block costs are recoverable; and

8.6.3 Estate costs have a recoverability of between 24/38ths and 100%, but this depends on the nature of the charge and can vary accordingly."

44. In their collective statement of case, the Objecting Respondents contend the applicant cannot rely on s.35(2)(f), as not all Painter House leases express a service charge proportion. As to s.35(2)(e), the proposed variation is inadequately justified. The leases would have been drafted by the applicant's solicitors and there is no explanation for the alleged errors. Further, the suggestion that 1/38th was used as there are 38 flats across both blocks is unlikely as the Peter House flats were intended to be used as social housing, let on tenancies. It also disregards the applicant's occupation of the Commercial Unit and the benefit it derives from the various services at the Development. If the Tribunal allows the

variations sought (or makes any other variation) then the respondents are entitled to compensation under s.35(10) and the Tribunal should give directions for expert evidence on this issue.

The evidence

45. The Tribunal heard oral evidence from Ms Lily Tripathi for the applicant and Mr Mengerink and Mr Scicluna for the Objecting Respondents. The bundle also included a witness statement for Ms Yvette Lingom, who is one of the leaseholders of Flat 20. She did not attend the hearing and the Tribunal attaches little weight to this statement. There was no witness statement from Ms Ocana, the sole objector to the substitution of "*Block*" for "*Building*" and he did not attend the hearing.

46. Ms Tripathi is employed by the applicant as a Senior Business Improvement Lead. She verified a witness statement dated 14 December 2022, which describes the Development, and gives brief details of lease variations for Flats 9, 14, 17, 18 and 19 Painter House. In the case of Flat 9, the original lease was granted in 2007 but was later surrendered or forfeited. A new lease was granted in 2014, but in a different form.

47. Ms Tripathi's statement also lists various expenses paid by the applicant for the Commercial Unit, including business rates, general office expenses, water charges, electricity, gas, fire safety, refuse collection and office insurance. She then addresses the service charges at Painter House. The flat leaseholders have each been charged 1/24th of total expenditure since they took occupation. Had they been charged 1/38^{th,} the applicant would face a shortfall of 14/38ths. This would affect its income and the services to be provided across its portfolio, which would not have been intended.

48. Ms Tripathi describes the applicant as a "*small to medium registered provider of social housing…with circa 2000 rented units and 10000 leasehold units*" and a "*not for profit organisation*". There is cladding at the Development and the applicant is negotiating the removal with the builders. In the meantime, it has implemented fire safety measures at a total cost of approximately £160,000. It has borne this, rather than passing this cost on to the leaseholders.

49. In cross-examination, Ms Tripathi was questioned on the applicant's status and whether it was "*profit for purpose*", rather than "*not for profit*" organisation. She was also questioned on insurance. The applicant has one policy, covering different risks, for all properties in its portfolio. The respondents' contributions are based on the number of bedrooms in their respective flats. The applicant does not contribute to the block premium but does pay the office insurance on the Commercial Unit. It does not contribute to the cost of repairs at the Development.

50. Initially, Ms Tripathi was unable to comment on the apportionment of water charges between the commercial and residential parts of the Development. The bundle included water bills from Thames Water and Castle Water. The former is addressed to the applicant, dated 12 October

2020 and shows an account balance of £34,639.67. It refers to the supply of water and wastewater to "*1-14 Peter House & 1-24 Painter House, 279-301 Commercial Road, LONDON E1 2PS*". The latter is also addressed to the applicant, is dated 01 September 2019, and shows an account balance of only £69.41. It does not identify the property and is incomplete.

51. Mr Mengerink verified a witness statement dated 29 November 2022. He is one of the joint leaseholders of 10 Painter House and the statement was given by him and the other leaseholder, Ms Catherine Elise Gilmore-Collinson. They are original leaseholders of Flat 10 and have lived there since 2007. Their statement refined arguments in their original objection dated 27 July 2022, which addressed various issues, including the disparities between the draft and completed leases for Flat 10. They had not challenged the applicant's service charge demands until recently, as they believed they were liable for a "*fair proportion*", based on the draft. They only obtained a copy of the completed lease in 2021, following a subject access request. They were surprised to discover this differs from the draft and includes a fixed proportion of 1/38th. They have since challenged the charges and sought clarification from the applicant, which has not been forthcoming. They also shared this information with other leaseholders at Painter House who, in turn, have queried their charges.

52. Based on the applicant's statement of case, Mr Mengerink and Ms Gilmore-Collinson infer the original Peter House tenancies were drafted on the same basis as the Painter House leases. If so, the Peter House tenants are each liable for 1/38th of Painter House expenditure. The exception is 14 Peter House where the 2014 lease only requires the leaseholder to contribute to Peter House and Common Parts costs. Mr Mengerink and Ms Gilmore-Collinson contend the Painter House leases make satisfactory provision for the computation and recovery of service charges and it is the sole Peter House lease that does not. The drafting of the latter leaves a shortfall of 1/38th for Painter House costs but this is a problem of the applicant's making, having granted this lease in different terms.

53. The statement also addresses the Commercial Unit. The applicant should contribute to service charges as a "*tenant*", to reflect the communal services benefitting this unit. This would be additional to the office expenses for the unit, which are the applicant's sole responsibility. Later in the statement, Mr Mengerink acknowledges there is no tenancy/lease and questions the reasons for this. He also questions what happens if the applicant vacates and lets the ground floor to a third party. If the new lease includes a service charge contribution, the proportions will exceed 100% (if the applicant's variations are granted).

54. As to the lease, Mr Mengerink highlighted differences between the draft and completed versions. The former included definitions of "*Superior Lease*" and "*Superior Lessee*" that do not appear in the latter. Further it

defined the "*Specified Proportion of Service Proportion*" as a "*A fair proportion*" whereas the completed version refers to "*1/38th*".

55. If the variations are granted, Mr Mengerink seeks compensation for all respondents pursuant to s.38(10).

56. In cross-examination, Mr Mengerink accepted there is a shortfall in the service charge recovery for Painter House. On his analysis, the applicant can recover 37/38ths of the expenditure for this block. He rejected Mr Blakeney's suggestion he was "*trying to have his cake and eat it"*. There is a legal agreement (the lease), which fixes the proportion for his flat.

57. Mr Mengerink queried the modest water bill from Castle Water and whether this relates to the Commercial Unit.

58. Following Mr Mengerink's evidence, Ms Tripathi was recalled to address the water charges and Peter House tenancies. During the lunch adjournment she ascertained that Castle Water supplies water to businesses and took over from Thames Water in 2016. She was unable to say if they supply water to the entire Development or just the Commercial Unit. She had also spoken to a colleague and been informed the tenancies only permit the recovery of service charge expenditure at Peter House. She agreed to produce a complete copy of the Castle Water bill and a sample tenancy on the second day of the hearing.

59. Mr Scicluna verified a witness statement dated 29 November 2023. His fiancée, Ms Anja Stosic, is the current leaseholder of 18 Painter House and bought this flat approximately six years ago. Mr Scicluna's statement was given on behalf of Ms Stosic and refined arguments in her Tribunal objection dated 04 August 2022. Their focus was the size of the Commercial Unit and the services benefitting that unit.

60. In the objection, Ms Stosic analysed the layout of the commercial and residential parts. Based on floor plan overlays, using lease-plans, she estimated the Commercial Unit could accommodate approximately 16 flats (10 in Painter House and 6 in Peter House). She then applied a weighting of 1.5 to reflect the commercial use, to arrive at a notional 15 flats on the ground floor of Painter House. This equates to 39 'flats; in this block, She also highlighted the greater ceiling height of the Commercial Unit relative to the upper floors.

61. Ms Stosic also analysed Estate costs, apportioning them on estimated access/use, with a weighting for each communal area. Based on this analysis, the Painter House leaseholders should contribute 31%, the Peter House tenants should contribute 24.33%, the leaseholder of 14 Peter House should contribute 7% and the applicant should contribute 37.67% (for the Commercial Unit).

62. Based on these figures, Ms Stosic concluded that 1/38th was the correct proportion for the Painter House leaseholders. She also seeks compensation if the variations are ordered.

63. Ms Stosic's objection also referred to the water charges at the Development. These charges are passed on to the respondents, via the service charge and the applicant does not contribute. There is no provision for this in the leases and Ms Stosic seeks a refund.

64. In his statement, Mr Scicluna acknowledges Ms Stosic's figures are "*best guesses*" in the absence of scale drawings. He goes on to say, "*I concede that the numbers are not a solid science and therefore not usable*." He suggests an alternative approach to apportionment based on the Upper Tribunal's decision in ***Farman & Ors v Cinnamon (Plantation Wharf) Ltd & Ors [2018] UKUT 0421(LC).***

65. ***Farman*** concerned the service charge provisions for two blocks (Ivory and Calico Houses) at Plantation Wharf, which is a large mixed-use development. At paragraph 3, HHJ Nigel Gerald explained that, as originally developed, the commercial units of Ivory House occupied 52% of the floor area yet contributed approximately 82% of the service charge. For Calico House the figures were 49.4% and approximately 78%. At paragraph 7 the Judge went on to say "*…it is not uncommon for commercial units to bear a higher proportion of the service charge than the commercial units…*".

66. Based on these percentages. He, Mr Scicluna calculated the service charge ratio for the commercial and residential units at Ivory and Calico Houses was approximately 4:1. He then compared this with Painter House, where the ratio is much lower (approximately 1.39:1), assuming the relevant part of the Commercial Unit can accommodate 10 flats. This reinforces his contention that commercial units often pay a higher service charge contribution and that 1/38th is the correct proportion for the Painter House flats.

67. Mr Scicluna repeated the request for compensation if the variations are ordered. He also raised the applicant's alternative remedy, being a potential negligence claim against the solicitors that drafted the leases.

68. In cross-examination, Mr Scicluna accepted and adopted the contents of Ms Stosic's objection. He rejected Mr Blakeney's suggestion they were trying to avoid paying 1/24th "*by whatever means possible*". Whilst he understood the logic of the applicant's case (1/38th based on 38 flats at Painter and Peter Houses), he disagrees with it.

69. Ms Scicluna said the calculations in Ms Stosic's objection were based on their original thinking and he stands by them. He is not abandoning the 10 flats argument but is now focused on the flats that could be accommodated in the Painter House part of the Commercial Unit. He relies on calculations in his statement, rather than the objection. He accepted the former required some rounding to arrive at 1/38th and only work with a 1.5 weighting for commercial use.

70. Mr Scicluna's case differs from that advanced by Mr Mengerink. He would not be drawn on whether Mr Mengerink is wrong, but accepted this is implicit if the Tribunal favours his argument.

71. Mr Scicluna said Ms Stosic had no reason to challenge her service charges until she discovered her proportion was 1/38th. He accepted there would be no substantial prejudice if the Tribunal found this proportion was based on 38 flats at Painter and Peter Houses. In that event, no compensation would be payable.

72. The applicant's solicitors provided four additional documents on the second morning of the hearing, being a complete copy of the Castle Water invoice, a sample tenancy for Peter House, the applicant's service charge guide for leaseholders and a printout of the service charge pages on their website. Mr Blakeney provided additional information about the water charges, based on further instructions. Historically there were separate meters and bills for the Commercial Unit and residential parts, with the applicant paying the bill for the former. It appears the commercial meter is no longer in use, as there is now one bill for the entire Development. The applicant paid 7% of this bill in 2016/17 and 2017/18, for the Commercial Unit. They are still investigating the apportionment for 2018/19 onwards and Mr Blakeney had no information on this or the reasons the commercial meter was decommissioned.

73. The sample tenancy includes a fixed service charge of £21.61 per week, in addition to the rent, which can be varied on four weeks' notice. Clause 2.3 iv states "*The service charge will be a fair proportion of the costs incurred or likely to be incurred in the provision of services each year*." Appendix A lists communal costs which may be included in the service charge, separated into "*Block Charges*" and "*Estate Charges*". The words "*Block*" and "*Estate*" do not appear to be defined.

74. The service charge guide list various items covered by the applicant's charges and explains "*Service charges also cover other running costs to your block or estate. These charges are due to the landlord (THCH) under the terms of your lease.*" The website pages show the applicant's universal policy for service charges, which is to charge costs on a block basis. There is a separate section on water rates for Painter and Peter Houses which states "*Residents living in Peter and Painter House to not have an individual water meter. We pay the water company for the usage and apportion the costs per home*." It goes on to say "*Residents living in Peter House will pay an equal share. The charge for residents living in Painter House will depend on how many bedrooms you have*."

Submissions

75. Mr Blakeney went first at the Tribunal's request. He made no criticism of the Objecting Respondents' witnesses or the manner they gave evidence but suggested they are motivated by self-interest.

76. Mr Blakeney referred to five authorities, three of which (***Brickfield***, ***Cleary*** and ***Triplerose)*** were cited in the collective response. The Lands Tribunal decision in ***Morgan v Fletcher [2009] UKUT 196 (LC)*** establishes that s.35(4) provides the only circumstances in which

s.35(2)(f) can be exercised. At paragraph 20 HHJ Jarman QC concluded "*…I find that subsection (4) must be constructed as if the word "if" reads "only if".*" The subsection cannot, for example, be used to vary perceived unfairness in the service charge allocation.

77. Section 35(2)(e) is a broader and s.35(3A) gives one example of a defect coming within the subsection. There is no rule a lease fails to make satisfactory provision where one leaseholder does not have to contribute to costs to which other leaseholders are required to contribute (***Cleary v Lakeside Developments Ltd [2011] UKUT 264 (LC))*** and ***Triplerose Ltd v Stride [2019] UKUT 99 (LC)*)**, nor does s.35(2)(e) enable the Tribunal to vary a lease because it imposes unequal burdens or is expensive or inconvenient.

78. At paragraph 26 of ***Brickfield Properties Ltd v Botten [2013] UKUT 133 (LC)***), HHJ Nicholas Huskinson said "*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 certain matters. In other words the purpose is to cure a defect in the lease*." The purpose, however, is not to cure contractual unfairness.

79. The Tribunal cannot order a variation if this would be likely to substantially prejudice any of the respondents (or any person who is not a party to the application) and an award under subsection (10) would not afford adequate compensation.

80. The Tribunal can backdate any variation (***Brickfield***). As to compensation, the Tribunal must consider the purpose of the variation and the defect being cured. As was said in ***Brickfield*** (paragraph 34):

"…it is true that the lessees will, by virtue of the variation, be in a worse position than they would be if for the remainder of their leases they each continued only to be responsible to contribute the original proportion of the costs of the services etc, such that the appellant or its successors had itself to find out of its own monies the shortfall (here 14.45%). However, in my judgment the substantial prejudice contemplated in section 38(6) cannot include the removal of an unintended and undeserved windfall flowing from the inability (because of an enfranchisement of one of the blocks) to recover 100% of the cost of the services to the remaining block. Similarly the loss to the lessees of the 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 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 the tenants in a case where the 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 benefits of curing the defect."

81. Mr Blakeney submitted that s.35(2)(f) is engaged as the applicant can only recover 24/38ths of the Painter House costs under the leases. Alternatively, they can recover 22/38ths and a fair proportion from Flats 9 and 11. Section 35 only applies to long leases of flats, so the Commercial Unit is disregarded. The test is whether the proportions for the leased flats added up to 100%. The only way the applicant could recover 100% is if the fair proportions for Flats 9 and 11 total 16/38^{ths}. This was not advanced in the collective response and would be contrary to recital (4) and clause 5(5) of the leases. Fair proportions might be 1/24th or 1/38th per flat, or fractions based on floor area but cannot total 16/38^{ths}. If they do, this reinforces the applicant's argument under s.35(2)(e), as there would be a lack of equivalence between Flats 9 and 11 and the other Painter House flats.

82. Mr Blakeney took issue with the collective response, which asserts the applicant cannot rely on s.35(2)(f) "*as at least one lease does not express a proportion*". This refers to the fair proportion wording for Flats 9 and 11. Mr Blakeney submitted that s.35(4) is not limited to fixed proportions. It is engaged when the proportions stated in the "*leases*" to be paid by "*the other tenants of the landlord*" (s.35(4)) do not add up to 100%, which is the case here. Further, the Commercial Unit must be disregarded as it is not subject to a lease.

83. Mr Blakeney addressed the other arguments, as follows:

    (a) Mr Mengerink contends there is no shortfall at Painter House, based on the wording of paragraph 8.1 of the applicant's statement of case. This is factually incorrect. The Peter House tenancies do not permit the recovery of Painter House costs, and this is contrary to the applicant's universal policy. Even on Mr Mengerink's case, there is a 1/38th shortfall as the leaseholder of 14 Peter House does not contribute to Painter House costs.

    (b) Mr Scicluna and Ms Stosic's mathematical approach, based on floor areas is artificial and requires arbitrary weighting and rounding. Their methodology is convoluted and does not stand up to scrutiny. Further "*correlation does not mean causation*". There was no intention the Commercial Unit would contribute to service charges. The first Painter House lease fixed the contribution at 1/38th, which is very specific and reflects the total number of flats in Painter and Peter Houses. These two blocks are connected and appear as one. The 1/38th contribution was intentional and envisaged each flat would pay the same proportion. The authorities clearly demonstrate that drafting errors occur, as happened here.

84. Mr Mengerink made closing submissions on behalf of the respondents. Initially he referred to the sample tenancy for Peter House. This is dated 22 March 2023 and the footer suggests the precedent was drafted in

September 2022. It substantially post-dates the Painter House leases. Mr Mengerink submitted the earlier tenancies must have been similar to the leases, as the applicant says the leases are drafted on the basis all 38 flats contribute.

85. As to the water bill, Mr Mengerink suggested the second meter is an exchange meter and queried why the applicant paid 7% (or any contribution) if the intention was to split costs between all 38 flats at Painter and Peter Houses.

86. Mr Mengerink pointed out the Painter House leases do not mention other parties. There are different beneficiaries for different parts of the estate and the only way to address this is to apportion costs. The leases were drafted by the applicant's solicitors and must be equitable. The applicant is clearly a beneficiary, as the occupant of the Commercial Unit, and should contribute to communal services. This is implicit and need not be expressly stated in the leases. It would be inequitable and an abuse of power to exclude the applicant's liability.

87. Mr Mengerink reiterated that 1/38th is the correct contribution for each of the Painter and Peter House flats. The only issue is the Applicant's contribution for the Commercial Unit.

88. Mr Mengerink submitted the Painter House leases make satisfactory provision for the recovery and computation of service charges on four alternative grounds:

    (a) The leaseholders of 9 and 11 Painter House must each pay a fair proportion of service charge costs. Their proportions need not be the same as the other flats and are malleable. Whilst he does not want these leaseholders to pay the shortfall, this is one interpretation.

    (b) The bulk of the shortfall can be recovered from the tenants at Peter House. There is a small shortfall for 14 Peter House, but this is a defect in that lease, rather than the Painter House leases.

    (c) In practice, the applicant buys services for its entire portfolio on a global, rather than block, basis. It then calculates each flat's contribution, meaning there is no shortfall. This applies to insurance, as confirmed by Ms Tripathi, and other services.

    (d) There is no shortfall, as the applicant should make up the difference (between the respondents' contributions and 100%) for their occupation of the Commercial Unit.

89. Mr Mengerink submitted that compensation is appropriate if the Painter House flat proportions are increased to 1/24th, as this would increase the respondents' contributions by approximately 40%. Further, it would have a negative impact on the value of their flats. Any variation should take effect from the date of the Tribunal decision, rather than backdated.

90. In response to questions from the Tribunal, Mr Mengerink explained he and Ms Gilmore-Collinson signed the Flat 10 lease at the applicant's

office and were not informed of the amendments to the draft**.** They only became aware of the changes when they obtained a copy of the completed version in 2021.

91. Mr Basit and Mr Scicluna made additional submissions, with the Tribunal's permission. Mr Basit suggested any compensation would be funded by the insurers for the solicitors that drafted the leases. Mr Scicluna reiterated the applicant's occupation of the Commercial Unit, which could accommodate 10 flats.

92. In their skeleton arguments, Mr Mengerink and Mr Scicluna both sought the appointment of an independent surveyor to determine the "*correct service charge contributions*" for the Painter House flats and Commercial Unit. They invited the Tribunal to make an order to this effect, with the surveyor's fee paid by the applicant. They also requested that all new proportions be expressed as a fraction or percentage.

93. Mr Mengerink's skeleton argument also included an application for an order under paragraph 5A of schedule 11 to the Commonhold and Leasehold Reform Act 2002 ('the 2002 Act'). If granted, this would reduce or extinguish Flat 10's liability to pay an administration charge for the applicant's litigation costs.

94. In response to these submissions, Mr Blakeney argued there was no prejudice deserving of compensation. There is nothing to suggest the Commercial Unit would "*subsidise*" the service charges at Painter House. Further, Mr Mengerink only challenged the service charges when he saw the 1/38th contribution in his completed lease. Until then, he accepted charges based on 1/24th and must have considered these reasonable.

95. Mr Blakeney suggested "*not for profit*" and "*profit for purpose*" means the same thing. The applicant invests any profit in its portfolio, rather than paying dividends. This benefits all leaseholders/tenants with one example being the fire safety measures at the Development, funded by the applicant. Any service charge contribution for the Commercial Unit would reduce this surplus.

96. Mr Blakeney acknowledged Ms Tripathi was not party to the lease discussions in 2007. Rather, she had given her view on the applicant's intention for the service charge proportions, based on her current knowledge of the Development.

97. As to s.35(2)(f), Mr Blakeney stressed there was no lease of the Commercial Unit so it cannot be considered when computing the total service charge proportions. It is not permissible to attribute a notional proportion to this unit.

98. Mr Blakeney submitted that clause 7(7) of the Painter House leases does not extend to the Commercial Unit. It applies to "*any premises in the Building*", which must refer to the residential flats. This is consistent with clauses 5(3) and (5), which refer to "*a similar lease of other premises in the Building*" and "*every lease or tenancy of premises in the*

Block", respectively. Further, clause 7(7) only requires the applicant to pay a contribution to the reserve at clause 7(4)(b) for premises "*not let on terms making the tenant liable to pay a Service Charge corresponding to the Service Charge under this lease*". This contribution is "*a sum equal to the total that would be payable by the tenants thereof*", so must be 1/38th for each such premises.

99. Mr Blakeney also pointed out that clause 7(4)(b) applies to a reserve for the matters at clause 7(5) but is limited to expenditure that occurs only once during the unexpired term or at intervals of more than one year. This is principally directed at major works, so the applicant must only contribute to some items under clause 7(7).

100. Mr Blakeney submitted the applicant had established the gateway grounds at s.35(2)(f) and (e). As to the terms of any order, the Tribunal cannot remedy perceived unfairness in the service charge contributions. It has a discretion whether to order a variation. If it does, the applicant proposes three options:

(a) the respondents contribute 1/24th of Block costs and 1/38th of Estate costs,

(b) the respondents contribute a fair proportion of all service charge costs, or

(c) the respondents contribute 1/24th of Block costs and a fair proportion of Estate costs.

Alternatively, the Tribunal can order its own variation, but this must relate to the gateway grounds made out.

101. Mr Blakeney described the substantial prejudice and compensation issues as "*inherently connected*". There is no prejudice or substantial prejudice arising from the proposed variations, or no prejudice/substantial prejudice giving rise to compensation.

102. As to compensation, Mr Blakeney relied on paragraph 34 of ***Brickfield***. The purpose of the proposed increase in the service charge proportions is to cure defects in the lease. If the applicant compensates the respondents for the increase, this will render the entire variation (and the object to be achieved by s.35) completely nugatory.

103. A similar decision was made in ***Parkinson v Keeney Construction Ltd*** [2015] UKUT 607 (LC) where HHJ Huskinson said (paragraph 18):

"*The F-tT rejected the argument that section 38(1) should be applied so as to put any claimant for compensation into the same position as the claimant would have been in if he financial contributions toward service charges made by that claimant under the lease remained in the original unamended percentage. This argument was analysed at paragraph in paragraph 41 of the F-tT's decision. The F-tT rightly observed that having provided a mechanism in the 1987 Act to amend leases when the where the lease fails to make satisfactory provision in respect of certain matters, it seems unlikely that Parliament would*

have intended that this cure would be effectively nullified by the award of compensation. A pertinent example was given by the F-tT, namely a case where lease needed to be amended because the landlord was entitled to recover more than 100% of the service costs. It would indeed be surprising if the landlord in such circumstances was entitled to say that the appropriate amendment (whereby recovery was limited to 100% of the service costs) gave rise to a relevant loss or disadvantage within section 38(10) for which the landlord could require compensation from the lessees to make good the loss of the yearly surplus, which the landlord had hitherto been inappropriately receiving."

104. Mr Blakeney also referred to paragraph 19, where the Judge highlighted the advantage (to a lessor and lessees) of having satisfactory lease provisions for the computation of service charges.

105. Mr Blakeney distinguished obiter comments in ***Cleary*** and ***Triplerose***, which appear to conflict with the decisions in ***Brickfield*** and ***Parkinson***.

106. The Tribunal suggested an alternative approach, being compensation for any diminution in the value of the respondents' flats, arising from the increase in their service charge proportions. Mr Blakeney pointed out there was no evidence of this or the respondents paying premiums for 1/38th contributions.

107. Mr Blakeney submitted that any variation should be backdated to the dates the leases were originally granted, relying on ***Brickfield***. Given the facts of the case, the Tribunal must find an error in the drafting of the leases in which case backdating is necessary to correct this error.

108. During the hearing, the Tribunal expressed concern that substituting a fair proportion for 1/38th could lead to a dispute and litigation over the meaning of "*fair*". Mr Mengerink echoed this concern. Mr Blakeney acknowledged the risk of further litigation but said this should not be determinative.

109. The Tribunal application referred to a potential professional negligence claim against the solicitors that drafted the Painter Houses leases. Mr Blakeney supplied brief details at the Tribunal's request. The applicant is pursuing a claim, and this is currently subject to a standstill agreement.

110. The final issue was Mr Mengerink's paragraph 5A application. The Tribunal queried if the respondents were also seeking an order under s.20C of the Landlord and Tenant Act 1985, preventing the applicant from recovering its litigation costs from the service charge account. Having obtained instructions, Mr Blakeney confirmed the applicant will not seek to recover its costs of these proceedings from any of the respondents or the service charge account.

Inspection

111. The Tribunal members inspected the Development during the afternoon of 13 April 2023, in the presence of Mr Blakeney, Ms Tripathi, Mr Mengerink, Ms Scicluna and Mr Basit. They viewed the interior of the Commercial Unit as well as the car park, communal garden/terrace, bicycle shed, refuse stores, the entrances for Painter and Peter Houses and the first-floor communal landing for Peter House.

112. The inspection was particularly helpful, as it gave the Tribunal a better understanding of the extent, layout, and nature of the Commercial Unit. This is a substantial and well-equipped office with reception, large communal work area and meeting rooms. The ground floor footprint is considerably larger than the upper floors, extending out as single storey to the rear.

Discussion and findings

113. This is an application under s.35 of the 1987 Act. It is not an application to rectify perceived drafting errors in the leases or to determine service charges. The Tribunal has no jurisdiction, at least in these proceedings, to determine the service charge proportions for 9 and 11 Painter House or the 'payability' of the water charges.

114. Before considering s.35(2)(f) and (e), the Tribunal must consider the current service charge provisions in the Painter House leases. With one exception, clause 7 is clear and unambiguous. Except for Flats 9 and 11, the respondents must each contribute 1/38th of "*the Service Provision*". Flats 9 and 11 must each contribute a fair proportion.

115. The exception is the use of the word "*Building*" at clauses 7 (4), (5) and (7). This is not defined, does not appear elsewhere in the leases and is ambiguous. The use of upper case "*B*" suggests this is a term of art but even Mr Ocana's definition leads to uncertainty. A structure with walls and roof could mean Painter House, Peter House, or both. This ambiguity is a clear defect in the leases.

116. The Service Provision is clearly explained at clauses 7(4) and (5) and includes expenditure on the "*the Common Parts*", as defined at clause 1(2)(b). Mr Blakeney contends the definition includes the Commercial Unit and parking spaces. The Tribunal disagrees. The qualifying words "*which are used or intended to be used for use by the Leaseholders of the flats within the Block together with the Tenants of the Estate*" apply to all areas/parts listed in the clause. The Commercial Unit and parking spaces are exclusively used by the applicant, rather than the respondents or the leaseholder and tenants at Peter House and are not Common Parts.

117. At first sight, the applicant's case appears attractive. There are 38 flats in Painter and Peter Houses, the original intention was for each flat to be pay an equal 1/38th contribution to "*the Service Provision*" and there was

an error in the drafting of the leases. However, this does not take account of the substantial Commercial Unit, used as the applicant's head office. Based on the Tribunal members' knowledge and long experience, gained from hearing numerous service charge cases, it is common for service charges to be apportioned between residential and commercial units on mixed-use properties. This is borne out by HHJ Gerald's comments in ***Farman***. It is not essential that all units contribute to service charges but, in the Tribunal's experience, this is normally the case. The apportionment need not be fair, if freely agreed and the Tribunal rejects Mr Mengerink's submission that leases must be equitable.

118. The Painter Houses leases do not identify the number flats in this block or Peter House. Nor do they refer to the Commercial Unit. The flats are not all the same size and it unclear, from the face of the leases, why 1/38th was used. There is no contemporaneous evidence as to the applicant's intention in 2007, when the leases were granted. Ms Tripathi gave her interpretation, but this is based on her current knowledge of the Development. Mr Mengerink is an original leaseholder and helpfully produced a copy of the draft lease for Flat 10. This referred to "*A fair proportion*" and a "*Superior Lease*", which suggest a different intention. Taking these factors into account, the applicant's case becomes less attractive. The original intention may have been a superior lease of the residential parts to separate it from the Commercial Unit, or for the flats to pay 24/38ths and the Commercial Unit to pay 14/38ths or something else entirely. The Tribunal is unable to determine this intention, based on the evidence before it.

119. Turning now to s.35(2), the applicant contends the service charge proportions do not add up to 100% as twenty-two flats pay 1/38th and the other two pay "*A fair proportion*". The Tribunal accepts the Commercial Unit must be disregarded when calculating the total proportions, as submitted by Mr Blakeney. Section 35(4) refers to "*a lease*" and "*leases*" and there is no lease of the Commercial Unit.

120. Where the Tribunal differs from Mr Blakeney is on the meaning of "*service charge proportions*" at s.35(4)(b). Logically, this must refer to fixed proportions, expressed as a fraction or percentage, otherwise it is impossible to compute a total. Descriptive proportions that can vary over time, such as fair or reasonable, are not compatible with this section or s.35(2)(f). In this case, Flats 9 and 11 each pay "*A fair proportion*". The Tribunal is not determining what a fair proportion means, has not heard from the leaseholders of Flats 9 and 11 and has no details for their flats. Whilst a total of 16/38ths is unlikely to be fair, the Tribunal cannot determine this issue.

121. The Tribunal agrees with Mr Swirsky, who drafted the collective response. The applicant cannot rely on s.35(2)(f). Not all the leases express a proportion within the meaning s.35(4). If the Tribunal is wrong about this, it still would not vary the leases as the current service charge provisions are perfectly workable and satisfactory (see paragraph 126, below).

122. Section 35(2)(e) is much broader than s.35(2)(f). The applicant contends the leases fail to make satisfactory provision for the recovery of service charges in two respects:

(a) clauses 7(4), (5) and (7) incorrectly refer to the "*Building*" rather than "*Block*", and

(b) it can only recover 24/38ths (or 22/38ths and two fair proportions) of the service charge costs at Painter House.

123. The applicant succeeds on the first ground, as the use of "*Building*" is a clear defect. The variation is necessary to cure this defect and should be backdated to the respective dates on which the leases were granted. Compensation does not arise, as the variation benefits all parties and there is no prejudice, let alone substantial prejudice, to the respondents.

124. The second ground is less clear-cut. The Tribunal rejects Mr Mengerink's primary case. Based on the sample tenancy for Peter House, the tenants pay a fixed service charge for expenditure on their block and the Common Parts. They do not contribute to Painter House costs, nor does the leaseholder of 14 Peter House. Mr Mengerink attached great weight to paragraph 8.1 of the applicant's statement of case, but this is not determinative. It simply states one of the grounds of the Tribunal application.

125. The calculations advanced by Ms Stosic and Mr Scicluna both involve 'reverse engineering'. They have started with the 1/38th proportions and worked backwards, used deductive reasoning to try and justify these based on the floor area and service usage of the Commercial Unit. However, their methodology is convoluted, and the original calculations rely on rounding and weighting. The commercial/residential ratios in ***Farman*** do not assist, as they were specific to the two blocks in question. Other blocks will have different weighting or no weighting.

126. Having said that, the Tribunal accepts the underlying principle that 1/38th proportions are satisfactory when you take account of the Commercial Unit. The current service charge provisions are perfectly workable, as the applicant can recover 24/38ths (or 22/38ths and two fair proportions) of the Painter House costs from the respondents. This is well over half. The applicant must fund the shortfall, but this is satisfactory as it occupies the substantial Commercial Unit and derives considerable benefit from the communal services (insurance, maintenance, management, repairs etcetera).

127. The Tribunal is unable to say why 1/38th was used in the leases. If the Painter House element of the Commercial Unit can accommodate 10 flats, as advanced by Ms Stosic, this apportionment appears to favour the respondents as the applicant pays more for the Commercial Unit pro rata. However, this assumes the proportions were based on floor areas with no weighting. There are other methods for apportioning service charges, and weighting may have been used. Further, the 1/38th

proportion also applies to the Common Parts and Estate costs. The Peter House tenants contribute to some these costs and the leaseholder of 14 Peter House contributes to Common Parts costs. It is also bears repeating that service charge apportionments need not be fair and s.35 cannot be used to correct perceived unfairness.

128. The applicant has not established the gateway ground at s.35(2)(e), in relation to the service charge proportions. It is therefore unnecessary for the Tribunal to decide whether to vary the leases and, if so, whether to backdate and/or award compensation.

129. The Tribunal is unwilling to consider Mr Mengerink's request for alternative lease variations, as there was no formal application under s.36(1) of the 1987 Act and the other respondents have not been given an opportunity to make representations.

130. The Tribunal makes no order on the numbering errors in the Flat 4 lease, as there was no application to vary the numbering and the leaseholder, Jorge Tseng, did not attend the hearing. He may wish to seek legal advice on these errors.

131. The Tribunal also makes no orders under s.20C of the 1985 and/or paragraph 5A of the 2002 Act, given the applicant's confirmation it will not seek to recover its costs of these proceedings from the respondents or the service charge account. But for this concession, the Tribunal would have made such orders as the Objecting Respondents have successfully opposed the application. The only variation granted is the substitution of "*Block*" for "*Building*" and this was agreed by all but Mr Ocana.

Decision

132. The Tribunal grants that part of the application relating to the substitution of "*Block*" for "*Building*". The precise terms are set out in the attached order.

133. The Tribunal refuses that part of the application relating to the service charge proportions.

134. One of the consequences of this decision is the applicant has been demanding incorrect service charges based on 1/24th proportions (at least for the flats with 1/38th in their leases). It appears the respondents paid these charges for many years, without demur.

135. The Tribunal is unable to determine service charges within these proceedings. It is open to any of the parties to make a separate application under s.27A of the 1985 Act. This would deal with payability of the charges, but the Tribunal cannot order refunds of any overpayments. That would be a matter for the County Court and there may be arguments over estoppel, limitation and/or waiver. The parties should try and agree these issues before embarking on further litigation and may wish to consider alternative dispute resolution. The

respondents are encouraged to seek legal advice on the effect of this decision.

Name: Tribunal Judge Donegan **Date:** 23 May 2023

RIGHTS OF APPEAL

1. 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.

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 of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 20C Limitation of service charges: costs of proceedings

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

…

Landlord and Tenant Act 1987 (as amended)

Section 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.

…

Section 36 Application by respondent for variation of other leases

(1) Where an application ("the original application") is made under section 35 by any party to a lease, any other party to the lease may make an application to the tribunal asking it, in the event of it deciding to make an order effecting any variation of the lease in pursuance of the original application, to make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application.

(2) Any lease so specified –

(a) must be a long lease of flat under which the landlord is the same person as the landlord under the lease specified in the original application, but

(b) need not be a lease of flat which is in the same building as the flat let under that lease, nor a lease drafted in terms identical to those of that lease.

(3) The grounds on which an application may be made under this section are –

(a) that each of the leases specified in the application fails to make satisfactory provision with respect to the matter or matters specified in the original application; and

(b) that, if any variation effected in pursuance of the original application, it would be in the interests of the person making the application under this section, or in the interests of the other persons who are parties to the leases specified in that application, to have all of the leases in question (that is to say the ones specified in that application together with the one specified in the original application) varied to the same effect.

Section 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 to substantially 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 to 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 insurers.

(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 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 of disadvantage that the tribunal considers he is likely to suffer as a result of the variation.

Commonhold and Leasehold Reform Act 2002

Schedule 11

Part 1

Reasonableness of Administration Charges

Meaning of "administration charges"

1(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—

(a) for or in connection with the grant of approvals under his lease, or applications for such approvals,

(b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,

(c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or

(d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—

(a) specified in his lease, nor

(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Reasonableness of administration charges

2 A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

...

Limitation of administration charges: costs of proceedings

5A

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph –

(a) "litigation costs means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and

(b) "the relevant court or tribunal" means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate	***"The relevant court or tribunal"***
Court proceedings	The court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, the county court
First-tier Tribunal proceedings	The First-tier Tribunal
Upper Tribunal proceedings	The Upper Tribunal
Arbitration proceedings	The arbitral tribunal or, if the application is made after the proceedings are concluded, the county court.

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LVT/2022/0003**
Property	**:**	**Painter House, Sidney Street, London E1 2HU**
Applicant	**:**	**Tower Hamlets Community Housing Limited**
Representative	**:**	**Mr Edward Blakeney (Counsel) instructed by Capsticks Solicitors LLP**
Respondent	**:**	**The leaseholders of the 24 flats at Painter House, as listed in the schedule accompanying the application**
Representatives	**:**	**Mr Peter Mengerink Mr Paul Scicluna Mr Mohamed Basit**
Type of application	**:**	**Variation of leases pursuant to section 35 of the Landlord and Tenant Act 1987**
Tribunal	**:**	**Judge Jeremy Donegan Mrs Evelyn Flint FRICS (Valuer Member)**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of order	**:**	**23 May 2023**

VARIATION ORDER
SECTION 38 OF THE LANDLORD AND TENANT ACT 1987

UPON considering the application to vary the leases of Flats 1-24 Painter House, Sidney Street, London E1 2HU ('the Leases') dated 31 May 2022

AND UPON hearing counsel for the applicant and Mr Mengerink, Mr Scicluna and Mr Basit for the Objecting Respondents

IT IS ORDERED that:

1. The Leases are each varied by the substitution of the word "*Block*" for "*Building*" throughout clauses 7(4), (5) and (7).

2. The variations take effect from the respective dates on which the Leases were granted.

3. The Tribunal's reasons for making this order are set out in the accompanying decision dated 23 May 2023 ('the Decision').

4. The applicant shall ensure this order is registered in the registers at HM Land Registry for the Leases and the freehold title EGL482597. The applicant shall submit the application for registration by **20 June 2023**. The application must be accompanied by certified copies of this order and the Decision.

Name: Tribunal Judge Donegan **Date:** 23 May 2023