FIRST-TIER TRIBUNAL

PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00BK/LVL/2023/0006**
Property	**:**	**56 Westbourne Terrace, London W2 3UJ**
Applicant	**:**	**56 Westbourne Terrace RTM Company Ltd**
Representative	**:**	**Ms C Edmonds of counsel**
Respondent	**:**	**The Leaseholders of 56 Westbourne Terrace**
Representatives of those opposing the application	**:**	**(1) Mr Davies in person** **(2) Mr Demachkie of counsel**
Type of Application	**:**	**Application by Applicant for variation of leases**
Tribunal Members	**:**	**Judge S Brilliant** **Mr K Ridgeway MRICS**
Date and Venue of Hearing	**:**	**08 March 2024** **10 Alfred Place, London WC1E 7LR**
Date of Written Reasons	**:**	**20 March 2024**

DECISION

Determination

1. The Tribunal determines the Leases should not be varied and the application fails.

Introduction

2. 56 Westbourne Terrace, London W2 3UJ ("the Building") is situated in a long tree-lined avenue, almost wholly made up of four storey stucco fronted terraced houses. It has been described as the "most spacious and dignified avenue" in Bayswater and "unrivalled in its class in London or even Great Britain".

3. The Building is divided into 11 self-contained flats ("the Flats"). Each of the Flats is held under a long lease ("the Leases").

4. The freeholder of the Building is 56 Westbourne Terrace Freeholders Association Ltd ("the Freeholder"). It is a lessee owned company, with each Flat owner owning one share in it.

5. In an appendix to this decision there is to be found a list of the lessees ("the Lessees") of the Flats in the Building, together with the number of their respective flats. Each of the Lessees owns one flat, apart from Mr Davies who owns two flats.

6. At the heart of these proceedings is an unfortunate dispute between (1) Mr Davies (Flats 9 and 11) and Mr Polturak (Flat 3), on the one hand and (2) the other 8 Lessees, on the other hand ("the RTM Lessees").

7. In 2018, the 8 RTM Lessees successfully applied for a right to manage the Building through a right to manage company ("the RTM Company"). The members of the RTM Company are accordingly the RTM Lessees. Mr Davies and Mr Polturak alone are not members of the RTM Company.

8. Since 2018 Mr Davies and Mr Polturak have refused to pay any service charges. This, the RTM Lessees say, is unjustified and has starved the RTM of the funds necessary to carry out major works and maintenance to the Building.

9. On the other hand, Mr Davies and Mr Polturak say they are entitled to withhold those service charges because of the RTM Company's failure to carry out necessary major works and maintenance in a proper and satisfactory manner, and that it is has failed to comply with its various statutory obligations under the Landlord and Tenant Act 1985.

10. At the start of the hearing all parties agreed that it would not be appropriate for the Tribunal to make findings of fact and fault in respect of these matters. It is highly relevant to these proceedings that there is this unfortunate dispute. But it is not necessary to go into the respective rights and wrongs. Indeed, we were told that these matters will be dealt with in separate s.27A proceedings between the parties to be held in April 2024.

11. The dispute between the parties has given rise to a problem from the point of view of the RTM Company. The problem relates to the control of the Freeholder. The RTM Lessees, of course, own a clear majority of the shares. Mr Davies and Mr Polturak between them own a minority of the shares. On the Companies House register, however, Mr Davies and Mr Polturak alone are shown as directors. There is a dispute as to the propriety of this.

12. The RTM Lessees do not have the power to forfeit the Leases of Mr Davies and Mr Polturak arising from their failure to pay service charges, because that is a right reserved to the Freeholder under the legislation. Mr Davies and Mr Polturak are very much in a minority. If the RTM Lessees were able to take control of the Freeholder then the maintenance and repair problems and the recovery of service charges could be sorted out from their point of view.

13. The Company Law dispute is, of course, outside the jurisdiction of the Tribunal.

The Application

14. The Applicant has made an application to vary the Leases to ameliorate 3 problems as they see them. In outline, the problems with the Leases as at present drafted are as follows (they will be set out in more detail below).

The recovery of legal expenses issue

15. First, the lack of an ability to recover the costs of taking proceedings against Mr Davies and Mr Polturak (either by way of a direct administration charge or indirectly through the service charges) means that the RTM Company has no funds with which to pursue them and places an unacceptable risk on it ("the recovery of legal expenses issue").

The RTM Company costs issue

16. Secondly, there is no provision for the costs of the RTM Company in complying with its statutory duties (such as filing accounts at Companies House) to be recovered through the service charge ("the RTM Company costs issue").

The insurance broker issue

17. Thirdly, there is no clear entitlement when undertaking their responsibilities to insure the Building that the costs of a broker can be recovered through the service charges ("the insurance broker issue").

The legislation

18. s.35 Landlord and Tenant Act 1987 provides (emphasis supplied):

(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 vis 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— …

(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; …

(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**.

19. s.38 Landlord and Tenant Act 1987 provides:

(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…

(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…

(6) A tribunal shall not make an order under this section effecting any variation of a lease if it appears to the tribunal —

(a) that the variation would be likely substantially to prejudice—

(i) any respondent to the application, or

(ii) any person who is not a party to the application,

and that an award under subsection (10) would not afford him adequate compensation, or

(b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

(8) A tribunal may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.

(9) A tribunal may by order direct that a memorandum of any variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order.

(10) Where a tribunal makes an order under this section varying a lease the tribunal may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the tribunal considers he is likely to suffer as a result of the variation.

The hearing

20. A face-to-face hearing took place. Ms Edmonds represented the RTM Company. Mr Davies represented himself. Mr Demachkie represented Mr Polturak.

21. We were supplied with a well-organised bundle containing 819 pages. The bundle included helpful statements of case from each of the parties. Counsel each provided a skeleton argument. As we have said, no oral evidence was needed or given. Mr Davies was focused when making his oral submissions, and sensibly adopted what Mr Demachkie had to say on the recovery of legal expenses issue.

The Lease: service charge provisions:

22. The bundle contains a sample Lease. By clause 4 (1) the Lessee covenanted:

During the subsistence of The Term to pay to The Lessor or its Agents the Interim Charge and the Service Charge at the times and in the manner provided in the Third Schedule hereto …

23. By paragraph 1(1) of the Third Schedule:

"Total Expenditure" means the total expenditure incurred by the Lessor in any Accounting Period (i) in carrying out their obligations under Clause 5 of this Lease (emphasis supplied)…

24. The amount to be paid by each Lessee is that particular Lessee's proportion of the Total Expenditure. The usual provision for interim and final payments is made, with an adjustment, if necessary, once the accountants' certificate has been provided after the end of the accounting year.

The insurance broker issue

25. Clause 5(f)(i) of the Lease requires the Freeholder:

To insure and keep insured the Building including the Lift with such Insurance Office of repute as the Lessor shall from time to time determine against the Insured Risks…

26. Clause 5(f)(iii) requires the Freeholder:

To pay to the Insurer forthwith upon the same becoming due the insurance premium for the Building

27. This is a standard insurance clause to be found in long leases.

28. The RTM Company uses the services of a broker in placing the necessary insurance. It pays for those services. It is unsure as to whether Clause 5(f)(i) entitles it to charge the Lessees for the costs of a broker, whereby the costs can be recovered by way of service charge pursuant to paragraph 1(1)(i) of the Third Schedule.

29. The RTM Company argues that by engaging a broker it ensures the overall costs to effect the insurance is reasonable and competitive, and would be less than the costs of the RTM Company procuring the insurance itself.

30. For the avoidance of doubt on this issue, the RTM Company asked for a variation to be made to the Lease. It is a variation it says that falls fairly and squarely within s.35(e).

31. The variation proposed is that paragraph 1(1) of the Third Schedule be varied so as to add to the costs recoverable through the service charges the following words at the end those costs:

(vi) in paying any fees for insurance brokers.

32. Mr Davies submits that it is not necessary to engage a broker. There is no reason why the RTM Company cannot do it for themselves. There are plenty of instances where a lessee owned freeholder does not make use of a broker, but places insurance itself. The commission paid to brokers has gone sky-high. The obligation of the RTM Company under the clause 5(f)(iii) of the Lease is to make payment to the insurer and not to a broker.

33. On this issue, Mr Demachkie broadly agrees with Miss Edmonds. He says that he agrees that the Lease does make provision for the recovery of a broker's costs. If that is right then the Tribunal has no jurisdiction to vary the Lease.

34. We agree with Ms Edmonds and Mr Demachkie that, on its true construction,

clause 5(f) is wide enough to allow for the costs of engaging a broker to be passed through the service charge in accordance with paragraph 1(1)(i) of the Third Schedule. Therefore variation is unnecessary.

35. Whilst we accept the Mr Davies is right that on occasions the services of a broker are not used, this does not mean that such services can never be used so as to form part of the service charges. It is a decision for a landlord to make on a case-by-case basis. So this application fails.

The RTM Company costs issue

36. The RTM Company says it is obliged by law to file documents at Companies House annually for which a fee is charged, and a failure to comply would lead to the RTM Company being struck off.

37. The RTM Company does not have funds of its own and there is no provision under the model articles for RTM companies to call upon its members to inject funds to meet company costs.

38. Under the terms of the Lease there is no ability to recover RTM Company costs from the Lessees.

39. The variation proposed is that paragraph 1(1) of the Third Schedule be varied so as to add to the costs recoverable through the service charges the following words towards the end those costs:

(v) in connection with the costs , fees and disbursements reasonably and properly incurred in the management of the Lessor to include Companies House filing fees, directors and officers insurance, company secretarial services and bank account charges.

40. In his statement of case Mr Davies drew our attention to the decision of the First-tier Tribunal in LON/OOBK/LSC/2016/004 which was a case between the present Freeholder and the Lessees in which at [40] the Tribunal held that such company costs were payable by the RTM Company and could not be passed through the service charges.

41. He also drew our attention to both the ARMA'S Standards and RICS' Code which draw a clear distinction between service charges and company expenditure. An RTM Company cannot use the one to recover the cost of the other.

42. Mr Demachkie did not dissent from this analysis.

43. We are satisfied that the RTM Company is not entitled to pass company costs through the service charge as has already been decided in the previous decision. So this application fails

The recovery of legal expenses issue

44. On this issue a variation is sought both of (1) an administration charge and of (2) the service charge.

(1) The administration charge

45. Clause 3(13) of the Lease provides that the Lessee is:

To pay all expenses including solicitors' costs and surveyors' fees incurred

*by The Lessor **of and incidental to** (our emphasis) the preparation and service of notice under Sections 146 and 147 of the Law Property Act 1925 (or any other notice hereunder) notwithstanding that forfeiture be avoided otherwise than by relief granted by the Court.*

46. Ms Edmonds argues that since the RTM Company cannot forfeit a Lease, the Leases should be amended so that an administration charge can be raised directly against a particular Lessee when proceedings (other than forfeiture) are brought against that Lessee to enforce a covenant in the Lease.

46. The variation sought is as follows. A clause new 3(13A) should be inserted:

To pay to the Landlord on demand the reasonable costs and expenses (including any solicitors', surveyors' or other professionals' fees, costs and expenses and any VAT on them) incurred by the Lessor in connection with or in contemplation of the enforcement of any of the Lessee's covenants.

47. Mr Demachkie argues that we have no jurisdiction to vary an administration charge. He says this for two reasons. First, s.35(2)(e) cannot apply because the Lessees can only vary a lease to recover expenditure incurred on their behalf for the benefit of another party. Any expenditure under the present clause sought to be varied would not be for the benefit of another party, but in fact to his detriment. Secondly, s.35(3A) clearly applies to service charges but not to administration charges.

48. Ms Edmonds argues that we do have jurisdiction to vary an administration charge. She refers to (1) Sinclair Gardens Investments (Kensington) Ltd v Fernie LON/LVL/39/06, (2) 68 Sinclair Road Ltd v Wong LON/00AN/LVL/2021/0007 and (3) Forschell Properties Ltd v Smolen LON/00BC/LVL/2012/0022.

49. Fernie was a s.35(4) application. It was decided on the papers, and there is nothing to suggest that this jurisdiction point was taken. In Wong the respondent tenant failed to engage with the proceedings at all, and there is nothing to suggest that this jurisdiction point was taken. In Smolen the respondent tenant was unrepresented and again there is nothing to suggest that this jurisdiction point was taken.

50. We are not bound by previous first instance decisions, but as a matter of judicial comity there are usually strong reasons to doing so. However, since this point was not taken in any of those cases we can start with a blank canvas. We prefer and agree with the submissions of Mr Demachkie.

51. If we are wrong, should be exercise our powers to make the alterations suggested?

52. In this context it is important to understand the difference between two important recent decisions of the Court of Appeal. As already stated the relevant wording in our case is **of and incidental to**… .

53. In Kensquare v Boakye [2021] EWCA Civ 1725, it was held (issue iii) that a provision for recovering expenses incurred by the landlord **for the purpose of** (our emphasis) the preparation and service of a s.146 notice notwithstanding forfeiture may be avoided otherwise by relief granted by the court, was wide enough to recover costs of Tribunal proceedings for breach of covenant.

54. By contrast, in Khan v Tower Hamlets LBC [2022] EWCA Civ 831, it was held that a provision for recovering expenses incurred by the landlord **incidental to** (our emphasis) the preparation and service of s.146 notice was not wide enough to cover subsequent litigation costs (see Newey LJ at [50]).

55. This is therefore a Khan case, not a Kensquare case. So why should the Applicant recover litigation costs when the Freeholder could not recover litigation costs? Why should the lease be varied in this way when the existing clause is clear and workable: see Triplerose Ltd v Stride [2019] UKUT 99 (LC) and Camden LBC V Morath [2019] UKUT 193 (LC).

56. So, even if we felt we had jurisdiction would not make the variation suggested.

(2) The service charge

57. At present, there is no power to recover legal expenses through the service charge. The variation proposed is that paragraph 1(1) of the Third Schedule be varied so as to add to the costs recoverable through the service charge the following words at the end those costs:

(iv) in paying the fees of any Solicitors or other professional in connection with or in contemplation of the enforcement of any of the Lessee covenants in the lessee where such fees are unable to be recovered from the defaulting leaseholder as an administration charge in accordance with clause 3 (13)(A).

58. It seems to us that as drafted it does not engage if we do not insert clause 3(13)(A). Putting that to one side, the first point to consider is whether we have jurisdiction to vary the service charge. Ms Edmonds relied upon the 3 cases referred to in paragraph 48 above. The same comments, however, made in paragraph 49 above equally apply.

59. Mr Demachkie submits that there is no jurisdiction under either s.35(2)(e) or s.35(3A). We agree with his submissions under s.35(2)(e). See our reasoning in paragraphs 47-50.

60. However, Ms Edmonds in this context also relies upon s.35(3A) which can conveniently be set out again:

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.

61. Mr Demachkie says that this should be given a narrow interpretation. It permits the recovery of interest or another fixed charge payable if a service charge is not paid on the due date. It does not permit landlords to pass on legal cost to tenants.

62. This is an interesting point upon which there appears to be no properly argued authority.

63. It is known that the 1987 Act was not a well drafted one[1]. We feel we should give s.35(3A) a wide and purposive construction to fill a significant lacuna in the Act as originally drafted. We find we have jurisdiction.

64. The most detailed and authoritative decision under s.35 is that of the Upper Tribunal in Shellpoint Trustees Ltd v Barnett [2012] UKUT 375 (LC), consisting of HH Judge Gerald and Mr AJ Trott FRICS.

65. At [107] it is said:

It is in our judgment a quite exceptional, and substantially prejudicial, thing to enable the landlords to recover its costs not only of recovering the service charge but also of enforcement of all of its covenants from all tenants through the service charge, particularly where the landlords are not owned or controlled by the tenants and there is no evidence that the landlords cannot afford to do so or that the absence of such covenants has caused any difficulties in the past or will or is likely to in the future. It would enable the landlords to decide how, when, by whom and at what cost they should enforce covenants. That would shift all the financial risk and liability from the landlords to the tenants whose only control would be proceedings via the LVT and all the time, trouble, cost and uncertainty that that involves. The appellants have put forward no justification for such a major risk and liability transfer and all that that entails. In our view the proposed variation would significantly affect the way in which the landlords, given virtual financial impunity (subject to any 1985 Act challenge), make future decisions about whether to enforce and pursue breaches of covenants.

66. It is true that the facts of this case are very much removed from the remarks underlined above. However, the word "particularly" is by no means the same as "except when." In other words, the approach taken by the Upper Tribunal is not confined to those cases which fall within the remarks underlined above.

67. There is no reason why this approach should not apply to RTM Companies as well.

68. We therefore decline to exercise our discretion so as to add a completely new provision for the recovery of legal expenses by way of the service charge.

Conclusion

69. For the reasons set out above, the application for variation of the Leases fails.

Name: Simon Brilliant Date: 20 March 2024

Rights of appeal

[1] For example, see the comments of Sir Nicholas Browne-Wilkinson V-C (as he then was) in Denetower v Toop [1991] 1WLR 945G, observing in relation to Part I (right of first refusal) that the 1987 Act is "ill drafted, complicated and confused". It is ill drafted because it was rushed through Parliament on 15 May 1987, so as not to fall with the disillusion of Parliament on 18 May 1987 caused by the General Election of that year. It was therefore never properly scrutinised.

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).

List of leaseholders and their respective flats

1	Carl Perry, Wendy Perry and Ryan Perry.
2	Alan Barton.
3	Jeremy Polturak.
4	Majid Alimadadian .
5	Merladona Trading Limited.
6	Paul Graham Archibald and Wendy Patricia Archibald.
7	Franco Costariol and Bruna Piccin.
8	Ka Ka Tan.
9	Robert Davies.
10	Qinghui Hua.
11	Robert Davies.