FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AH/LVL/2023/0005**
Property	**:**	**Flat 2, 2-3 The Exchange, 11-13 Purley Road, CR8 2HA**
Applicant	**:**	**Mr Rizwan Hussein M Alibhai & Mrs Catherine Janine Cabare EP Alibhai**
Representative	**:**	**Zaheer Ahmad (Counsel)**
Respondent	**:**	**Southern Land Securities Limited**
Representative	**:**	**Lucy Meredith (Counsel)**
Type of application	**:**	**Variation of a lease by a party to the lease**
Tribunal member	**:**	**Judge Robert Latham** **Richard Waterhouse FRICS**
Date and Venue of hearing	**:**	**24 November 2023 at** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**30 November 2023**

DECISION

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1. The Tribunal dismisses this application as we have no jurisdiction under section 35 of the Landlord and Tenant Act 1987 to vary the terms of this lease.

2. The Tribunal makes no order under section 20C of the landlord and Tenant Act 1985.

3. The Tribunal declines to make a costs order against the Applicant.

4. The Tribunal makes no order for the refund of the tribunal fees paid by the Applicants.

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The Application

1. On 14 June 2023, the Applicants issued this application to vary the terms of their lease pursuant to section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act"). They seek is to vary their service charge contribution from 25% to 15%. This application relates to their Flat 2 at 2-3 The Exchange, 11-13 Purley Road, CR8 2HA ("the Building"). Their contribution is specified in Clause 4 (c) (i) of their lease. They further seek an order for the limitation of the landlord's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985.

2. On 31 August 2023, the Tribunal gave Directions:

   (i) Given that the application potentially affected the three other lessees in the Building, the Applicants were directed to send a copy of the application to them by 6 September. The Applicants did not comply with this Direction. On 9 October, the Respondent emailed a copy of the application to these lessees.

   (ii) On 19 October, the Respondent filed their Statement in Response to the application.

   (iii) On 9 October, the First Applicant provided a witness statement. He now suggests that either their percentage be reduced to 15%, which would leave a shortfall of 10% in the service charges recoverable by the landlord, or that all the lessees should pay 17.5%. They currently pay 15%. This would require the amendments of their leases. The Applicants have made no such application, and the three lessees who would be affected have had no notice of this.

The Hearing

3. Mr Zaheer Ahmad (Counsel) appeared for the Applicants. He was accompanied by both of his clients. He provided a Skeleton Argument, a number of photographs of the Building and three EPC certificates. Ms Lucy Meredith (Counsel) appeared for the Respondent.

4. The day before the hearing, the Tribunal provided both parties of the Upper Tribunal with a copy of the judgment of HHJ Jarman QC in *Morgan v Fletcher [2010] UKUT 186 (LC); 1 P&CR 17*.

The Law

5. The Applicants apply for their leases to be varied pursuant to section 35(2)(f) of 1987 Act which provides (emphasis added):

   > "(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. 2

(3) .....

(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) <u>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</u>.

<u>The Lease</u>

6. The Applicants acquired their leasehold interest in Flat 2 on 1 November 2016. Their lease is dated 20 April 2007 and is for a term of 99 years from 5 March 2007. The only provisions of their lease that is relevant to this application are Clause 1 which specifies a 25% contribution to any insurance and Clause 4 (c) (i) which specifies their service charge contribution to be 25%.

7. The Tribunal has not been provided with copies of the leases of either the three other residential flats or the ground floor shop premises.

<u>The Background</u>

8. The Building is a four storey terraced property in a row of shops which was constructed c.1920. Bairstow Eves currently occupy the ground floor shop premises. The Applicants are the lessee of Flat 2 which is a one-bedroom flat on the first floor. They do not occupy their flat.

9. The Applicants complain that they are required to pay an unfair and unreasonable proportion of the service charges relating to the whole Building. Flat 2 is a one-bedroom flat. The other flats have two bedrooms. Mr Ahmad produced three EPC certificates which record Flat 2 as being 39 sq m whereas Flats 1 and 4 are twice as large at 78 sqm.

10. Certain service charges are paid in respect of residential common parts. Each lessee pays 25%. The Applicants make no criticism of this. Other service charges are levied in respect of insurance and the repair of the whole building. The Applicants are required to pay 25% of this, whilst the other lessees only pay 15%. The commercial premises pay 30%, the sum which the landlord has assessed as being its "fair proportion".

11. Mr Alibhai states that neither the estate agent nor their conveyancing solicitor alerted them to this situation when they acquired their flat in 2016. Neither was this raised by the Estate Agents who were marketing the flat.

12. The dispute only became apparent in 2022, when the landlord proposed to execute major works to the exterior of the Building. The Applicants have

refused to pay the sums demanded and there are currently arrears of some £20,571.

13. Mr Ahmad suggests that the Applicants' percentage should be reduced to 15%, which would leave a shortfall of 10% in the service charges recoverable by the landlord. He suggested that the lessor should meet this shortfall. The Tribunal pointed out that a landlord would normally expect to recover 100% of its service charge expenditure.

14. Alternatively, Mr Ahmad argued that all the residential lessees should pay 17.5%. They currently pay 15%. This would require the amendments of their leases. The Applicants have made no such application.

15. The circumstances in which the current situation arose is unclear. We have not seen the other leases which would seem to be drafted differently to specify a 15% contribution towards the insurance and exterior works, but 25% towards the residential common parts. Neither do we know the sequence in which the leases were granted.

16. Mr Ahmad argued that the current apportionment is manifestly unfair. Had the Applicants known the other lessees were not contributing their share when they acquired the leasehold interest, they would have negotiated with the lessor. However, the lease had been granted in 2007, and the lessor would have had no reason to vary the lease when the Applicants acquired it in 2016. The Tribunal does not accept that there was any requirement for the lease to specify the respective service charge contributions of all the lessees. Neither was there any duty on the vendor to notify the Applicants of the respective contributions. There is no evidence that the vendor was aware of the disparity. The Applicants were advised by solicitors. They were aware of the service charge contribution that they would be required to pay.

17. Ms Meredith referred the Tribunal to *Morgan v Fletcher*. She argued that the Tribunal had no jurisdiction to vary the lease. The current service charge contributions total 100%. It is therefore not arguable that the leases fail to make satisfactory provision for the computation of the service charge payable under the lease.

Our Determination

18. The Tribunal accepts Ms Meredith's argument. We are satisfied that we have no jurisdiction to vary the lease. Under the five leases, the lessor is able to recover 100% of its service charge expenditure. The leases therefore currently make satisfactory provision for the computation of the service charges that are payable.

19. As HHJ Jarman noted in *Morgan v Fletcher* (at [18]), the Act seeks to address two problems: (i) where the aggregate of service charges payable in respect of a block of flats amounted to more than 100% giving the lessor a surplus over monies expended; and (ii) where the aggregate was less than 100%, producing a shortfall and so failing to promote the proper maintenance of the block. The avoidance of a situation where contributions are unfairly disproportionate is a mischief of a different nature to that for

which provision is made in the legislation. Whether legislation should make provision for this is a major policy decision which the 1987 Act has not addressed.

20. The Applicants seek an order under section 20C of the Landlord and Tenant Act 1985 restricting the ability of the landlord to pass on any of its costs uncured in connection with these proceedings through the service charge. In view of our determination, we are satisfied that no order should be made. We are further satisfied that we should make no order for the refund of the tribunal fees paid which they have paid.

21. Ms Meredith sought a costs order against the Applicants restricted to her brief fee. This is normally a no costs jurisdiction. She can only secure a payment of costs if she is able to establish that the Applicants have acted unreasonably in bringing or conducting proceedings pursuant to rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. In *Willow Court Management Co v Alexander* [2016] UKUT 290 (LC); [2016] L&TR 34, the Upper Tribunal set a high threshold before such an award should be made. The fact that a party loses, is not sufficient. The Applicants have acted on legal advice. The Tribunal could have used its case management powers to strike out the case on the ground that it was bound to fail in the light of the guidance provided in *Morgan v Fletcher*. It did not do so. We are satisfied that the Respondent has not established unreasonable conduct by the Applicants to the required threshold.

Judge Robert Latham
30 November 2023

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number),

state the grounds of appeal and state the result the party making the application is seeking. If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).