

CAMILLA LAMONT & LOUISA NYE

Landmark Chambers

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Problem

The residential leases in a block of flats provide that the tenants pay between them 75% of all costs incurred in relation to the insurance and repair and decoration of the structure and exterior and 100% of all other costs in relation to the building.

The reason why the tenants only pay 75% of certain of the costs is not altogether clear. The landlord does own the next door building and insures with the block of flats and this explains why it pays 25% of the insurance. However, no other costs are shared.

The landlord has, in fact, been charging the lessees 100% of all costs save for the insurance for some 10 years without question but a lessee has now queried why the provisions of the Leases are not being applied.

Can the landlord successfully apply for a variation under S35 of the Landlord and Tenant Act 1987 (“LTA 1987”) or otherwise seek to avoid having to pay 25% of the structural and exterior repair costs and repay sums overcharged to date?

Answer

Under S.35 of the LTA 1987 any party to a long lease of a flat can apply to the LVT for a variation of a lease on the grounds that the lease fails to make satisfactory provision regarding the computation of service charge: S.35(2)(f). Satisfactory provision regarding computation is treated as not having been made if the aggregate of the amounts payable either exceeds or is less than the whole of the expenditure: S35(4). In *Morgan v Fletcher* [2009] UKUT 186 the Upper Tribunal held that the legislative intent was solely to ensure that the aggregate of the service charges payable should be “*no more or less than 100%*”.

However the LVT's power to order a variation is discretionary and it must be reasonable in all the circumstances for the variation to be effected. Further, the LVT is directed not to make an order if the variation would be likely to substantially prejudice any respondent to the application and that an award under subsection (10) would not afford him adequate compensation.

The tenants might seek to argue that they would be substantially prejudiced by the variation on the grounds that it will increase their collective liability for costs by 25%. There is very little guidance as to whether such an argument is likely to succeed when the proposed variation simply brings the aggregate service charge payable up to 100%. In our view the LVT is unlikely to find this argument attractive because it would fundamentally undermine the primary provision in S35(4). Parliament deliberately extended this ground on the basis that allowing a landlord full recovery would "*encourage well maintained blocks*", which in turn would benefit tenants.

Therefore in our view an LVT is more likely than not to order a variation in the landlord's favour without payment of compensation, at least so far as the future is concerned. There does not appear to be any good reason why the tenants should only pay 75% when they benefit from 100% of the repair costs.

On the other hand it is doubtful that the variation could or would be ordered to take effect retrospectively so as to give the landlord a defence to any claim relating to the historic overpayments.

There is nothing in the legislation to indicate whether the LVT should allow a variation to be backdated or not. It is possible that an LVT might decide that it does have sufficiently broad jurisdiction to effect back-dated variations, due to the breadth of S35 and S38.

However in our view the better reading of the legislation is that backdating should not be permitted. First, while the LVT has broad powers to order the variation in the manner specified in the application or as it sees fit (S38 (1) and S38 (4)), the general rule regarding orders of the court is that they do not have retrospective effect: CPR r.40.7. If Parliament had intended that the LVT should be able to retrospectively vary leases you would expect specific

provision in the legislation rather than silence. The concept of the rule of law leans heavily against the imposition of retrospective liability.

Second, while section 39(1) provides that any variation will be binding on any predecessors in title of those parties, we are of the view that section 39(1) is only intended to protect previous lessees or lessors who have not been released from their obligations under the lease and does not imply that retrospective alteration of the obligations under the lease is acceptable.

Third, the adverse impact on third parties supports the argument that it cannot have been intended that a variation could be backdated. Section 39(2) specifically provides that sureties will be bound by variations, which is contrary to the usual rule that a variation of a lease made without the concurrence of the surety will discharge him from his obligations. Again, if the legislator intended that variations could go even further (varying past liabilities as well as binding third parties) one would expect the statute to expressly provide for this.

Assuming that the leases are not varied with retrospective effect; can the tenants get their money back? They would need to issue a restitutionary claim in court for monies paid under a mistake: see *Nurdin & Peacock Plc v D.B. Ramsden & Co Ltd* [1999] 1 WLR 1249. The LVT has no jurisdiction to order repayment. Depending on the facts there may be various defences open to our landlord. A six year limitation period applies to such claims under section 5 of the Limitation Act 1980 and so the tenants are unlikely to be able to recover the full 10 years' worth of overpayments. If the landlord has spent sums received from the tenants in good faith, a defence of change of position may well be open to him. Finally, if the landlord can point to a clear and unambiguous representation made by any of the tenants to the effect that he was entitled to retain the overpayments, which he has relied on to his detriment, an estoppel defence may apply, but this is likely to be a plea of last resort.