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RESIDENTIAL PROPERTY TRIBUNAL

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0041/12/21

In the Matter of Flats 1 to 9 Wellington Court, Wellington Street, Cardiff CF11 9BL
And in the Matter of an Application under Part IV, sections 35 and 37 of the Landlord and Tenant Act 1987

Applicant:		**Heather Scott-Cook (Flats 1 and 2)**
Respondents:	**(1)**	**Araford Limited**
	(2)	**Christopher Tanner (Flat 3)**
	(3)	**Darren Gay (Flat 4)**
	(4)	**Elizabeth Gittens-Ward (Flat 5)**
	(5)	**Kevin Yuen (Flat 6)**
	(6)	**Jake Sumner (Flat 7)**
	(7)	**Germaine Bonney (Flat 8)**
	(8)	**Hayley Egan (Flat 9)**
Tribunal:		**Colin Green (Legal Chair)** **Andrew Lewis FRICS (Surveyor Member)** **Eifion Jones (Lay Member)**
Date of Hearing:		**7 September 2022**

DECISION

(1) The Applicant's application under section 37 of the Landlord and Tenant Act 1987 is dismissed.

(2) In respect of the Applicant's application under section 35 of the 1987 Act, it is ordered that the leases of each of the nine flats at Wellington Court, Wellington Street, Cardiff be varied as follows.

a. By replacement of the words "the 25th day of June to the 24th day of June" in paragraph 2 of the Fifth Schedule with the words "the 1st day of April to the 31st day of March".

b. As from 1st April 2023, by replacement of the existing provisions of clause 3(v) with the following words:
"To pay to the Lessor in each year by equal instalments in advance on the first day of each month an initial service charge of such sum as the Lessor may reasonably demand having regard to the actual and estimated cost of

services for the forthcoming year such sum to be credited to the Tenant against his liability under paragraph iv of this clause and the Fifth Schedule in the manner specified in such schedule."

(3) No order is made under section 20C of the Landlord and Tenant Act 1985.

REASONS

Preliminary

1. This application concerns proposed variations of the leases of Wellington Court, Wellington Street, Cardiff, a purpose-built block of flats consisting of three storeys and nine flats. Each of the leases is an underlease for a term of 99 years (less 10 days) from 25 October 1972 and the Tribunal has proceeded on the basis that the material terms of each of the leases are the same as those of Flat 2, contained in the bundle ("the Lease"). The head lease, for a term of 99 years from 25 October 1972, is vested in the First Respondent ("Araford"), the landlord. Each of the nine flat owners is also a shareholder of Araford (clause (4)(iii) of the Lease) whose officers are drawn from the flat owners/shareholders from time to time. The current assignees of the nine leases are parties, as set out in the title to the proceedings.

2. The Tribunal (consisting of the same panel) previously dealt with service charge issues in respect of Flat 4 which had been transferred to it by the Cardiff County Court pursuant to s. 176A of the Commonhold and Leasehold Reform Act 2002. The Tribunal's decision of 15 November 2021 provides additional background.

3. The hearing of the present application took place via CVP on 7 September 2022, attended by the Applicant, Heather Scott-Cook (by telephone), and Christopher Tanner, Darren Gay, and Elizabeth Gittens-Ward (by video). Mrs. Gittens-Ward represented herself as the owner of Flat 8 and Araford as a director of that company. No other Respondent was present or represented and had submitted no representations or other documents to the Tribunal.

4. In seeking the variations Mrs. Scott-Cook relies on two provisions in Part IV of the Landlord and Tenant Act 1987.

Section 37

5. Section 37 of the 1987 Act provides as follows:

> ***"37 Application by majority of parties for variation of leases.***
> *(1) Subject to the following provisions of this section, an application may be made to the appropriate tribunal in respect of two or more leases for an order varying each of those leases in such manner as is specified in the application.*
> *(2) Those leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats*

which are in the same building, nor leases which are drafted in identical terms.

(3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.

(4) An application under this section in respect of any leases may be made by the landlord or any of the tenants under the leases.

(5) Any such application shall only be made if—

(a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or

(b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.

(6) For the purposes of subsection (5)—

(a) in the case of each lease in respect of which the application is made, the tenant under the lease shall constitute one of the parties concerned (so that in determining the total number of the parties concerned a person who is the tenant under a number of such leases shall be regarded as constituting a corresponding number of the parties concerned); and

(b) the landlord shall also constitute one of the parties concerned."

6. By reason of s. 37(5) and (6), the application can only be made if at least 75 per cent of the total number of the parties concerned (being the nine leaseholders and Araford) consent to it and it is not opposed by more than 10 per cent of such parties. Therefore, in the present case support by at least 8 parties and opposition by no more than 1 is required.

7. The Tribunal must decide if it has jurisdiction to determine the application and whether the relevant statutory conditions are satisfied. The percentage of those in favour or opposed is to be taken as at the date the application is made to the Tribunal. Any consent received or opposition expressed after that date will not be taken into account by the Tribunal in deciding whether the percentage threshold was reached, see: *Dixon v. Wellington Close Management Limited* [2012] UKUT 95 (LC).

8. In the present case no proposed variation was even available to be presented to the relevant persons prior to the application being issued in December 2021. Although the application mentions various concerns it does not specify precisely what order is sought. Details of the proposed variations do not seem to have been identified until provision of a draft deed of variation, which the Applicant first requested from solicitors in February 2022. Therefore, the s. 37 application must fail. The correct procedure is to provide the draft with a covering explanation and a means by which

each party can indicate consent or opposition. Only once that has been completed should the application be made (assuming the thresholds have been reached).

9. In addition, even assuming votes could be taken at the hearing, they were insufficient to comply with the statutory requirements. The proposed variations were supported by Mrs. Scott-Cook (2 votes), supported by Mrs. Gittens-Ward in respect of alterations to the user covenants but opposed in respect of the other variations (2 qualified votes), and opposed by Mr. Tanner and Mr. Gay (2 votes). There was no expression of support or opposition by any of the other tenants.

Section 35

10. Section 35 of the 1987 Act provides as follows:

> *"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] [F7and 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."

11. No additional categories have been added by regulations under s. 35(2)(g).

12. A draft deed of variation has been provided, settled by Robert Twigg of Everett Tomlin Lloyd & Pratt, intended to be executed by all the leaseholders and Araford. Although the precise variations sought were not specified in the application, as required under s. 35(1), and by paragraph 6(2) of Schedule 2 to the Leasehold Valuation Tribunals (Procedure)(Wales) Regulations 2004, nevertheless under s. 38(4) the Tribunal can make "either the variation specified in the relevant application under section 35…or such other variation as the tribunal thinks fit". Therefore, the absence of the draft deed at the time the application was made does not prevent the Tribunal from making an order varying the terms of the Lease, whether as provided in the draft deed or otherwise.

13. Details of the variations are set out in a schedule to the draft deed and fall into three categories. First, paragraphs 1 and 2 of the First Schedule to the Lease contain regulations in respect of user: that the demised premises shall be used and occupied as a private flat only for the sole occupation of the Tenant and the family of the Tenant, and that neither the demised premises nor any part thereof shall be used for business purposes. Both paragraphs would be varied by paragraphs 3 and 4 of the Schedule to the draft deed of variation. The use of the demised premises is not a matter which falls within any of the specified categories in s. 35(2) however, and therefore the Tribunal has no jurisdiction to consider whether the Lease fails to make satisfactory provision in respect of such matters.

14. The second category of variations concerns the service charge, and potentially fall within s. 35(2)(e) and/or (f). The proposal is to replace clauses 3(iv) and 3(v), and the whole of the Fifth Schedule with the provisions set out in paragraphs 1, 2, and 5 of the schedule to the draft deed.

15. By clause (3)(iv) and (v) of the Lease, the Tenant covenanted with the Lessor (Araford) as follows:

"(iv) to pay to the Lessor in each year one equal ninth part of the cost (calculated as provided in the Fifth Schedule hereto) of providing for the services and other things specified in the Sixth Schedule hereto such payment to be made at the times and in the manner specified in the said Fifth Schedule.

(v) to pay to the Lessor in each year by four equal quarterly payments (and so in proportion for any less period than a quarter) …to be made in advance on the four usual quarter days in each year an initial service charge of £25. such sum to be credited to the Tenant against his liability under paragraph iv of this clause and the Fifth Schedule and in the manner specified in such Schedule."

Unsurprisingly, over the years quarterly payments have been replaced with monthly payments which currently stand at £50.00 per month.

16. The Fifth Schedule to the Lease provides as follows:

"1. The cost of services and other things for each year shall be actual cost as certified by the auditors of the Lessor of providing the services and other things specified in the sixth Schedule to this Lease

2. The year for the purpose of certifying the cost shall run from the 25th day of June to the 24th day of June ("hereinafter called "the accounting period")

3. If the cost to the Lessor in any accounting period of 12 months of carrying out its obligations under the Sixth Schedule to this Lease as certified under paragraph 1 of this Schedule ("hereinafter called "the annual cost") exceeds the aggregate amount payable by all the tenants of all the flats in the Building by way of initial service charges (hereinafter called "the annual contribution") Together with any unexpended surpluses as hereinafter mentioned and a certificate of the amount by which the annual cost exceeds the total of the annual contribution and unexpended surpluses be served upon the Tenant by the Lessor or its agent then the Tenant shall pay to the Lessor within 28 days of the service of such certificate (which shall be a copy of that signed by the auditors of the Lessor) a ninth part (hereinafter called "the excess contribution") of the amount shown therein and if in any accounting period the annual cost is less than the annual contribution the difference (being the unexpended surplus) shall be accumulated by the Lessor to be applied towards the annual cost in future year.

4. As part of the cost of services herein provided for the lessor may make provision for an annual contribution to a redecoration reserve such reserve to be utilised in discharging the obligations of the Lessor under Clause One of the Sixth Schedule hereto"

At some point the accounting period changed to the year 1 April to 31 March.

17. The Sixth Schedule provides:

"1. At all times during the said term to keep the external walls and load-bearing walls and the girders and timbers and roof and exterior of the Building (including drains gutters and external pipes) and the forecourt and surround and such boundary walls and fences as belong to the Lessor and all staircases passages and parts used in common by the tenants of the flats in good and substantial repair and in clean and proper order and condition and properly painted decorated or treated and also to keep the structure of the Building and all the upper parts of

the Building and all water tanks and cisterns electric wires cables meters and gas and water pipes and meters and drains and soakaways not forming part of the demised premises in good and substantial order and condition and the gardens in the forecourt and at the back of the Building properly tended

2. To paint with three coats at least of good quality paint of suitable colours in a proper and workmanlike manner in the year One thousand nine hundred and Seventy Six and afterwards in every third year of the term and also during the last year thereof all the outside wood metal stucco and cement work of the demised premises and any additions thereto and other external parts usually painted.

3. [Provision for insurance]

4. To do all such acts matters and things as may in the Lessors reasonable discretion be necessary or advisable for the proper maintenance or administration of the demised premises and of the Building including in particular (but without prejudice to the generality of the forgoing) the performance of all acts matters and things and the payment of all expenses required or desirable in running and managing the Lessor company and the appointment of managing or other agents company officers solicitors surveyors and accountants and the payment of their proper fees in connection with the supervision and performance of the Lessors covenants contained in this Lease and the provision of the certificates mentioned in the Fifth Schedule to this Lease"

18. In summary, under the Lease, as currently implemented, the tenant is obliged to make monthly payments (as varied in amount by agreement from time to time) and if necessary to make an excess contribution after the end of each accounting period to the extent that the actual cost as certified by the Lessor's auditors exceeds the annual contribution for that period, such payment to be made within 28 days of service of the certificate.

19. Mrs. Scott-Cook has raised two issues in respect of the service charge provisions. The first is one that arose in the previous proceedings as expenditure was incurred without sufficient funds being available to draw on. Therefore, she considers that the Lease fails to make proper provision for a sinking or reserve fund.

20. The Tribunal does not consider this is correct. Paragraph 4 of the Fifth Schedule to the Lease (paragraph 16 above) contains provision for an annual contribution to a "redecoration reserve" in respect of the obligations under paragraph 1 of the Sixth Schedule (paragraph 17 above) which contains a wide-ranging set of obligations to repair, maintain etc. Therefore, although paragraph 4 of the Fifth Schedule refers to a "redecoration reserve" it is not limited to decorative works and covers all works of repair and maintenance, current or future, and allows a suitable reserve to be built up. The fact this has not been done, leaving Araford with insufficient funds to carry out necessary work, is not a failure of the service charge provisions but is due to such provisions not having been properly implemented or managed. There is no reason why each year an appropriate sum cannot be included to allow for a reserve fund or a

sinking fund in respect of planned major works. It is a matter for Araford as to over what period such sums are accumulated. What an appropriate sum might be and whether the costs or works are reasonable is not something the Tribunal can comment on absent specifics. General guidance on such matters can be found in the RICS Code of Practice: Service Charge Residential Management Code and additional advice to landlords, leaseholders and agents (3rd edition) which can be found online.

21. The proposed variations to the above service charge provisions are undoubtedly drafted in a more contemporary fashion, but a lease does not fail to make satisfactory provision – the relevant test under s. 35 – simply because it could have been better or more explicitly drafted, see: *Gianfrancesco v. Haughton* LRX/10/2007. For the reasons stated, the Lease does not fail to make satisfactory provision in respect of a reserve or sinking fund.

22. The other issue raised in respect of the existing service charge provisions concerns clause 3(v) of the Lease, dealing with the initial, or advance, service charge (paragraph 15 above) and the fact that it is "hard-wired" at £25.00 per annum, a sum that might have been realistic in 1974 but is insufficient almost 50 years later. As explained above, over the years the lease owners have agreed an increase in frequency and amount in respect of this provision, so that they currently pay £50.00 a month. Varying clause 3(v) to reflect that would be equally problematic however, as this would only replace one fixed sum with another, and by its nature an advance service charge can be expected to vary, often from one year to the next. Although no tenant has refused to agree to monthly payments that increase from time to time, it is possible that a new leaseholder might do so and insist on paying £25.00 a year, as provided in the Lease, or that general agreement might not be reached in the future as to any increase above £50.00 per month with no mechanism to produce a binding figure. In the Tribunal's view, as currently drafted clause 3(v) fails to make proper provision in respect of the advance service charge.

23. In order to deal with this, it is unnecessary to replace the whole of the service charge provisions with those contained in the draft deed. All that is required is to replace clause 3(v) with the following:

> *"To pay to the Lessor in each year by equal instalments in advance on the first day of each month an initial service charge of such sum as the Lessor may reasonably demand having regard to the actual and estimated cost of services for the forthcoming year such sum to be credited to the Tenant against his liability under paragraph iv of this clause and the Fifth Schedule in the manner specified in such schedule."*

24. It should be noted that in directing this variation the Tribunal is not expressing any view as to the proper amount of future advance service charges or what constitutes a reasonable sum.

25. The other service charge variation required is to alter the provisions of paragraph 2 of the fifth Schedule to reflect that the accounting period has changed to the year 1 April to 31 March.

26. The third category of proposed variations is to replace the whole of the Sixth Schedule with that set out in paragraph 6 the schedule to the draft deed. As mentioned above, the Sixth Schedule of the Lease contains Araford's obligations to repair, maintain, manage, etc. the costs of which are recoverable by way of service charge. Such provisions potentially fall within s. 35(2)(a)(ii) or (iii). The issue is why the existing provisions of the Sixth Schedule fail to make satisfactory provision and how the proposed variations address that. The onus is on the applicant to justify such changes to the Lease and when asked to provide reasons Mrs. Scott-Cook was unable to do so. She appeared to acknowledge that there were no failings, it was simply that these variations were included in the draft deed prepared by the solicitor.

27. Under s. 38(6), the Tribunal shall not make an order effecting any variation of a lease if it appears that the variation would be likely substantially to prejudice any respondent to the application or any person who is not a party to the application. In the Tribunal's view neither of the two variations mentioned above are prejudicial to Araford as landlord or any of the nine tenants. Nor would any prejudice be caused to any of the tenant's mortgagees by such variations.

Conclusion

28. The Tribunal will dismiss the application under s. 37 of the 1987 Act but grant the two variations mentioned above in respect of the application under s. 35. The parties should note that a variation order can be registered at the Land Registry in the same manner as a deed of variation, see: Land Registry Practice Guide 27, paragraph 6.4. The Tribunal recommends this is done. It would be best if they consulted a solicitor who would be able to deal with all parties concerning what is an administrative matter.

Section 20C of the 1985 Act

29. This gives the Tribunal jurisdiction on the application of a tenant to order that all or part of the costs incurred by the landlord in the proceedings are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or other tenants, and the tribunal may make such order as it considers just and equitable in the circumstances. However, since the only legal costs in this matter were incurred in respect of the draft deed of variation, for which Mrs. Heather Scott has stated she alone will be responsible, no costs have been incurred by Araford which can form part of a service charge. Therefore, no order can be made under s. 20C.

Dated this 6th day of October 2022

Chair, Leasehold Valuation Tribunal