FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**CAM/00KF/LVL/2023/0005**
Property	:	**28 Clatterfield Gardens** **Westcliff on Sea** **Essex SS0 0AX**
Applicant	:	**Miroslawa Pilgrim**
Representative	:	**Chennells Solicitors**
Respondents	:	**1. Mark Miller** **2. Sarah Miller**
Type of application	:	**To vary lease -** s.35 of the Landlord and Tenant Act 1987
Tribunal members	:	**Judge David Wyatt**
Date of decision	:	**3 December 2024**

DECISION

Decisions of the tribunal

The tribunal decides:

(1) not to make an order varying the terms of the lease; and

(2) not to make an order under section 20C of the Landlord and Tenant Act 1985.

Reasons

Procedural history

1. On 19 October 2023, the Applicant applied to the tribunal under section 35 of the Landlord and Tenant Act 1987 (the "**Act**") to vary the lease of

her first-floor flat in a house which had been converted into two flats. The Respondents are the freeholders, the Applicant's landlords under the lease. They said that they held the lease of the ground floor flat (No.28), which was their home.

2. The Applicant said the flat has two bay windows with flat roofs to the rear and one bay window with a tiled sloping roof to the front, describing these as the "**Bay Window Roofs**". She argued these were not demised to her because they were above the ceilings, so they formed part of the freehold and the Respondents were responsible for maintaining them. The Applicant in effect asked the tribunal to clarify this by amending the landlord's covenant to repair such matters as the roof and roof timbers (with the tenant paying half of the costs) to add the words: "*flat roofs and bay roofs*".

3. The Applicant also applied for an order under section 20C of the Landlord and Tenant Act 1985. She argued that the lease was unclear and she should not have to pay the landlords' costs of the proceedings under the terms of her lease when the problem was with the drafting of the lease and she had sought to resolve the matter by agreement.

4. On 22 August 2024, a procedural Judge gave case management directions proposing that the application be determined on the papers, unless by 30 September 2024 a hearing was requested. The Respondents were to produce a statement in reply to the application and did so. The Applicant was permitted to send a reply (which they did) before they produced the bundle for the determination. They produced the bundle together with a video taken from the interior of a bedroom, showing water dripping from the ceiling just behind a window which looks onto the rear of the property.

5. There was no request for a hearing. Accordingly, by rule 31(3) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "**Rules**"), the parties are taken to have consented to this matter being determined without a hearing. I am satisfied that it appears appropriate for this matter to be determined based on the documents in the bundle.

6. On 28 October 2024, I directed that a draft of this decision be sent to the parties and that: "*If the applicant wishes to respond, they must by 13 November 2024 inform the case officer (asking them to inform me) and send to the respondents: (a) witness statement(s) setting out all disputed matters of fact; (b) a statement setting out all representations; and (c) copies of any other documents relied upon. If the applicant does so, the respondents may…*".

7. The directions provided that if I was not informed by 18 November 2024 that the parties wished to respond, the tribunal would thereafter finalise and make the decision on paper. I am informed that there has been no response. Accordingly, I have made my decision as set out above and below.

Lease

8. The lease is dated 30 September 1968 and was granted for a term of 999 years at a notional ground rent. The lease describes the building as the "*…land and building … known as 26 and 28 Clatterfield Gardens … consisting of two maisonettes.*"

9. The lease demised "*…ALL THAT maisonette situated on the first floor of the … building … including the ceilings and the floors and the joists on which the floors are laid …*" together with a staircase, balcony, garden and other secondary areas and rights. In clause 2(5), the tenant covenants to repair "*… the demised premises … and all additions … and the fixtures therein and all walls sewers drains pathways passageways easements and appurtenances…*".

10. In clause 2(6), the tenant covenants to pay half of the costs of repairing all "*…ways passageways pathways sewers drains pipes watercourses cisterns gutters party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Tenants in common with the Landlords or the tenants or occupiers of the retained premises including repairing … the foundations and the roof and roof timbers of the said building.*"

11. In clauses 3(1) and (3) respectively the landlord covenants to insure the "*said building*" and "*…(the Tenants paying … one half of the expense of so doing) to repair … the foundations and the roof and roof timbers of the said building and all ways passage ways pathways sewers drains pipes watercourses cisterns gutters party walls party structures fences easements and appurtenances belonging to or used or capable of being used by the Tenants in common with the Landlords or the tenants or occupiers of the retained premises…*".

Satisfactory provision (s.35)

12. Sections 35 and 38 of the Act are set out in the Annex to this decision. Section 38 sets out the tribunal's powers in respect of orders on applications under section 35.

13. The grounds on which applications may be made under section 35 of the Act to vary a long lease of a flat are set out in s.35(2). They are that the lease fails to make "*satisfactory provision*" with respect to one or more of the matters specified in s.35(2). The application relied on s.35(2)(a), which specifies:

> "*(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…*"

14. The application contended that, for the reasons summarised in paragraph 2 above, the lease failed to make satisfactory provision with respect to the repair or maintenance of the flat in question or the building containing the flat.

15. In their response, the Respondents referred to the Upper Tribunal decisions in Gianfrancesco v Haughton (LRX/10/2007), Triplerose Ltd v Stride [2019] UKUT 99 (LC) and Camden v Morath [2019] UKUT 193 (LC). They said the lease was not unclear or unworkable. They argued that the Bay Window Roofs were included in the demise to the Applicant. They were an integral part of the structure of the windows, and part of the walls, whether or not they were above the ceiling line. They did not extend into the main roof. They said it would be unfair to make them responsible for repairing these Bay Window Roofs, or pay half of the costs of doing so. They said their relationship with the Applicant had been difficult and alleged (amongst other things) unpaid service charges for buildings insurance costs for 10 years.

16. In reply, the Applicant produced a statement exhibiting copies of correspondence between the parties over several years. She alleged the Respondents had changed their stance, producing an e-mail from the First Respondent in November 2019 referring to a responsibility to share the cost of any "*maintenance or repair that is shared use*" and offering to share the cost of repairing a leak into one of the flat roofs above the rear bay windows "*as it is causing damage to your flat and my building*." The Applicant said she waited for the First Respondent to provide estimates but heard nothing more from him. In October 2020, the Applicant had written about a leak in the other flat roof and the Respondents had replied this was not their responsibility, but they were happy for the Applicant's contractors to erect scaffolding for any necessary work. The Applicant said that in October 2021 the bedroom ceiling had collapsed, her tenant moved out and she was unable to re-let the Property until repairs had been completed. She also responded to the other allegations and produced copies of correspondence between the parties.

17. Woodfall on Landlord and Tenant confirms at 5.026 that:

"*…Generally speaking, in the case of a demise of one floor of a building or of a room on any floor which is bounded or enclosed on one or more sides by an outside wall, unless the outside wall is excepted or reserved or there is some context which leads to a contrary conclusion, prima facie the premises demised comprise the whole; that is to say both sides of the wall. So the lease of a studio was held to include the outer wall enclosing the rooms let so that the tenant was entitled to place his own sign on that part of the wall …*

"*…It does not follow from the inclusion of external walls in a demise that the demise also includes the roof. Whether it does is a question of construction of the lease as a whole…*

"*…An external fixture (whether ornamental or not) fixed to that part of the external wall which encloses the demised premises is included in the demise*."

18. Woodfall refers to various long-established authorities for this, including the decision of the Court of Appeal in Sturge v Hackett [1962] 1 WLR 1257. The authors also confirm at 13.136, referring to even earlier authorities, that items such as windows and external doors may be part of the structure of a flat and included in the demise.

Conclusion

19. It seems to me that the Respondents are right. The demise is of all that maisonette on the first floor. The lease wording confirms that amongst other things it includes the ceilings (not for example that it stops at the interior surface or plaster of the ceiling, the type of formulation used where that is what is meant). The only exceptions and reservations are the usual general rights to support and protection, passage of services and so on. The demise does not include the separate main roof(s) or roof timbers, because the landlord covenants to repair those.

20. Although the photographs and video produced by the Applicant do not enable precise assessment, it seems to me that the flat "roofs" next to the rear windows (one of which is presumably that shown in the video produced by the Applicant) are probably in line with or part of the ceiling, and the sloping tiled "roof" above the shallow bay window at the front is probably no higher than the ceiling line. Even if they are slightly above the ceiling, they are not part of the main roof structures or timbers and I consider that they are included in the demise to the Applicant, who is responsible under the terms of the lease for repairing them.

21. Accordingly, my view is that the lease does not fail to make satisfactory provision with respect to the matters alleged. It is not unclear, or it is clear enough. No case has been made that it is unworkable, and it does not appear to be. Accordingly, I cannot make an order to vary the lease and this application fails.

Whether to make an order

22. If I am wrong about that and the lease is not sufficiently clear or otherwise does not make satisfactory provision with respect to repair or maintenance, section 38 of the Act provides that I "*may*" make an order varying the specified leases unless section 38(6) applies (section 38(7) is not relevant here).

23. Section 38(6) provides that a tribunal shall not make an order effecting any variation of a lease if it appears to the tribunal that: (a) the variation "*would be likely substantially to prejudice any respondent … or any person who is not a party to the application*" and that compensation would not be an adequate remedy; or (b) that: "*for any other reason it would not be reasonable in the circumstances for the variation to be effected*." Section 38(10) gives power to provide for a party to pay

compensation in respect of any loss or disadvantage the tribunal considers is likely to be suffered as a result of the variation.

24. It seems to me that it would not be appropriate or reasonable for the variation sought by the Applicant to be effected. The photographs show a building which was substantially extended and modified probably before the lease was granted, with:

    a. two large main roof structures;

    b. the small secondary first floor bay window "roof" areas the focus of these proceedings;

    c. a number of other secondary small "roof" areas above the windows and entrance doors on the ground floor, most of which appear to be the responsibility of the first floor leaseholders/landlords; and

    d. a larger flat roofed area above what appears to be a rear ground floor extension.

25. Under the current arrangements, the costs of access for the fewer "roof" structures on the first floor are likely to be higher, but the ground floor has more to maintain even if the ground floor rear extension is disregarded.

26. It might be more efficient overall for the freeholders to take on responsibility for repair of all the secondary "roof" areas (or all of the building except an interior-only demise) and for all leaseholders to share the costs, but I am not satisfied that the basic variation sought by the Applicant would achieve this (at least with sufficient certainty). Even apart from the uncertainty their suggested addition may create, this would expand only the landlord's repairing obligation. It would not, for example, expand the tenant's covenant to contribute the cost. Amendments to achieve anything like this for very long lease(s) may be a substantial exercise, calling for careful thought and precise drafting.

27. In view of the above matters, I do not need to consider whether, as the Respondents allege, the Applicant has failed to pay service charges for a long period of time. The Applicant has in her reply given a robust response (saying for example that she would have paid insurance costs if her requirements had been met) and produced copies of e-mails between the parties arguing about such matters. It does not seem to me to be fair to determine this without more, potentially witness statements and a hearing, and in view of the matters above it does not seem necessary or proportionate to embark on that type of exercise. I need only say that I do not think the First Respondent's early offer to pay half of the costs of repairing the leaking first floor flat roof area has any real weight against the Respondents or otherwise alters the construction of the lease. On the papers, it seems to have been a sensible or hasty voluntary offer to help expedite urgent repairs to stop a leak.

Section 20C

28. It appears the Respondents have not yet incurred any costs in relation to these proceedings. The Applicant appears (from the documents in her reply) to have been threatening to make a claim against the Respondents. In any event, the Applicant brought these proceedings and has been unsuccessful. I am not satisfied that the alleged lack of clarity in the lease make it just and equitable to make any order under section 20C of the Landlord and Tenant Act 1985.

Name: Judge David Wyatt **Date:** 3 December 2024

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).

ANNEX

Sections 35 & 38 of the Landlord and Tenant Act 1987

35.— Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to the appropriate tribunal for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

(a) the repair or maintenance of—
(i) the flat in question, or
(ii) the building containing the flat, or
(iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;

(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

(c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease ;

(g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—

(a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and

(b) other factors relating to the condition of any such common parts.

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 and Tribunal Procedure Rules shall make provision—

(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and

(b) for enabling persons served with any such notice to be joined as parties to the proceedings.

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

(a) the demised premises consist of or include three or more flats contained in the same building; or

(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.

(9) For the purposes of this section and sections 36 to 39, "appropriate tribunal" means—

(a) if one or more of the long leases concerned relates to property in England, the First-tier Tribunal or, where determined by or under Tribunal Procedure Rules, the Upper Tribunal; and

(b) if one or more of the long leases concerned relates to property in Wales, a leasehold valuation tribunal.

38.— Orders varying leases.

(1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the tribunal, the tribunal may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.

(2) If—

(a) an application under section 36 was made in connection with that application, and

(b) the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application under section 36,

the tribunal may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.

(3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application, the tribunal may (subject to subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order.

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.

(5) If the grounds referred to in subsection (2) or (3) (as the case may be) are established to the satisfaction of the tribunal with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.

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

(a) that the variation would be likely 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.

(7) A tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—

(a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or

(b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or

(c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.

(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.