



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

- Case Reference** : CHI/00HA/LVL/2023/0001
- Property** : 18 New King Street, Bath BA1 2BL
- Applicant** : Major Felix Cairns and Dr Harriet Powell –
Garden Maisonette
- Respondents** : 18 New King Street (Bath) Management Co
Ltd
Sally Galsworthy – First Floor Flat
Paddy Nisbett – Second Floor Flat
Michelle Castignetti – Top Floor Flat
- Type of Application** : Variation of Lease, sections 35, 36, 38, 40 of
the Landlord and Tenant Act 1987
- Tribunal members** : Judge David Clarke
Michael Ayres FRICS
Michael Jenkinson

DETERMINATION AND STATEMENT OF REASONS

Determination and Order

The Tribunal determines that the lease dated 2 September 1988 of the leasehold property known as the ground floor and garden maisonette, 18 New King Street, Bath and made between Keith Stainer as Lessor of the first part, the 18 New King Street Management Company Ltd of the second part, and Mark Thomas Robert Ashley Wood and Jacy Jane Claire Waters of the third part shall be varied so that the Lessee's Proportion set out on the first page of that lease is amended from Twenty per cent (20%) to Forty per cent (40%) and the Lessee's Share Entitlement is amended from One Share to Two Shares.

The Tribunal orders that a memorandum of this variation is endorsed on the said lease dated 2 September 1988.

Statement of Reasons

The Applications

1. This case concerns linked applications under sections 35, 36, 38 and 40 of the Landlord and Tenant Act 1987 (“the Act”). This original application was made on 4 February 2023 by Felix Cairns and Harriet Powell who are the leaseholders of the flat or apartment known as the Garden Maisonette situate in the basement and ground floor of a Grade 2 listed Georgian town house known as 18 New King Street Bath (“the Property”). The Application was under section 35 of the Act and sought a variation of the percentage of the service charge payable under the long lease of the maisonette. Following Directions issued by Judge Tildesley on 3 May 2023, a further application under section 36 of the Act dated 15 May 2023 was made by Michelle Castignetti, acting as director of the 18 New King Street (Bath) Management Co Ltd (“the Management Company”), which company is the freeholder and lessor and is also a Respondent under the original application. This secondary application on behalf of the Respondent enables the Tribunal to make such variations as are decided to be appropriate to all four long leases contained within 18 New King Street in accordance with its determination.

Inspection of the Property

2. The Property, 18 New King Street, is a classic stone-fronted Georgian terraced house with five floors, consisting of a basement level, leading into the back garden, a ground floor with the entrance onto the street and three upper floors. It was inspected by the Tribunal prior to the hearing on 15 July 2023. It is situated close to Bath city centre in a quiet street of largely similar properties many of which appear also to have been converted into flats.

3. The entrance to the Property is into the ground floor across a void giving light to the basement level below (but with no access to the basement level). Immediately on the left inside the front door are the stairs down to the basement level of the maisonette and further on there are the stairs up to the three flats above. All the old doors to rooms on the ground floor level have been closed off.

4. The garden maisonette is on the basement and ground floors. At the basement level there is a kitchen and living room (and a passageway) with direct access to a garden at the rear both from the living room and the passageway. At some point since the grant of the Lease the small conservatory shown on the plan on the lease has been rebuilt, widened, and extended into the garden to create a larger living area. The first floor of the maisonette is accessed from the basement floor by an internal staircase. It consists of three bedrooms (one double and two single or small double rooms) and a small bathroom.

5. The three flats on the first, second and third floors are of a similar size but laid out slightly differently. The Tribunal inspected the flats on the first and second floor, both of which are arranged in a similar fashion consisting of one bedroom, a small bathroom, a living room, and an adjoining kitchenette. While the Tribunal was not able to access the top floor flat, the plan on the lease of that property shows what might be considered a better lay out in the top floor flat made possible by the staircase being part of the property. This enables there to be a separate small kitchen and perhaps a slightly larger bathroom,

but with the disadvantage that the flat is situate partly in the roof space so it may have some restricted height.

6. However, the main conclusion of the Tribunal from the inspection of the Property is that the garden maisonette is not only more than double in floor area but offers very more substantial living accommodation with three bedrooms, rather than one, a larger living area and larger kitchen and the benefit of a private walled garden. Even if one discounts the modern conservatory (as the Tribunal should do as it was apparently constructed after the leases were granted), there was apparently an existing smaller conservatory when the lease was granted in 1988.

The Relevant Facts

7. In the late 1980's, the then freehold owner of 18 New King Street converted the Georgian town house and created four residential units. The maisonette, occupying the basement and ground floor, (excluding the entrance hall) was let on 2 September 1988 for a term of 999 years from 25 March 1988. The three parties to that lease are the then lessor, Keith Steiner, the Management Company, and the purchasing lessees. Prominently on the front sheet of that lease there are defined terms. The 'Lessee's Proportion' is stated to be 20% and the 'Lessee's Share Entitlement' is stated to be one share.

8. Subsequent leases, also for terms of 999 years and with the term of the lease commencing on the same date, were made by Keith Steiner to purchasing lessees of the three flats on each of the first, second and third floors. The lease of the top floor is dated 25 August 1989, that of the first-floor flat is dated 23 March 1990 and that of the second floor flat, 8 February 1991. The purchaser of the second-floor flat was Paddy Nisbett, who still owns and resides in that flat. Each of the leases of the three flats follows the form and wording of the lease of the maisonette. The front sheet of each lease contains the same provisions, namely the 'Lessee's Proportion' is stated to be 20% and the 'Lessee's Share Entitlement' is stated to be one share. The annual ground rent for each of the four apartments within the building is also the same, namely £25 per annum.

9. The other provisions within the leases that are relevant to this application are as follows:

1. The Management Company covenants to maintain the insurance of the building and to keep the common parts, defined as the Maintained Property, in good repair.
2. The Management Company covenants not to withhold membership of the Company from any person who becomes a lessee.
3. Each Lessee covenants (Clause 5(1)) with the Lessor and with the Management Company to pay the Lessees proportion of the amount estimated by the Company to cover the maintenance charges for the first year or part thereof; and then there are further clauses for payment of any adjustments required after production of the accounts. The lessees covenant to pay 'the annual subscription' for future years, and all amounts are set to the amount of the 'Lessees Proportion' of the annual maintenance charges.

10. The problem is not hard to discern. There are four residential units within the building, each required to pay a 20% proportion of the service charge expenditure. The shortfall is obvious and significant. It is therefore surprising that for a period of over 30 years, and notwithstanding sales and purchases of two of the flats and the maisonette with the involvement of estate agents and solicitors over that timescale, the issue has not been raised previously. The history, briefly outlined to the Tribunal at the hearing, helps to explain the position.

Property Management prior to 2023

11. The following account is a summary taken both from the papers filed and from oral evidence at the hearing on 17 July 2023. All lessees were present at the hearing.

12. It appears that the former freeholder, Keith Steiner, transferred the freehold to the Management Company shortly after the completion of the lease of the second floor flat in 1991. From that time on, until early 2020, the management of the Property was undertaken by one or more of the current lessees as directors of the company (without the involvement any professional management agency) and it seems that Paddy Nisbett was involved for the whole of that period. He told the Tribunal that for all years prior to Felix Cairns and Harriet Powell purchasing, the three previous lessees of the garden maisonette had contributed 40% of the annual maintenance charges required. He attributed the reason for that to the terms of the memorandum and articles of the management company. (A copy of those details was not included in the bundles of documents, but it did not seem necessary for an adjournment to obtain copies since there was no dispute as to the evidence given). The Tribunal was told that the memorandum and articles of the management company provided for there to be one share for each of the lessees of the three flats and two shares for the garden maisonette. For that reason, service charges had always been levied on a 2:1:1:1 ratio and paid on that basis for a period of over 30 years.

13. As lockdown commenced in 2020, Paddy Nisbett felt it better for the management to be passed to a professional firm and Bath Leasehold Management Company (“Bath Leasehold”) took over the duties (and it is surprising that the discrepancy between the terms of the leases and what was being charged did not come to light at that point). In the summer of 2020, Felix Cairns and Harriet Powell purchased the garden maisonette. Orally, they gave evidence that there was no indication to them at the time of their purchase that they were required to pay 40% except that there was a note in the Leasehold Property Enquiry form indicating that the apportionments for this unit was higher as it was larger, but without setting out a figure attached to this higher apportionment. The extent therefore that the issue of what was the percentage of service charge due under their lease was indicated to them or discussed by their legal advisers prior to their purchase is unclear. In their application, Felix Cairns says that, following their purchase, invoices sent by Bath Leasehold listed their contribution as 40% and that between April 2021 and August 2022 they made contributions at a 40% apportionment, but saying that that was ‘in error’. The contribution at 40% included a substantial payment following a section 20 notice (for repairs to a parapet). It was only in August 2022 after ‘deeper examination’ of the terms of their lease that they realised that they were being overcharged and disputed what was due to Bath Leasehold.

14. The result was that Bath Leasehold resigned as agents in September 2022, and though they were never paid the 20% shortfall, the Tribunal was told that Bath Leasehold now considered the matter closed. Not surprisingly, it was not possible to appoint an alternative agent with a dispute existing among the lessees and only 80% of the service charge recoverable under the terms of the four leases. Sally Galsworthy, as a director of the company, managed to secure payment of the annual insurance premium.

15. The Tribunal does not think it necessary to set out in detail what the parties say about the matters after September 2022 or their meetings or attempts to find a solution. In short, there has been a degree of acrimony and no solution to the dispute between the parties about the correct way to resolve the inadequacies of the lease terms has been found. Sally Galsworthy and Paddy Nisbett tried to undertake the management responsibilities for a time but claim that they are still out of pocket financially and have not been fully reimbursed. They both resigned on 29 March 2023 'out of sheer nervous exhaustion'. That left Michelle Castignetti as sole director at the date when the application under section 36 of the Act was issued; but the Tribunal was told at the hearing that Harriet Powell is now a director as well.

16. Another problem is that Felix Cairns and Harriet Powell hold 2 shares out of 5 in the Management Company, so they are 'persons of significant control' (over 25% of the shares). This has apparently caused issues with the Management Company bank account which requires their participation.

The applicable law

17. The applications are made under Part IV of the Act, namely sections 35-41. Felix Cairns and Harriet Powell made application under section 35 for an order varying the lease of the garden flat.

18. The grounds on which the application under section 35 can be made is that the lease fails to make satisfactory provision with respect to one of the matters listed in section 35(2). In this case, it is failure to make satisfactory provision in the computation of the service charge payable under the lease (section 35(2)(f)). Three requirements must be met in such a case by virtue of section 35(4), There must be provision for such charge to be a proportion of expenditure incurred or to be incurred on behalf of the lessor; other leaseholders must also be liable to pay by way of service charge proportions of any such expenditure; and the aggregate of the amounts payable by those proportions would either exceed or be less than the whole of any such expenditure.

19. Those requirements are clearly met in this case as only 80% of the whole expenditure is recoverable, with a proportion of 20% set out in each of the four leases. All the lessees, all of whom were present at the hearing, agreed and accepted the grounds for making lease variations was met.

20. An application under section 35 only permits a variation of the lease of the applicant, namely in this case, the garden maisonette lease. Consequently, and because the proposal in that application would necessitate changes to the three flat leases, the Directions issued

by Judge Tildesley on 3 May 2023, referred to that fact and delayed the determination of the original application to permit the Respondent Management Company or the other parties to make an application under section 36 of the Act to enable corresponding variations in each of the three flat leases. An application under section 36 of the Act dated 15 May 2023 was made by Michelle Castignetti, acting as director of the Management Company. This secondary application on behalf of the Respondent enables the Tribunal to make such corresponding variations to each of the other leases contained within 18 New King Street in accordance with its determination. The Tribunal therefore has jurisdiction to make variation of all four leases of the units contained within the Property since the grounds on which the application under section 35 was made are also satisfied with respect to the three flat leases as well (section 38(2)(b)).

21. The other important relevant provisions in Part IV of the Act relevant to this application are as follows:

- (1) By virtue of section 38(4) the variation that a tribunal may make in its order may either be the variation specified in the original application by Felix Cairns and Harriet Powell or such other variation as the tribunal thinks fit (section 38(4)).
- (2) A tribunal may not make a variation order of a lease if it appears to the tribunal that the variation would be likely substantially to prejudice any respondent to the application or for any other reason it would not be reasonable in the circumstances for the variation to be effected (section 38(6)).
- (3) As an alternative to an order varying a lease, a tribunal may make an order directing the parties to the parties to the lease to vary it.

The proposals for variation

22. All the parties at the hearing accepted that some variation to one or more of the leases is required. It is clear to them and to the Tribunal, that the current position is unsustainable. A situation where the leases provide that only 80% of the annual expenditure required on behalf of the lessor is not viable. Without amendments, essential expenditure on insurance premiums, vital repairs, let alone day-to-day outgoings may not be made (apparently the cleaners employed to clean the entrance hall have been dispensed with thus breaching one of the lessors' covenants) and thereby the four units may become unsaleable.

23. The proposal put forward in the original application by Felix Cairns and Harriet Powell was to amend the leases of all four units by amending the percentage contribution in each case from 20% to 25% and thereby achieve a full 100% recovery. However, the application also suggested that the lease of the ground floor maisonette should be further amended to incur 40% of the building insurance only, 'owing to the additional benefit realised on account of the larger square footage' of the garden maisonette.

24. After the application had been submitted, and after discussions between Felix Cairns and Harriet Powell on the one hand and Michelle Castignetti on behalf of the Management Company, an alternative proposal was submitted, but not agreed by Sally Galsworthy and Paddy Nisbett. This proposal, termed the 'hybrid solution' at the hearing, provided for each unit to pay a 25% contribution to administrative and management expenses (including accountancy, bank charges, agent fees, fire alarm testing, communal

utility costs, cleaning and health and safety assessments) and for repairs and decorating the common areas including the door, hallways, communal window cleaning, gutters and general painting and maintenance. However, the cost of building insurance and major structural works, to be defined as 'major works' to the structure, including electrical, plumbing, and historic structural features, would attract a percentage contribution of 40% from the lessee of the garden maisonette and 20% from the lessees of the three flats.

25. Sally Galsworthy and Paddy Nisbett submitted that the correct variation should be to the garden maisonette lease only, by varying the percentage contribution from the garden maisonette for all matters to 40% with the leases of the three flats being unchanged at 20%. However, they accepted that the lease of the garden maisonette should be further amended to alter the Lessees Share Entitlement from one share to two shares. This would make the share entitlement correspond to the memorandum of the Management Company and ensure that the lessee of the garden maisonette obtains two votes out of five in any decision in the Management Company general meeting.

26. The Tribunal is satisfied that the variation that is required is to be found in one of three possibilities. No party is now supportive of the first possible solution namely the change to provide that each unit contributes 25%, whether there is a caveat that the garden maisonette pays 40% of the insurance premiums or not. Two of the lessees, Sally Galsworthy and Paddy Nisbett, argue for 40% from the garden maisonette and 20% from the three flats. There could be a variety of 'hybrid' solutions; but the one put forward in the application by Felix Cairns and Harriet Powell and supported by Michelle Castignetti has the support of the other two of the four lessees.

The issue of substantial prejudice

27. Before making its determination, the Tribunal considered section 38(6) of the Act. Would any variation 'be likely substantially to prejudice' any of the parties? The Tribunal concluded that any variation would indeed prejudice one or more of the lessees to some extent, since the proportion of contribution to the service charge must be increased somewhere if 100% recovery is to be achieved. But the Tribunal is satisfied that none of the suggested variations would substantially prejudice any party, because the real substantial prejudice would occur, to all the parties, if no variation is made at all.

Determination

28. The Tribunal determines that the appropriate variation is to vary the lease of 2 September 1988 of the garden maisonette so that the Lessee's Proportion set out on the first page is amended from Twenty per cent (20%) to Forty per cent (40%) and the Lessee's Share Entitlement is amended from One Share to Two Shares.

29. The reasons or factors leading to this alteration being the most appropriate for this determination are as follows.

- (1) The garden maisonette is more than double the size of the flats in floor area. Indeed, the inspection by the Tribunal left it with the impression that the maisonette felt more than twice the size of the flats in the sense of greater space in the living area and kitchen and with the benefit both of three good size bedrooms instead of one, and a pleasant garden area. Felix Cairns argued strongly that this

should not be a factor in the Tribunal's determination as nothing was stated in the Act about unit size. That is of course correct, but the Act does not give any guidance in that regard or as to any factor that the Tribunal should consider; and equally does not say that size should not be a factor.

- (2) Sally Galsworthy argued that the Tribunal should consider the capital value of the units and suggested that the garden maisonette had a significantly higher current market value that easily exceeded twice the value of the three flats. No evidence to support that assertion was submitted to the Tribunal. However, the Tribunal did discern from the copy leases in the bundle of documents that the premium paid on the grant of the lease of the garden maisonette in September 1988 was £108,000 whereas the premiums payable for the first, second and top floor flats on dates in 1989, 1990 and 1991 were £45,000, £30,000, and £38,000 respectively. Even considering the volatility of the housing market in those years, the disparity in prices does give substance to Sally Galsworthy's submission - quite apart from the fact that a three-bedroom maisonette for sale on the open market is bound to realise a price substantially in excess of the price obtainable for a one bedroomed flat.
- (3) While it is not possible to explain how it came about that there was only an 80% recovery of service charge from the four units in the Property (an attempt was made to find out why it occurred by contacting the successor firm to the solicitors who had acted for Keith Stainer in the transactions, but files had been destroyed), it is clear to the Tribunal that it could not have been deliberate. The Management Company, as party to the lease, must have been incorporated before the lease of the garden maisonette was granted and the memorandum and articles apparently provided for twice the number of shares for the lessee of the garden maisonette. For thirty years, the management of the Property has been conducted based on a 40% share from the lessee of the maisonette. While this cannot in any way justify, or be a reason, for amending the lease to 40%, it does suggest that a 2:1:1:1 division of costs was accepted over a considerable period as reasonable by a succession of previous purchasers.
- (4) The 'hybrid' solution put forward by Felix Cairns and Harriet Powell and Michelle Castignetti on behalf of the Management Company was an attempt at a compromise solution even though Michelle Castignetti acknowledged that it was not in her personal interest to agree to it. While the willingness to compromise may be commendable, the Tribunal does not consider it is a sensible solution. The details of any such change to each of the four leases will be very difficult, (such as the definition of 'structural repair') but not impossible, to draft but the problem is in its operation. There may well be occasions in the future when works are required to the Property that involve both structural repairs (which would attract a 40% contribution from the garden maisonette), and decoration and minor repairs (which would attract 25%). What may at the outset seem to be a problem that requires minor decorative repair may later be found to be caused by a structural problem. In such circumstances, the allocation of costs could be problematic, and cause further difficulties in relation to such matters as the cost of scaffolding which might have to be divided between different contribution percentages. Such a 'hybrid' solution would also be unusual in the market (see below). It may also cause difficulties if there are reserve funds established for future works. The Tribunal

does not therefore consider any hybrid solution as a preferable alternative to simple arithmetic division.

30. Applying the Tribunal's expert knowledge of the property market, the most significant reason for determining that the appropriate variation is to vary the lease of the garden maisonette so that the Lessee's Proportion is altered to 40% is that such a contribution in the case of a two-floor maisonette in a property with four units where the other three units are half the size on a single floor is what would be expected in the property market. In service charges found in buildings of various types, the service charge percentage is commonly or even almost invariably related to the size of the unit or the benefits it enjoys, sometimes even with very precise figures closely related to floor area. Moreover, differential contributions, such as are suggested by the 'hybrid' solution put forward in this case, are usually only found where one unit enjoys a very specific benefit, such as a car parking space, or access to specific services which can be easily quantifiable in financial terms, which thereby enables separate schedules of service charge expenditure. The hybrid contribution suggested in this case would be very unusual in the market.

31. The impact of the variation made by this determination will fall solely upon Felix Cairns and Harriet Powell. The Tribunal does not consider that the variation will be likely to prejudice them substantially. Indeed, for two reasons, it considers that it will not even be a significant prejudice. Firstly, in making their original proposal as set out in the application, it was conceded by them that they would contribute a 40% contribution towards payment of the insurance premiums 'on account of the greater square footage'. Later, in the hybrid proposal, they were ready to go further and pay 40% towards all major structural repairs to the property which in the long term are likely to be a greater amount than annual maintenance and administration charges. They have also already contributed 40% to the £13,000 cost of roof and parapet works (although this was before the issue of the amount stated in the lease became clear to them). If the 'greater square footage' justifies some aspects of the service charge being rated at 40% then it can be strongly argued that it justifies 40% for all aspects of the service charge.

32. Secondly, the Tribunal is not convinced that Felix Cairns and Harriet Powell purchased the garden maisonette with the percentage of service charge payable as central to their decision. They admit that there was a note in the Leasehold Property Enquiry form when they purchased indicating that the apportionments for this unit was higher 'as it was larger', but without setting out a figure attached to this higher apportionment. It is surprising that neither they or their legal adviser picked up on this and sought further details as to what the higher apportionment was before proceeding with the purchase. Moreover, they paid 40% for the best part of two years and it was only in August 2022 after 'deeper examination' of the terms of their lease that they realised that they were being overcharged. However, little 'deeper examination' was required as the Lessee's Proportion is stated clearly on the first page of the leases. All of which suggests that the amount of the service charge contribution was not a fundamental factor in their decision to purchase.

33. By virtue of section 38(9) of the Act, the Tribunal directs that a memorandum of the variation is endorsed on the lease of the garden maisonette dated 2 September 1988,

namely that the Lessee's Proportion set out on the first page of the lease is amended from Twenty per cent (20%) to Forty per cent (40%) and the Lessee's Share Entitlement is amended from One Share to Two Shares.

34. The Tribunal considered section 38(1) of the Act but did not consider that the payment of any compensation to Felix Cairns and Harriet Powell by any of the other parties was appropriate.

Right of Appeal

35. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case (RPSouthern@justice.gov.uk). 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.

36. 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.

37. 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 that the party who is making the application for permission to appeal is seeking.

24 July 2023