FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/43UB/LVT/2023/0006
Property	:	Flat 1, Weycroft, 78 Portmore Park Road, Weybridge Surrey KT13 8HH ("the Property")
Applicants	:	Mr Ian Wilson & Mrs. Jill Wilson
Representative	:	Mark Williams Solicitor W. Davies Solicitors
Respondent	:	Weycroft, Weybridge Limited
Representative	:	Mark Mullin Counsel instructed by Owen White & Catlin LLP
Type of Application	:	Variation of a Lease (section 35, 36 and 38 of the Landlord and Tenant Act 1987
Tribunal Members	:	Judge H Lederman R Waterhouse FRICS T Wong
Date of Hearing	:	9th May 2024
Date of decision:	:	1st July 2024

Decision and statement of reasons

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DECISION

a. **The Lease of Flat 1 Weycroft 78 Portmore Park Road, Weybridge Surrey KT13 8HH ("the property") dated 31st December 1994 (Title number SY655358) ("the Lease") does not make satisfactory provision for the repair or maintenance of the property for the purposes of section 35(2)(a)(i) of the Landlord and Tenant Act 1987 ("the 1987 Act").**

b. **The Lease of the property does not make satisfactory provision for the repair or maintenance of the external walls or roof to the rear single storey extension to the property which is currently in use as a terrace for the first floor Flat 5 depicted in the photograph on page 45 of the hearing bundle for the purposes of section 35(2)(a)(iii) of the 1987 Act.**

c. **In the exercise of its power under section 35(2) of the 1987 Act, the Tribunal orders the Lease shall be varied in the form set out in the Annex to this Decision (attached).**

d. **If any costs incurred or to be incurred by the Respondent in connection with these proceedings are found to fall within the contractual provisions for payment of service charges, none of the costs incurred in connection with this application are to be regarded as relevant costs to be taken into account in determining the amount of service charges payable by the Applicants for the purpose of section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act").**

e. **The Respondent shall reimburse the Applicants for the application fee and the hearing fee a total of £300.00 payable within 14 days of the date of this Decision.**

REASONS

Background

1. The Applicants seek an order varying the Lease of Flat 1 Weycroft 78 Portmore Park Road, Weybridge Surrey KT13 8HH under Section 35 of the Landlord and Tenant Act 1987 ("the 1987 Act"). In this kind of case Tribunal has the power to order a variation where the lease fails to make satisfactory provision with respect to one or more of the following

    "(a)the repair or maintenance of—

(i)the flat in question, or
or
(iii)any land or building which is let to the tenant under the lease, or in respect of which rights are conferred on the tenant under it;"

2. The background to this application is that the land and buildings at Weycroft 78 Portmore Park Road ("Weycroft") is a large Victorian Edwardian house built around 1900 converted into 4 flats in the late 1950's or 1960's. There are 4 flats. Flat 1 is a ground floor flat which was the subject of a 99 year lease from 24th June 1959 and contained a plan which for the purpose of identification indicated the extent of the demise of Flat 1. Immediately above Flat 1 at the property is Flat 5. The Applicants are the current lessees of the property and appear to have been in occupation at the times relevant to the disrepair which is the background to this application.

3. The Respondent is the freeholder of the building and landlord of Flat 1. Flats 2, 3 and 5 are let on long leases to the director of the Respondent (Haley Hancock) and Martin Hancock her partner. There is no flat numbered 4. Flats 2 and Flat 3 have been sublet. Flat 5, so it is said by the Applicants, is used as a full time office. This was not put in issue.

4. On 31st December 1994 a Deed of Variation was entered into by the Respondent and the Applicants' predecessors in title. It is common ground that Deed varied the original lease made in 1960 by extending the term (by way of surrender and re-grant) to a term of 125 years from 24th June 1993. No other variations of significance for the purpose of this application were made in that Deed.

5. The original tripartite structure of the lease arrangement was that the then freeholder granted a lease to the Respondent as management company which assumed the obligations of repair and maintenance of Weycroft to the lessees. At some point prior to 1994 the original freeholder dropped out of the picture and the Respondent became the freeholder. It was assumed by all parties that references to the obligations of the Respondent as the management company under the Lease, were those of the Respondent as a freeholder and landlord. It appears that the Applicants or one of them are minority shareholders in the Respondent. The unchallenged evidence of Ian Wilson is that the Respondent freeholder is in effect run by and for Hayley Hanock's own interests: see paragraph 7 of the witness statement of Ian Wilson (page 67).

6. It is common ground (from witness statements and expert reports contained in the hearing bundle) that

   (a) On an uncertain date in the 1960's, the property was extended at the rear on the ground floor ("the extension");
   (b) the extension to the property in the 1960's was a single storey with a flat roof;

(c) the extension is not reflected on the lease plan to the original Lease or the Deed of Variation;
(d) the extension is shown on the annotated plan attached to the application at pages 37-38
(e) The roof of the extension has been used as a roof terrace for the benefit of the first floor Flat 5 since around 2002 when some works were done included balustrading and the creation of a door to access the terrace.

7. The Tribunal was informed that the Applicants and the Respondent are in dispute about the right of Flat 5 to use the terrace above the extension to the property as a balcony and whether or not that use has caused damage to the roof of the extension. That dispute is not before the Tribunal but is part of the background giving rise to this application and illustrates some of the issues which have arisen owing to undocumented changes to the layout of the property and Weycroft. The correspondence in the hearing bundle gives a flavour of the disagreements.

8. In these reasons page references are to the hearing bundle comprising 291 numbered pages.

The variation of the Lease sought initially

9. Initially in the application the Applicants sought a variation of the Third Schedule to the Lease by providing that the demise included the extension, the flat roof of the extension, the joists and beams and service media used solely by the property, but excluding the flat roof and other elements from the areas of the building reserved to the Respondent in the Second Schedule. (The Tribunal noted the potential ambiguity in the wording of variation suggested at that time which appeared to have been clarified by the Applicants' Reply dated 30th October 2023).

10. The application asserts that no adequate provision is made in the Lease for repair or maintenance of the property and / or installations.

11. The Respondent, in its initial reply to the statement of case asserted that the application was attempting to increase the demise of the property. It disputed this was a variation. The Respondent asserted this was something which the Tribunal could not do on an application under section 35 of the 1987 Act. The Respondent asserted that the extension fell within the property as demised when the original lease was surrendered (by operation of law if not specifically) and a new lease began in 1994. It was further said that in any event there is a repair and maintenance obligation placed on the Respondent and so there is no lack of adequate provision.

The variation sought by the Applicants in the Reply dated 30 October 2023

12. The Applicants provided a Reply dated 30th October 2023 in compliance with the Tribunal's directions of 10th October 2023.

13. In their Reply (pages 46-49) the Applicants seek the following variation in the light of the Respondent's acknowledgement of the extent of the demise of the Property:

    "THE RESERVED PROPERTY

    [as existing 2nd Schedule, but add new paragraph],....

    <u>For the avoidance of doubt. the flat roof and the joists or beams thereof shall as such be part of the Reserved Property</u>."

    "THE SIXTH SCHEDULE"

    [as existing, but add the underlined section to clause 7]

    "7. To keep the halls stairs landing and passages <u>including the flat roof</u> forming part of the Reserved Property properly cleaned and in good order and keep adequately lighted all such parts of the Reserved Property as are normally lighted or should be lighted"

14. On 28th December 2023 the Tribunal determined as a preliminary issue the Applicants' amended variation sought by the application did not seek to increase the demise of the property.

Preliminaries documents and procedure

15. Both parties were represented by experienced advocates and solicitors, each of whom prepared a Skeleton Argument in advance of the hearing and separate written submissions upon costs applications pursuant to directions of the Tribunal made at the end of the hearing on 9th May 2024. Copies of the authorities relied upon were not produced. Neither party sought to tender a witness who statements were in the hearing bundle to give live evidence or for cross examination. It was said the bulk of the statements were either not germane to the issues or contained argument. The Tribunal adopted this course as it was consistent with the overriding objective of determining the issues efficiently and quickly without undue delay. Neither party highlighted issues of fact which required evidence in chief or cross examination . The witnesses were in attendance at the hearing remotely. The witness

statement Hayley Hancock bore the incorrect dated 20th February 2023. This was an error for 2024: see the index to hearing bundle.

16. The Respondent was represented by Owen White & Catlin LLP solicitors ("OWC") in these proceedings. That firm also represented and acted for Mrs Hayley Hancock (also known as Hayley Stephens) and Martin Hancock in their role as leaseholders in connection with the disagreements arising from use of the extension roof as a terrace for Flat 5: see for example the letters from OWC dated 22nd February 2022 at pages 96-98 and 3rd November 2022 at pages 121-122. The Tribunal returns to the significance of this point later.

17. In these Reasons where narrative, facts or descriptions are recited, they should be treated as the Tribunal's findings of fact unless stated otherwise. These reasons address in summary form the key issues raised by the application. They do not rehearse every point raised or debated. The Tribunal concentrates on those issues which go to the heart of the application.

18. Neither party had sought the permission of the Tribunal to introduce expert evidence. The Applicants wished to rely upon an engineer's report from Tony Waring of Harvey's Structural Surveyors and Inspection dated 17th August 2021 (130-166). The Respondent exhibited a report from William G Read of THDG Limited consulting structural engineers addressed to Weycroft Financial Services Limited, (apparently a company associated with the Respondent) dated 8th October 2021 (pages 193-201). Both reports contained helpful descriptions of the construction and layout of the relevant parts of the property and the building. Neither report was tendered as an expert report which complied with the requirements of expert evidence reflected in part 35 of the Civil Procedure Rules or the RICS Guidelines for Expert Witnesses. Neither party objected to the admission into evidence of those reports. Insofar as those reports contain expressions of expert opinion, the Tribunal determined it was consistent with the with the overriding objective of resolving the issues fairly, to give permission for the reports to be admitted into evidence. The author of each report appeared to be well qualified to express views upon the issues which were the subject of the reports.

19. At the outset of the hearing the Tribunal Judge confirmed all parties had the hearing bundle. Some of the correspondence in the hearing bundle contained the label "without prejudice save as to costs" – for example the letter of 22nd February 2022 at pages 96-98 and the letter of 29th June 2022 at pages 113- 115. The privileged parts of the first letter appeared to have been redacted at page 98. The Respondent (represented by experienced Counsel and solicitors) made no objection to admission of these and other similar letters into evidence, despite express reference to one of these letters in the Applicants' skeleton argument. The Tribunal was satisfied that this was a deliberate and conscious decision taken after advice and that amounted to a waiver of

any privilege which may have attached to the contents of correspondence with that label. They correspondence was deployed as part of the Respondent's case.

20. The Tribunal Judge ensured before and during the hearing that all parties could see and hear the other parties and that the cloud video connection was satisfactory during active parts of the hearing.

The "gateway" provisions to variation in section 35(2) of the 1987 Act

21. The Applicants and their solicitors argued the Lease failed to make satisfactory provision with respect to the repair or maintenance of the property and land or building let to them under the lease or in respect of which rights were conferred on them under the Lease.

22. The Applicants pointed to the following factors:

   a. The ground floor extension to the property constructed in the 1960's was not expressly referred to as part of the demise in the Lease as re-granted in 1994. The terrace was not referred to in the Lease;

   b. The Respondent's solicitors (no doubt on express instructions) who at that stage expressed themselves to be acting for Mr and Mrs Hancock as individuals initially argued extension did not form part of the demise in their letter of 22nd February 2022 at 96-98. In so doing they repeated the assertion of Mrs Hancock made in her letter of 17th September 2021 at 99-101 apparently made after taking legal advice.

   c. The Respondent's solicitors belated acknowledgement that the extension formed part of the demise of the property made in its letter of 3rd November 2022 (page 122) made no reference to the right of Mrs Hancock (as lessee or director of an occupier Weycroft Financial Services Limited) using the roof of the extension as a roof terrace.

   d. The flat "roof" to the extension has been used and constructed for use as a "terrace" subsequent to the re-grant of the Lease in 1994. This means the area which at one stage was described as a roof to the extension is also being used as a "floor" to an area adjacent to part of Flat 5. This creates uncertainty as to whether the "floor" to that terrace is part of the "roof" falling with in the freeholder's repairing and maintenance obligations in paragraph 6 of the Sixth Schedule to the Lease and the definition of "Reserved Property" in the Second Schedule to the Lease.

   e. There is uncertainty whether the freeholder or the lessee of the Property is responsible for maintenance of the "make up" of the roof to the extension including the hidden parts – paragraph 8 of

Ian Wilson's witness statement. The Tribunal took this to mean constituent parts to the area currently used as a roof terrace (page 68).

f. In the course of submissions it became clear that there was also a potential issue as to whether the fibreglass waterproof membrane laid under the decking placed on the flat roof to the extension referred to on page 136 of the Harvey's report was a fixture or fitting within the scope of the freeholder's repairing obligations in paragraph 6 of Schedule 6 to the Lease, or a chattel which did not.

23. The Respondent argued as follows on this "gateway" issue:

a. The provisions of the Lease as originally drafted were clear and workable in accordance with the guidance in *LB Camden v Morath* [2019] UKUT 193.

b. It was said to be common ground that the "flat roof terrace" is not within the demise (areas let to the tenants) of the property

c. The provisions of the Lease could not become unsatisfactory due to events or changes after the grant of the Lease – the demise is static not ambulatory – skeleton argument paragraph 24;

d. At the date of the grant of the Lease the roof to the extension was used solely as a roof; a change of use such as "informal" use of the roof as a terrace, does not alter what was reserved to the freeholder.

e. Properly read, the provisions of paragraph 6 of Schedule 6 to the Lease dealing with the obligations of maintenance and repair by the freeholder clearly encompassed the roof to the extension to the Property which was an "addition" to the "Reserved property" expressly contemplated by the original 1960 Lease and at the date of the 1994 Lease referred to the extension.

f. The roof to the extension was a clearly defined to form part of the Reserved Property in the Second Schedule; the joists and beams were also clearly defined.

g. The joists and the beams to the roof are not supporting the floor of a flat within the meaning of the Third Schedule to the Lease – they are clearly within the Reserved Property.

h. It was common ground that the "roof" to the extension is not within the demise of Flat 5 – Respondent's skeleton argument paragraph 21. (The Tribunal notes this assertion was not substantiated or evidenced – the Lease to Flat 5 was not in evidence).

i. The roof to the extension was being used as roof terrace. If use as a terrace was to cause damage to the roof that would trigger an obligation on the freeholder to repair it – paragraph 13 of Hayley Hancock's statement page 182;

j. The roof terrace is neither exclusively a roof nor a floor: paragraph 13 of Hayley Hancock's statement page 183;

k. In the course of submissions the Respondent argued the balustrade surrounding the terrace attached to the roof of the extension would amount to an "addition" to the reserved property (being the external main structural part of the Building) within paragraph 6 of Schedule 6 to the Lease as defined by the Second Schedule.

l. The application was motivated by the Applicants' frustrations about management of Weycroft.

Determination on the "gateway" issues

24. The Tribunal has no hesitation in finding that the provisions of the Lease relating to repair or maintenance of the roof of the extension at the Property are not "satisfactory" for the purpose of section 35(2) of the 1987 Act.

25. The Lease did not clearly refer to the extension, or the roof to the extension, even before the terrace was constructed. The definition of the demise (in the Lease described as "the premises" in clause 1(g) of the recitals) and the Third Schedule incorporated a plan numbered 1. Plan 1 was incorporated "for the purpose of identification only", a coloured version of which is at page 83. That plan omits the extension and was incomplete at the date of the 1994 Lease. This omission created uncertainty and a lack of congruity between the plan and the configuration of the property, the extent of the demise and the repairing and maintenance of obligations owed by the Respondent.

26. The Respondent and the Respondent's solicitors highlighted this lacuna in their letters of 17th September 2021 (page 99-101) 22nd February 2022 (96-98). They initially disputed the extension was part of the demise of the property, until the extent of the demise of the property was conceded in November 2022.

27. The 1994 Deed makes no reference to the extension. The official copy of the land register relating to the Property at pages 75-76 makes no reference to the extension. The title plan to the land register relating to the was not produced in evidence. The Respondent did not argue that the title plan referred to the extension or shed light on any of the issues ventilated at the hearing.

28. The "Reserved Property" in the Second Schedule refers to the "external main structural parts of the Building forming part of the Property

including the roofs and external parts thereof and the joist or beams which are attached to any ceiling except where the said joists or beams also support the floor of a flat". The phrase "the Building" is not defined in the recitals or any other part of the Lease but at the date of the grant of the 1960's Lease would have been defined by reference to plan 1 as long as the demise was not in conflict with the same. That is the broad effect of the phase for "the purpose of identification only". The phrase "the Building" is not defined or qualified by the phrase "and additions thereto" which is found in paragraph 6 of the Sixth Schedule.

29. At the date of the 1994 re-grant, the rear extension arguably could have been considered an "addition" to the Reserved Property. At that time the roof joists and beams to the extension could have been argued to have been part of that addition. That is not to say the drafting would have been clear at that time. However, in order to construct or make use of it as the roof terrace for the benefit of the first floor flat 5, a first floor bay window above the flat roof was converted into a bay window with a door opening. This is just about visible from the photograph at figure 6 on page 162. To the uninitiated observer the "roof terrace" appears to be part of Flat 5 as it leads from the bay window from Flat 5. There is nothing in the Lease of the property which clearly shows that the terrace is part of the Reserved property as distinct from part of Flat 5. There is nothing in the Lease of the Property which clearly shows that the terrace is part of the "roof" as distinct from part of the demise to Flat 5.

30. The uninitiated observer looking at the Lease and the plan attached to the Lease would question whether the floor of the "terrace" was the "roof" of the property or part of the demise of Flat 5 or in some other way held for use by the Respondent, as the current freeholder.

31. The Respondent argued that it was common ground that the roof roof/roof terrace is not within the demise of Flat 5 – paragraph 21 of its skeleton argument. Paragraph 12 of Mr Wilson's witness statement of 23rd January 2024 (page 69) reveals that this is not common ground, That paragraph raises the issue of whether the terrace is a "floor" being used as part of the demise of Flat 5. If so, and on the assumption that the lease of Flat 5 is in similar form to the Lease, the joists and the beams supporting the terrace would fall within the demise as defined by Schedule 3 and recital 1(g). If so, liability for repair and maintenance would lie with the lessee of Flat 5 and not the Respondent. This would lead to reduction in the liability of the service charge fund for such repairs.

32. An assignee or mortgagee, or their solicitors, looking at the Lease and the official copy of the land register would have no way of knowing whether the roof terrace was also a "roof" within the meaning of the Second Schedule to the Lease as well as a "terrace" which the Respondent says falls within the definition of "Reserved property". The Respondent has not produced a Licence for alterations, Licence to assign (which might have been required under clause 3(v)(ii) of the

Lease) or any other document which sheds light on this issue. There is no reference to a terrace or balcony in the Lease.

33. If the Respondent or the lessees of Weycroft (Mr and Mrs Hancock as lessees of Flat 5, or other flats) were to assign their interest in any of the leases or the freehold, an assignee might seek to raise the very argument about the extent of the demise – and by extension the repairing and maintenance obligations- which OWC on behalf of Mr and Mrs Hancock as lessees and subsequently the Respondent initially sought to dispute.

34. Separately, the construction of the terrace includes artificial grass on decking laid on a fibreglass membrane. The engineer Mr Waring could not tell whether the original built up felt had been removed or whether the felt was still in place. He thought the former. If the felt has been removed it is not clear whether the fibreglass membrane is part of the "roof" which is part of the reserved property, an addition thereto or something inserted by or on behalf of the Lessee of Flat 5. It is unclear if the fibreglass was laid by the lessee of Flat 5, its predecessor or whether the lessee of Flat 5 has any repairing or other responsibility for the part of the terrace which adjoins the rear extension now being used as terrace. The Respondent's Counsel argued that it was part of the "roof".

35. One of the issues highlighted by Mr Waring's report is that where the first floor bay window to Flat 5 meets the existing house there is a weakness in the weather proofing: see his report under the heading "First floor bay window" (page 136). He noted decay to the roof structure underneath the bay window. It is unclear from the Lease and the official copy of the land register whether the area at the terrace adjoins the main building at Weycroft forms part of the "roof", if for example, parts of the roof structure which are not the beams and joists excluded from the demise of the property are not the cause of disrepair or in need of maintenance.

36. It is unclear from the Lease and the official copy of the land register in evidence whether Flat 5 has been granted an easement or licence to use the terrace, or whether for example the terrace is part of an extension to the demise of Flat 5 or part of the "roof". The Respondent's assertion that the terrace is not part of the demise of Flat 5 (skeleton argument paragraph 21) is not borne out by the evidence, which does not address this issue in any detail. The lease for Flat 5 was not put in evidence. Each of these permutations might have different consequences for allocation of responsibility for maintenance and repair and (separately) allocation of proportions of service charges payable by the various flats in Weycroft.

37. There is an artificial grass laid on top of the fibreglass membrane. It is unclear whether this is the Respondent's fixture or fitting or a removable chattel for the purpose of paragraph 6 of the Sixth Schedule and service charge.

38. There is no reference to the terrace or repairing obligations for the same in the Lease. The reference to "additions" in paragraph 6 of the Sixth Schedule is potentially ambiguous or uncertain in the light of the changes to the configuration and layout which have occurred since the Lease was drafted. If "addition" refers to the extension it is unclear whether "addition" encompasses the fibreglass membrane, the balustrade to the terrace, alterations to the construction of the bay window door to the building at Weycroft or other parts of the floor to the terrace. The provisions of the Lease relating to repair and maintenance are not readily clear or workable.

39. The second gateway issue is whether the Lease makes satisfactory provision in respect of rights granted to the property. The Fourth Schedule grants rights of access for performance of the Applicants' obligations under clause 3 of the Lease and rights of support and quasi easements and rights and benefits of a similar nature. This reflects the covenant in clause 3(h) of the Lease. The Respondent says the terrace structure is now part of the roof of the property. As matters stand that is not reflected in the Lease. In the absence of clear provision in the Lease or supplementary Deeds it is unclear whether that right may need to be exercised against Flat 5 for example, insofar as it affects the roof terrace or the Respondent. That is of significance as the Applicants are required to give reasonable notice (except in case of emergency) to the occupier and owe obligations to make good all damage done under clause 3(h). As matters stand the occupier of parts of the roof terrace could be either or both of the Respondent, Weycroft Financial Services Limited (or some other person or entity who may be a lessee of Flat 5). The party to whom the obligation to make good damage is also unclear.

40. Separately if the use of the roof to the extension as a terrace is found to cause damage in the future, there is uncertainty whether the cost of repair and maintenance arising from that use would fall to Flat 5 or the Respondent. The Respondent's argument that this would be embraced by the word "additions" in paragraph 6 of the Sixth Schedule does not meet this point. It is arguable, albeit less than clear in the events that happened, that the extension is such an "addition". It is far from clear that alterations to the main building and the works to construct the "terrace" such as the installation of fibreglass and possible removal of felt and/or installation of a bay window door could be regarded as an "addition" for the purpose of paragraph 6 of the Sixth Schedule. The bay window door works would appear to be better categorised as an alteration rather than an addition.

41. The Applicants assert the Lease does not provide a mechanism for enforcement of breaches of covenant in respect of the terrace because it is not clear that the terrace is part of the reserved property. This point does not arise if the terrace is treated as part of the roof.

Discretion

42. If the Tribunal finds either or both Gateway condition is established under section 35(2) of the 1987 Act, it has a discretion whether to order a variation: see section 35(2) and section 38(1) of the 1987 Act. The discretion is potentially a wide one.

43. Factors relevant to the exercise of that discretion are set out in section 38(6) of the 1987 Act as follows:

> "(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."

44. The Respondent did not argue that the proposed variation (or any variation under section 35) would be likely to cause substantial or any prejudice to the Respondent, lessees, occupiers or any of its linked entities, such as Weyford Financial Services Limited. The question of compensation under section 38(10) of the 1987 Act was raised as potential issue in the Respondent's skeleton argument. No evidence was adduced that any party or any other person would suffer loss as consequence of any proposed variation which should be the subject of such an award.

45. The Applicants point out in Mr Wilson's witness statement (paragraph 19 page 71) that, Flat 5's allocation of service charges appears to be 12.1%, by some way the lowest proportion payable by all 4 flats at Weycroft. This was unchallenged. If the terrace is regularised in the Lease as part of the roof and the reserved property so that cost of repair and maintenance are a service charge item, this may have implications for the future allocation of service charges between the various flats. This assertion went unchallenged.

46. The changes in the physical layout of the building and the adjacent Flat 5 since the Lease was drafted, in principle make this a paradigm case for the exercise of the Tribunal's discretion if either of the gateway conditions are made out.

47. The absence of a licence for alterations, licence for change of use and an inaccurate lease plan, taken with disputes about repair and allocation of liability for repairs arising from the construction of the terrace or the bay door, all point in favour of regularising and documenting as clearly as possible the status of the terrace and consequent allocation of liability for repair and maintenance and access. The details and merits of the various disputes about liability for damage caused in the past or

any future damage, are not of any great weight in deciding whether clarity and workability of the Lease should be given priority.

48. The Respondent did not address discretion as an issue separately but sought to argue that this application was "the wrong mechanism to try to litigate [the Applicants'] grievances with the Respondent" (paragraph 31 of the skeleton argument). As this application only deals with a request for variation, the Tribunal does not attach much weight to that submission. If the outcome of this application might assist the parties to resolve their differences about liability for any past or future disrepair of the structure which is now described as the roof terrace, differences about allocation of service charges, and minimise the need for separate proceedings about breach of covenant, these would all point the balance in favour of exercising the discretion to order a variation.

Cost of these proceedings

49. The Tribunal has power upon an application made by the Applicants as lessees to make an order that the costs incurred or to be incurred in connection with these proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of service charges payable by the Applicants under section 20C of the Landlord and Tenant Act 1985 ("the 1985 Act"). The Tribunal to may make such order on the application as it considers just and equitable in the circumstances.

50. Paragraph 8 of those submissions uses the phrase "wasted costs" in the context of section 20C of the 1985 Act. The Tribunal has not been asked to consider any claim for costs against professional representatives sometimes known as "wasted costs" orders and does not do so.

51. The Respondent's written submissions on section 20C advance arguments about whether legal costs or other costs of these proceedings are contractually payable by the Applicants or other lessees under the terms of the Lease. The issue of whether those costs are payable under the Lease is not before this Tribunal. The Tribunal makes no determination on that issue.

52. The Applicants have been largely successful in their application for variation of the Lease. This is an important consideration. Directions were issued orally at the end of the hearing that all submissions on costs were to be provided following the hearing on 9th May 2024. The Respondent's Counsel provided written submissions dated 28th May 2024. The Applicants' written submission on costs were dated 16th May 2024. Neither sought to introduce additional material on the issue of costs.

53. The Tribunal does not accept the application for a variation was misconceived or made for improper purposes as the Respondent's submissions suggest. The incongruity between the wording in the

Lease, the lease plans and the configuration of the extension and the terrace were very clear and should have been the subject of confirmatory Deeds at a much earlier stage. On the Respondent's stated position, the terms of the Lease are clear and the terrace was clearly part of the roof of the extension.

54. The need for this hearing, the application and associated costs could have been avoided if a confirmatory deed of variation had been prepared clearly reflecting the status and liability of the roof terrace. Such an plan could also have been offered after the issue oaf this application.

55. The Respondent as freeholder with responsibility for management could and should have taken steps to regularise and document its stated position that the terrace was within its maintenance responsibilities and part of the roof to the property and outside of the demise to Flat 5. The absence of any documentary evidence of the basis or terms of use of the terrace by Flat 5 was a major contributing factor to the need for this application which still can be addressed.

56. The controlling parties behind the Respondent are also occupiers, lessees or associated with lessees holding the other flats in Weycroft. Mrs Hanock as an officer of the Respondent and as a majority shareholder (with her husband) in effect have control of the Respondent and represent the other lessees. The only party apart from the Respondent which an order under section 20C is likely to impact upon is the Applicants.

57. The Variation made by the Order of this Tribunal will require to be registered at HM Land Registry. That process is an essential consequence of and part of these proceedings. None of the costs of that process (legal costs or other costs) should be a relevant cost payable by the Applicants as service charge. These costs would have had to be borne by the party effecting the alteration of Flat 5 and the terrace under a licence for alterations in the ordinary course of events had the provisions of the Lease (and the assumed provisions of the Lease of Flat 5) been followed.

58. It would be prudent for corrected and up to date plans to be prepared to accompany the order made by the Tribunal and the Lease as varied. None of the costs of preparation and filing of those plans (or new plans relating to the Leases at Weycroft) should be a relevant cost payable by the Applicants as service charge. Those costs would have had to be borne by the party effecting the alteration under a licence for alterations in the ordinary course of events.

Reimbursement of fees

59. The Tribunal considers it just and equitable to order the Respondent to reimburse the Applicants for the application fee and the hearing fee for the same reasons as given in relation to the decision under section

20C of the 1985 Act. It was necessary for the Applicants incur the hearing and application fees to achieve the Decision of this Tribunal.

This has been a remote hearing in part which has been consented to by the parties. The form of remote hearing was CVPREMOTE. All issues could be determined in a remote hearing in that application. The documents that we were referred to are set out above

H Lederman
Tribunal Judge

1st July 2024

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.

Flat 1, Weycroft, 78 Portmore Park Road, Weybridge Surrey KT13 8HH
("the Property")

Mr Ian Wilson & Mrs. Jill Wilson Applicants

Mark Williams Solicitor
W. Davies Solicitors
mw@wdavies.com

Weycroft, Weybridge Limited Respondent

Annex to decision dated … June 2024

Form of variation ordered

THE RESERVED PROPERTY

[as existing 2nd Schedule, but add new paragraph],....

For the avoidance of doubt. the flat roof (including the parts currently constructed as a terrace adjacent to Flat 5) and the joists or beams thereof shall as such be part of the Reserved Property."

"THE SIXTH SCHEDULE"

[as existing, but add the underlined section to clause 7]

"7. To keep the halls stairs landing and passages including the flat roof (including the parts currently constructed as a terrace adjacent to Flat 5) forming part of the Reserved Property properly cleaned and in good order and keep adequately lighted all such parts of the Reserved Property as are normally lighted or should be lighted"