FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00BB/LSC/2021/0356** **LON/00BB/LDC/2021/0261** **LON/00BB/LVL/2021/0008**
Applicant	**:**	**Britannia Village (Nine) Residents Management Company Ltd**
Representative	**:**	**Mr Robert Bowker of Counsel**
Respondents	**:**	**The leaseholders as named in the applications**
Represented Respondents	**:**	**James Cantle, Florence Cantle, Rohan Chandane, David Coppard, Brian Dowd, David Elliott, Simon Fletcher, Tushar Kanaujia, Paras Maalde, Julie McFaul, Ates Nalbantoglu, Woei Teoh and Zheng Wang**
Representatives	**:**	**Mr Paras Maalde and Mr David Coppard**
Property	**:**	**Western Beach Apartments, 36 Hanover Avenue and 1 & 2 Fitzwilliam Mews, London, E16**
Tribunal	**:**	**Judge Siobhan McGrath** **Mrs Helen Bowers MRICS**
Date of hearing	**:**	**6th July 2023**
Date of decision	**:**	**3rd August 2023**

DECISION

Decision of the Tribunal

The decision of the Tribunal is set out in the annexed Order

Background

1. The applicant (the RMC) is the head-lessee of Western Apartments, 36 Hanover Avenue and 1 and 2 Fitzwilliam Mews ('the Property'), which comprise a block of 119 flats and two mews houses. The respondents are the leaseholders of the 119 flats and are all members of the applicant company.

2. Three applications were made to the tribunal: an application to determine service charges under section 27A of the Landlord and Tenant Act 1985 ('the 1985 Act'), an application to vary the flat leases under section 35 of the Landlord and Tenant Act 1987 and an application for dispensation under section 20ZA of the 1985 Act. All three applications relate to proposed fire safety works including the replacement of timber decking in the flat balconies.

3. The reason that three separate applications were made is that there has been and remains uncertainty about who should be responsible under the leases for the repair and maintenance of the flat balconies.

4. To cover all eventualities, the applicant first asked the Tribunal to decide whether the landlord management company is responsible remediating the balconies and if so whether those costs are recoverable from the leaseholders. The associated section 20ZA application was made so that if the landlord was responsible it could move quickly to carry out the works to the balconies so there would be no further delay.

5. The lease variation application was made on the basis that if the Tribunal decided that the leases did not require the management company to carry out the remediation work or if there was uncertainty about that question, then the leases should be changed to make it clear that the management company should carry out the works and should be able to retrieve the cost from the leaseholders.

6. At the time the applications were made, the provisions of the Building Safety Act 2022 had not been brought into force. Following the commencement of relevant parts of that Act in July 2022 and in particular the leaseholder protections

introduced by Part 5, the Tribunal sought submissions from the parties as to the application and possible impact of that Act.

7. During this time it became clear that the original developers, Taylor Wimpy, were willing to pay for the necessary remediation work. By the date of the hearing it was tolerably clear that this would include the cost of the work to the balconies but that until a contract was signed there was no certainty of that being the result as there was some uncertainty as to the extent of Taylor Wimpy's statutory liability. Therefore, the applicant asked for those applications to be stayed and not determined until the position was more certain.

8. Notwithstanding this uncertainty, it was submitted on behalf of the represented leaseholders that the applications under section 27A and section 20ZA should be dismissed as being otiose.

9. At the hearing, the Tribunal expressed some sympathy for the lessees. It will be some time until the Taylor Wimpey's final decision is known and in the interim they would be subjected to the inevitable stress of having ongoing legal proceedings.

10. Following a discussion, and an assurance from the Tribunal that if the proceedings were withdrawn this would not prevent the applicant from bringing fresh applications in respect of the same or similar subject matter, the applicant agreed to seek to withdraw those two applications and the Tribunal agreed.

11. Accordingly, the Tribunal needed only to consider the lease variation applications. For the reasons set out below the Tribunal was satisfied that variations should be made. Those variations are not temporary but will endure throughout the terms of the leases (unless varied again) and we consider that this will be of benefit to all parties concerned.

Lease Variation

12. The Landlord and Tenant Act 1987 gives the Tribunal power to vary a lease if it fails to make "satisfactory provision" with respect to a number of specified matters. These include the repair or maintenance of the flat in question or the building containing the flat. They also include the recovery of expenditure by one party to the lease from another party where that expenditure is for the benefit of that other party.

13. The first question for the Tribunal is therefore whether the lease fails to make such satisfactory provision. The only way that this can be assessed is by an examination of the relevant parts of the lease. This is a technical exercise but must be undertaken carefully as any changes that are made will impact on the rights and obligations of both the landlord and leaseholders for the whole length of the lease. A variation in a lease is not time limited.

The lease provisions

14. The first set of relevant provisions in the lease are contained in clause 1 which includes the following definitions:

> *"'Property'*
>
> *The Flat shown colored red and numbered …. on Plan B being part of the land comprised in the title above referred to including bays/bay windows (if any) to which direct access is obtained from the flat*
>
> *'Buildings'*
>
> *All buildings and other structures (and any structures incidental to the user thereof) and any Service Installations now or hereafter constructed (save any Electricity sub-station site) on over or beneath the Development.*
>
> *'Common Parts'*
>
> *All parts of the Development including the Main Structure and Accessways (but excluding the Amenity Areas) not comprised in the Leases*
>
> *'Development'*
>
> *The land shown edged red on the Plan A and the buildings thereon and thereover (but excluding the Property)*
>
> *'Estate'*
>
> *All land (excluding the Development and the Property) in respect of which the Company….is or was the registered proprietor ……*

'Flat'

The part or parts of the Building (Including any balcony or terrace therewith) bounded by the Main Structure forming part of the floors exterior walls and ceilings thereof and one half of all other walls dividing the same from the Development (the position and extent whereof is indicated and coloured red on Plan B) which said part or parts of the Buildings includes the items referred to in Part I of the First Schedule

'Main Structure'

All structural parts of the Building more particularly described in Part II of the First Schedule

15. The second set of relevant provisions are contained in Part 1 of the First Schedule and set out what is included in the Flat. These specifically states that:

> *"(f) Where the same includes a balcony or terrace the fixings and finishes upon the surface of the floor and the interior of any walls or ceiling thereof and the airspace to the ceiling level thereof"*

16. The third set of relevant provisions are contained in Part 2 of the First Schedule and set out what is included in the Main Structure. These specifically state that:

> *"(c) Any joists and floor-slabs and the internal structure of any loadbearing supporting or retaining floor walls beams columns or ceilings of the Buildings and all other similar structural parts thereof"*

17. In summary the Flat is also known as "the Property". If the Flat has a balcony it is included with the flat with the exception of the load bearing elements where the balcony is tied into the Main Structure.

18. The distinction is important when we come to consider who is responsible for the maintenance of the balconies under the fourth set of relevant provisions. Under Part 1 of the Fifth Schedule the Residents Management Company is obliged as follows:

"'Repairs'

To keep the Common Parts in a good state of repair and condition"

19. The Common Parts do not include any part of the Development comprised in the Leases. Therefore, the RMC has no right nor any obligation to maintain the balconies as they are part of the Flats.

20. Because the RMC has no obligation to maintain the balconies, the provisions relating to the maintenance or service charges also do not apply. The maintenance charge is defined in clause 1 as follows:

"'Maintenance Charge'

Means ...-

(a) In relation to the Buildings and the Common Parts the proportion applicable to the Property....of the sums spent or be spent by the Residents Management Company on the matters specified in Part I of the Fifth Schedule and so far as the same relate to the matters specified in Part II of the Sixth Schedule as estimated or adjusted in accordance with Part I of the Sixth Schedule

21. The expenditure that is recoverable under the maintenance charge provisions is set out in Part II of the Sixth Schedule and includes:

"'Maintenance'

All sums paid by the Management Companies for the repair and maintenance decoration cleaning lighting and managing of the Development whether or not the Management Companies were liable to incur the same under its covenants herein contained."

22. Finally, the Residents Management Company cannot exercise a right of entry to repair or maintain the balconies. Part II of the Second Schedule sets out the rights reserved to the RMC . These include:

"'Entry'

To enter upon the Property at all reasonable times (and at any time in an emergency) so far as may be necessary for the purposes of inspecting maintain repairing and renewing all parts of Buildings comprised in the Development or the Estate and the Service Installations comprised in the Property"

The consideration of the law

23. On behalf of the applicant, it is said that the position under the lease is not satisfactory as the arrangements for the repair and maintenance of the balconies is obscure and impractical. They therefore contend that the basis of the application is, both highly practical and forward-thinking. For the time being, it will allow the balcony work to occur far more easily because it will facilitate access. In the future, if work is required to the balconies, for example, to alleviate inevitable wear and tear in the decades to come or to carry out routine or cyclical maintenance, it will allow the cost of that work to be recovered through the service charge, subject, of course, to the leaseholders' statutory protections which will be unaffected by this application.

24. For the following reasons we agree:

(a) The wording of the leases is unsatisfactory. In particular the leases failed to make a clear distinction, having regard to the way in which the building and the balconies were constructed, between which parts of the balcony are the responsibility of the landlord and which parts are the responsibility of the leaseholders;

(b) The design of the balconies means that a failure to remediate or maintain one balcony could have an impact on other flats or the structure or common parts of the building;

(c) The arrangement where maintenance and repairing obligations for the balconies are split between the management company and individual leaseholders is impractical and unsatisfactory;

(d) Varying the leases to make it clear that although the balconies remain within the demise of the flat (they are owned by the leaseholder), it is for the management company to maintain and repair them will lead to consistency in management, maintenance and safety

(e) In order to make satisfactory provision it will also be necessary to vary the leases so that the management company can recover the costs incurred in undertaking works to the balcony and also so that they can have any necessary access through the flats to undertake works of maintenance and repair.

25. We therefore decided to exercise our discretion and to make an order varying the leases.

The terms of the variation

26. At the hearing of the application, we considered various submissions on the terms of any variation from both the applicants and from Mr Maalder on behalf of the represented leaseholder. At the end of the hearing we asked Mr Bowker, counsel on behalf of the applicant, to prepare a draft order. That draft was then circulated to all of the leaseholders for comment. Our conclusions following that exercise are set out in the following paragraphs.

First Variation

27. The first variation sought is to the definition of "Maintenance Charge." The applicant's draft differed in structure to the existing paragraphs (a) and (b) of the definition. On behalf of the represented respondents, Mr Maalder proposed firstly that consistency should be maintained as clause 1 is a definition and not a tenant covenant. We agree.

28. Mr Maalder also contended that two qualifications to the paragraph should be introduced. Firstly, a qualification to the effect that the charge should only be recoverable to the extent that such sums are permitted by law. He argued that this

would make it clear now and in the future that provisions such as those contained in the Building Safety Act 2022 and the Landlord and Tenant Act 1985 prevail over this clause. Whilst we understand Mr Maalder's apprehension we do not consider that the qualification should be included. Firstly, the statute and precedence will prevail without the addition of the suggested wording. Secondly, as a matter of good practice, drafting should not include additional wording which, in the event, might itself be open to interpretation.

29. The second qualification requested by Mr Maalder was that the lease should limit the recovery of costs to those not recoverable from any other third party. He argued that the proposed qualification was to reflect the currently reality where Taylor Wimpey have entered into discussions to fund all of the required work to the balconies, even though it is arguable that they do not fall within the ambit of the 2022 Act. He submitted that the requirement to seek funding from third parties should endure throughout the life of the lease. We do not agree. Firstly, the use of the term "third party" (or indeed any similar) term is too uncertain to be enforceable. If the qualification were included in the lease it may lead to uncertainty, unhelpful delay and dispute. Secondly, we doubt that section 35 of the 1987 Act would allow the Tribunal to make such a wide-reaching change. In our view this goes beyond the criteria of "fails to make satisfactory provision". As we observed at the hearing, there is a possibility that a similar provision may be introduced by legislation in any event.

Second Variation

30. The second variation sought relates to rights reserved to the landlord for access to the balconies. We consider that this right is necessary but suggested that the power of entry should be limited to what is "proportionate" and this was included in Mr Bowkers's draft. Mr Maalde pointed out that the draft needed to clearly specify that the right included a right to enter upon the Property itself and we agree.

The Third Variation

31. The third variation is to the definition of Repair in Part I of the Fifth Schedule and adds words which make it clear that the duty in respect of the balcony (or terrace) is

to repair, maintain, remediate, renew or comply with any statutory duty. This is consistent with the other variations and the objectives of the parties and as such we approve the suggested variation.

Fourth Variation

32. The fourth variation is an addition to the definition of "covenants" in Part II of the Sixth Schedule where words are added to make it clear that costs incurred in respect of the balconies or terrace is a relevant covenant. Mr Maalder submitted that the variation was not needed as it was simply repeating what had been included earlier in the lease. Whilst we see his point in this respect, we do not consider that the variation should be excluded as it simply reflects the structure of the lease.

Conclusion

33. For the reasons given above, we decided that the applicant's request to withdraw the section 27A and section 20ZA applications should be granted. This is expressly on the basis that, if necessary, the applicants would not be debarred from bringing new section 27A and section 20ZA applications in respect of the cost of the same or similar works.

34. Also, for the reasons given above we are satisfied that the conditions are met for lease variations under section 35 of the Landlord and Tenant Act 1987. The terms of the variations are set out in the annexed order.

35. Finally, the Tribunal has directed that the Chief Land Registrar must register the variations set out in the annexed order against the registered title for each of the Flats.

36. During the course of the case management of the applications the respondent lessees were invited to make applications under section 20C of the Landlord and Tenant Act 1985 which deals with the treatment of a landlord's costs in the case. In this instance the applicant stated that the costs of the applications would not be recovered through the service charge. The landlord derives an income from licensing

telecommunications infrastructure on the roof of the building and those funds would be used to cover the costs of the application.

37. The variation order is annexed to this decision.

Siobhan McGrath

Helen Bowers