



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference	:	BIR/00CN/LVT/2020/0001
Properties	:	7 Flats at 801-815 Warwick Road, Tyseley, Birmingham, as listed in Appendix 1.
Applicant	:	Contratree Limited
Representative	:	Bude Nathan Iwanier Solicitors
Respondents	:	The leaseholders as listed in Appendix 1.
Type of application	:	An application under section 35(1) of the Landlord and Tenant Act 1987
Tribunal Members:	:	Judge D Barlow Mrs S Hopkins
Date of Hearing	:	15 March 2021

DECISION

Covid-19 pandemic: description of hearing

This determination included a remote video hearing which has been consented to by the parties. The form of remote hearing was audio (**V:CVPREMOTE**). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing. The Applicant filed two composite bundles for the hearing referred to as the “Bundle” and the “Supplemental Bundle”. Reference in square brackets within the decision are to the page number in which the document appears in the respective bundle.

DECISION

- (1) We make no order to vary the Leases set out in Appendix 1.

REASONS

Background

1. The Applicant is the freehold proprietor of 801-815 Warwick Road, Tyseley, Birmingham, B11 2EL (“the Block”) registered under title number WM340520. The Block comprises a three-storey block with five commercial retail units on the ground floor (“the Shops”) and 10 residential flats on the first and second floor (“the Flats”).
2. The Respondents are the registered proprietors of leasehold interests in seven of the Flats as follows:
 - a. The First Respondent (Mr Murad) holds the term remaining on the lease of Flat 801C, dated 6 October 1979, between Horace Davis and Elaine Hyde, registered with title number WM173786. The lease predates the remaining Respondents’ leases by some years and is an old-style lease with defective provisions [pages 1-11 of the Supplemental Bundle];
 - b. The Second Respondents (Mr and Mrs Walker) hold the term remaining on the lease of Flat 807B, dated 30 May 1985, between the Applicant and Janice Foster, registered with title number WM352322 [pages 12-25 of the Supplemental Bundle];
 - c. The Third Respondents (Mr and Mrs Jinks) hold the terms remaining on three leases as follows:
 - i. Flat 807C, dated 16 June 1986, between the Applicant and Robert Runciman, registered with title number WM386099;
 - ii. Flat 807D, dated 19 October 1987, between the Applicant and Elizabeth Bird, registered with title number WM420707; and
 - iii. Flat 813A, dated 22 August 1986, between the Applicant and Terence Brown, registered with title number WM388652 [pages 26-76 of the Supplemental Bundle];
 - d. The Fourth Respondents (Mr Ramesh Parmar, Rikesh Parmar and Jeana Parmar) hold the term remaining on the lease of Flat 813B, dated 28 November 1986, between the Applicant and Sylvia Keyte, registered with title number WM632520 [pages 95-111 of the Supplemental Bundle]; and
 - e. The Fifth Respondents (Mr and Mrs Breslin) hold the term remaining on the lease of Flat 813C, dated 3 February 1989, between the Applicant and (1) Adrian Daniel and (2) Susan

Cashmore, registered with title number WM461290 [pages 77-94 of the Supplemental Bundle] .

(The Second, Third, Fourth and Fifth Respondents' leases, were granted between 1985 -1989, are substantially the same and are collectively referred to as "the Leases")

3. There are two long lease residential flats which are not the subject of this application. Flat 813d and Flat 807a, which were granted in 1999 and 2000 respectively. They are on a more modern form of lease with extensive service charge provisions [pages 130-147 and 186-203 of the Supplemental Bundle].
4. There is a tenth residential flat which is owned by the Applicant and apparently also held on a modern form of lease (no copy was provided by the Applicant).
5. The five Shops are held on three commercial leases, which all contain an obligation by the tenant to pay a fair proportion of the costs incurred by the landlord in keeping the structural parts of the Block and various common parts in repair, decorated and lit [pages 148-185 and 204- 275 of the Supplemental Bundle].
6. There is a history of issues and disputes between the Respondents and the landlord's various managing agents, concerning maintenance of the Block, some of which have been the subject of previous applications to the county court and to this Tribunal. The Block is currently managed by Mr Simon Stern of Fountayne Managing Limited ("Fountayne"), whose family also manage the business of Contratree Limited. The Block was previously managed by Effective Management, another Stern family business and prior to that Cottons, a Birmingham based company. Since 2013 the Block has been managed by the Stern family, who also manage the business of Contratree Limited.
7. The issues between the parties stem from what appears to be poor management of the building over a period of years. The Respondents' say this is a consequence of neglect by a landlord that has effectively, been absent for a substantial period. Mr Stern says it is because the service charge provisions in the lease are such that efficient and effective collection of the service charge is impossible and prevents the landlord from complying with its repair and maintenance covenants.
8. The current position is that urgent repairs are required to meet fire safety standards, not least due to an external fire escape having been condemned as unusable, following Fire Risk Assessment carried out in 2019.

Relevant statutory provisions

9. The Tribunal's jurisdiction to vary residential long leases derives from section 35 in part IV of the **Landlord and Tenant Act 1987** ("the Act"). The relevant provisions of the Act provide as follows:

s35 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—*

...

(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.

...

(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.

S38 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.

...

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under s35 or s36 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.

...

Grounds of the application

10. In this case the Applicant seeks to rely upon sections 35(2)(e) and (f), namely that the lease fails to make satisfactory provision for the recovery by the landlord of expenditure incurred or to be incurred by it for the benefit of the leaseholders and fails to make satisfactory provision for the computation of the service charge payable under the lease.
11. Within the application, (which stood as the Applicant's Statement of Case), the Applicant specified a single ground, which is - "*the leases granted at different times were not in uniform draft and the collection of service charges fairly between the parties is impossible*". The Applicant expanded on this slightly in the witness statement of Simon Stern dated 22nd of July 2020, which was filed with the Bundle on 16 September 2020 [pages 268 to 270 of the Bundle]. In his witness statement, Mr Stern submits that the Applicant is entitled to the variations sought on two grounds. First because the existing leases do not all have the same service charge provisions; and secondly, because there is no provision for the landlord to levy an interim service charge to obtain money on account of anticipated charges. Mr Stern also submits that the proposed variations are not prejudicial in that they do not affect the existing statutory rights of the tenants to challenge specific service charge items.
12. At 3.30 pm on Friday 10 March 2021 (i.e. less than a business day before the hearing), a skeleton argument was filed by Ms Mathers on behalf of the Applicant. This, for the first time, clarified the specific S35(2) factors on which the application relies; and made new submissions on

the terms of the Leases which the Applicant contends are unsatisfactory with regard to those factors. They can be summarised as follows:

- a. The lessees' contribution is determined by reference to, now obsolete, rateable values and is therefore an unsatisfactory provision ("the proportions issue").
- b. There is no provision for collection of an interim charge to cover anticipated expenditure, which means that the landlord may have to wait up to 15 months for payment of expenses incurred just after the annual certificate date (24 June) ("the interim charge issue").
- c. There is no provision for charging interest on late payment of service charges, a matter that is specifically referred to in s35(3)(A) of the Act. When combined with the lack of any right to levy an interim charge, the lack of an interest charging term is unsatisfactory ("the default interest issue")
- d. The combined effect of the unsatisfactory terms is to render the Leases administratively cumbersome and inefficient to manage. Furthermore, as the Leases are not in a modern form it is appropriate for the Tribunal to go beyond varying the leases to address the above factors and update the service charge terms generally, to achieve a unified form of lease that is consistent with the later leases of 813d and 807a, granted in 1999 and 2000, ("the updating issue").
- e. The variations do not prejudice the Respondents ("the no prejudice issue").
- f. The proposed variations would make satisfactory provision for the computation and recovery of service charges due under the Leases.

The Leases

13. Mr Murad's lease of Flat 801c was granted in 1979. It is an old-style lease (which I will refer to as the type 'A' lease) that includes terms that would now be regarded as defective.

14. The remaining Leases (which I will refer to as the type 'B' lease) are in common form and all contain the following service charge provisions:

Clause 2(2) contains a lessee covenant to pay a "reasonable proportion based on rateable value of the costs expenses outgoings and matters mentioned in the Sixth Schedule hereto (the amount of such contribution to be ascertained and certified in writing by the surveyor for the time being of the lessor by 24 June in each year and the amount so certified shall be final and binding on the parties hereto) once a year on 29 September in each year commencing on 29 September."

Clause 3(1) contains a covenant by the lessor, subject to payment by the lessee of the contributions specified in clause 2(2) "well and substantially to maintain repair redecorate and renew:

- (a) *the structure and in particular the walls roof chimney stacks gutters and main water pipes of the said building*
- (b) *the gas and water pipes drains and electric cables and wire in under and upon the said building enjoyed or used by the Lessee in common with the owners and tenants of the other flats in the said building*
- (c) *the parts of the said building so enjoyed or used by the lessee or the tenants of the other flats in common as aforesaid and the boundary walls and fences of the said building*

Clause 3(2) is a covenant by the Lessor to insure the building and any fixtures or fittings that in the lessor's opinion it is prudent to insure "against loss or damage by fire storm Tempest and (if possible) aircraft explosion and damage by burst pipes in such sum as shall be considered by the lessors surveyors to be the full value thereof for two years loss of rent and cause all monies received in respect of any such insurance to be paid out in building repairing or otherwise reinstating the said building or the part thereof so destroyed and/or damaged."

The Sixth Schedule sets out the costs expenses outgoings and matters in respect of which the lessee is to make a contribution, as follows:

- (1) *the expense of maintaining repairing redecorating and renewing:*
 - (a) *the main structure and in particular the roof chimney stacks gutters foundations and main water pipes of the said building*
 - (b) *the gas and water pipes drains and electric cables and wires used by the lessee in common with the owners or tenants of the other flats*
 - (c) *all common parts of the said building*
 - (d) *the boundary walls and fences of the said building*
 - (e) *all sums payable by the lessor in performing the obligations under clause 3 (1) and (2) hereinbefore mentioned that are not specifically mentioned in this schedule the costs of cleaning and lighting any common parts of the said building*
- (2) *the costs of insurance and keeping insured throughout the term hereby created the said building and any part thereof any fixtures or fittings therein that in the Lessor's opinion it is prudent to insure against loss or damage by fire storm tempest and (if possible) aircraft explosion and damage by burst pipes and such other risks including two years loss of rent normally covered under a comprehensive insurance as the lessors shall determine.*
- (3) *All rates taxes and other outgoings (if any) payable in respect of the parts of the said building used by the lessee in common as aforesaid.*
- (4) *The fees of the lessors managing agents for the collection of the rents of the flats in the said building and for the general management thereof.*

15. Mr Murad's type 'A' lease, contains very limited terms that would now be regarded as defective. Clause 2(8) contains a tenant covenant to contribute a "rateable proportion according to user" of the costs of maintenance and repair of the structural parts of the building and the common parts and services. Exceptionally the lease does not contain any corresponding express positive obligation on the part of the landlord to maintain the common parts or the structure. Furthermore, there is no covenant for the landlord to insure the building and use any proceeds to re-instate, or for the tenant to contribute to the costs of any buildings insurance the landlord does maintain.

The proposed variations

16. The proposed variations are extensive. In essence they are a wholesale replacement of the existing clauses 2(2), 3(1) and (2) and the Sixth Schedule of the type 'B' lease, with provisions that are substantially the same as those contained in the more recent leases of 813d and 807a granted in 1999 and 2000 (which I will refer to as the "the type 'C' lease").
17. The main differences between the service charge provisions in the type 'B' lease and the type 'C' leases, which form the basis of the proposed variations, are as follows:
 - a. The accounting period is changed from commencing on 29 September to 1 January in each year [page 27 of the Bundle]
 - b. There is a new tenant covenant to pay an interim charge in addition to the service charge on the terms set out in a Schedule to the proposed variations, both charges to be recoverable as rent in arrear [page27 of the Bundle].
 - c. The landlord covenant to maintain and keep the service charge items in substantial repair and condition is expanded to include the following additional matters:
 - i. The costs of employing caretakers, porters and gardeners and for the cost of repair maintenance, insurance, rates and notional rent for a caretaker's flat.
 - ii. The landlords decorating obligations are more particularised in terms of the treatment to be applied to surfaces.
 - iii. Additional insurance provisions in the event of reinstatement of the building proving impossible.
 - iv. New provisions for the costs of maintaining a communal television aerial, a coin operated telephone box, fire extinguishers, a lift and ancillary equipment.
 - v. A new provision for maintenance of an electric door entry system serving the main entrance, once installed.
 - vi. Provision for a reserve fund to be set aside to meet future expenditure the landlord reasonably expects to incur meeting its covenants.

- vii. New provisions for the costs of maintenance of gardens and communal dustbins.
 - viii. New provisions for recovering interest on borrowing to meet the costs of complying with the landlord's covenants.
 - ix. A new provision for recovering fees charged by a solicitor or other professional involved in recovering arrears of rent and/or service charge from any tenant [pages 28-31 of the Bundle].
- d. The Schedule to the proposed variation is drafted to reflect the Fifth Schedule of the type 'C' lease. There is a definition of 'Total Expenditure' at paragraph 1, which includes all expenditure incurred by the landlord in the relevant accounting period in carrying out its service charge duties including a notional rent for a caretaker's flat [pages 33-34 of the Bundle]
 - e. The 'Service Charge' is defined as "*such a reasonable proportion based on the rateable value of the Total Expenditure as is specified in sub-clause 1 of this clause or (in respect of the accounting period during which this Lease is executed) such proportion of such percentage as is attributable to the period from the date of this Lease to the 31st day of December next following*".
 - f. To the extent the Service Charge exceeds Interim Charge paid by the tenant, the excess is payable to the landlord within 21 days of service on the tenant of a Certificate (referred to in paragraph 6 of the Schedule) and in case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - g. The 'Interim Charge' is defined as such sum to be paid on account of the Service Charge in respect of each accounting period as the lessors of the managing agents shall specify at their discretion to be a fair and reasonable interim payment. The Interim Charge is to be paid by equal payments in advance on 1 January and first of July in each year and in the case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - h. Paragraph 6 provides that the landlord or its agents must Certify as soon as practicable after the expiry of each accounting period the Total Expenditure for that period, the amount of any Interim Charge paid by the tenant in respect of that period (together with any surplus carried forward), the amount of the Service Charge in respect of the accounting period and any excess or deficiency of the Service Charge over the Interim Charge [page 34 of the Bundle].
 - i. The Certificate is said to be conclusive and binding on the parties. The tenant can inspect the receipts and vouchers relating to the Total Expenditure on prior payment of any costs to be incurred by the landlord or the landlord's agents and the landlord will consider written objections signed by not less than 60% flat owners, to any items of expenditure. There is also what purports to be a binding arbitration clause [page 34 of the Bundle].

The parties submissions

The Applicant's case

18. The Applicant was represented at the hearing by Ms Wendy Mathers of counsel. Mr Stern of Fountayne, the landlord's managing agent, attended on behalf of the Applicant to give evidence.
19. Ms Mather's submissions largely confirmed the arguments put forward in her skeleton argument. She accepted that it was for the Applicant to establish that it had made out a ground under s35(2) for every variation proposed and that it was for the Applicant to demonstrate that the variation should be the one proposed by the Applicant (or some other variation under s38(4)).
20. One issue raised by the Tribunal concerned Ms Mathers argument concerning the lack of provision for interest on arrears of service charge and the proposal, in her skeleton argument, that the omission should be rectified by a charging clause with a proposed interest rate of 4% above the base rate of National Westminster Bank plc. The difficulty being that the proposed variation in the application contained no such term. The only variation proposed by the Applicant was that any default in payment of the service charge would be recoverable by the landlord as rent in arrear.
21. Ms Mathers submitted that as the variations were intended to bring the Leases in line with the format of the type 'C' leases the Tribunal could exercise discretion to include an additional variation along the lines of paragraph 4(7) of the modern leases, which made a similar provision for interest to be charged on arrears of rent and service charge [page 116 of the Bundle].
22. Ms Mathers accepted that the proposed variation went far beyond that necessary to address the lease terms that the Applicant says are unsatisfactory in relation to the s35(2) matters, but submitted that if the Tribunal determined that variations should be made to address those specific matters, then it could exercise discretion to go further and replicate the service charge provisions of the type 'C' lease to enable the Applicant to collect the service charge on an equal and well particularised basis.
23. The specific variations requested in paragraph 16(a)-(i) above were then considered in more detail. With some input from Mr Stern it was acknowledged by Ms Mathers that a substantial number of service charge items did not exist within the Block and could be deleted from the draft. These include references to the parking areas, garages, gardens, passenger lifts, communal dustbins and refuse disposal areas, a caretaker, a caretaker's flat, porters, staff gardeners, communal television aerials, coin operated telephone boxes, an electric door entry system and fire extinguishers. The clauses were apparently copied over

from the type 'C' lease, where they appear to have been included by the drafter without proper consideration of their relevance to the Block. The Block stands within a footprint that has a very small surrounding strip of land that the residential leaseholders do not use.

24. The definitions were largely the same as in the type 'B' lease. The change in the accounting period was intended to accommodate operation of the interim charge. Once the irrelevant items were deleted, there was no material change to the landlord's covenant in the type 'B' lease, to keep the remaining specified items in good and substantial repair. The main variations to the landlord's covenant are to include a right to maintain a reserve fund, a right to charge interest on sums borrowed to finance compliance with the landlord's covenant and a right to charge solicitor's fees and professional fees incurred in recovering arrears of service charge.
25. The main variations to the service charge mechanism are contained in the Schedule to the draft variation. The most significant of which would allow the landlord to levy an interim charge. Mr Stern gave evidence at the hearing on this point. He said that although the landlord could raise small sums of £10-15,000.00 by way of loans from family businesses, it could not borrow the substantial amounts needed to fully comply with the outstanding repairs in that way. Ms Mathers suggested that the limited income of the landlord company, meant that it should be viewed as akin to an RTM company that needed to raise funds to carry out the essential services. In evidence Mr Stern said the landlord's annual income was about £20-25,000.00 from the ground rents and Shops rents and a further £4-4,500.00 rental from another property in Sussex owned by the landlord.
26. Mr Stern said that after the previous Tribunal hearing in 2015, there remained arrears of service charges that could not be collected easily because it was clear that every demand would be challenged by the Respondents. The Applicant therefore decided that it would pay the Block insurance every year but would not do anything else unless absolutely necessary, such as fire safety works. As a consequence, no service charge demands or accounts have been sent to the residential tenants since 2016, and the Block has been largely un-maintained. In 2016 the arrears totalled some £45,000.00 but no action was taken by Mr Stern to recover the arrears because, in his words, each and every demand would be challenged.
27. Mr Stern explained that the main point of the variation was to bring forward any dispute about the service charge to the date on which the budget was set by the interim charge which importantly, was before the landlord had incurred the actual costs. Any dispute could be quickly referred to the Tribunal for a determination, before the landlord had to lay out substantial costs of maintenance and repair. At present the landlord was having to incur the service charge costs before it could invoice the tenants who then routinely then challenged the demands. Furthermore, the absence of a contractual provision for interest on

arrears, presented no incentive for the tenants' not to routinely challenge demands.

The Respondents' case

28. Mr Murad the First Respondent, attended the hearing and was permitted to make submissions in relation to the proposed variation of his lease, despite his not having participated in the proceedings prior to the hearing.
29. Mrs Jinks attended the hearing to represent the Third Respondent, having made brief submissions in writing on 25 June 2020.
30. Mr Ramesh Palmer and his son attended the hearing to represent the Fourth Respondent, Mr Palmer having made extensive written submissions in his Statement of Case dated 25th of June 2020.
31. Mr Breslin joined the hearing by telephone to represent the Fifth Respondent. Mr and Mrs Breslin had made brief submissions on 25 June 2020, which were substantially similar to those of Mr and Mrs Jinks.
32. It was evident from the written submissions of the Respondents, and confirmed at the hearing, that there has been a history of very poor relations between the landlord and the residential tenants of the Block. Mr Palmer said that it was important to note that the landlord Contratree Limited, the managing agent Fountayne, the previous managing agent, Effective Management are all companies owned and run by the Stern family and that over the years most of the correspondence has been between the leaseholders, Simon Stern and his mother Cipora Stern. Contratree, a Stern family company owned the block when the leases they are now seeking to vary were granted, and Contratree continued to own the block when the more recent leases were granted in 1999 and 2000. The Applicant had therefore chosen to create the inconsistent forms of lease that it now complains has made managing the service charge impossible.
33. Much of Mr Palmer's written evidence related to ongoing issues with the maintenance of the building and in particular the external fire escape which Mr Palmer states was deemed dangerous and non-usable by West Midlands Fire Service following an inspection in 2017. It was explained to Mr Palmer that while the Tribunal appreciated that these issues were of immense concern to the leaseholders, they were not matters that the Tribunal could make any findings or determination on, within the context of this application.
34. Mr Palmer specific objections to the application can be summarised as follows:
 - a. The new submissions made by the Applicant's counsel within the skeleton argument were filed less than a working day prior to the

hearing and then expanded on during the morning of the hearing. The submissions concerning a new term for interest on arrears of service charge at 4% over base rate, should be disregarded as the Respondents' have had no time to consider or respond effectively, which has seriously disadvantaged them. The Applicant did not include reference to a term for interest on arrears within its statement of case, the draft variations or Mr Stern's witness statement and the Tribunal should therefore reject counsel's submissions on this.

- b. The Tribunal should also reject any argument that the landlord cannot afford to meet the costs of the services – that has not formed any part of the Applicant's case until today and runs contrary to previous representations made to the Respondents.
- c. If Mr Stern thought he was owed £45,000.00 he could seek forfeiture. The reason he has not done so, is because he hasn't sent out any statements, bills or reminders in four years, and that is an indication of how poorly the property is managed. Mr Parmar said that he owned a lot of rental properties, the charges were about £500.00 per year, £1,400.00 if the Council managed them. All straightforward, all justified service charge demands which he paid. He was happy to pay any demands from Mr Stern that were properly justified and the reason Mr Stern has not issued demands, is that he knows he can't justify them. When the tenants' had previously challenged demands, Mr Stern had been unable to produce any invoices from the companies that he claimed had done the work.
- d. The introduction of an interim charge would seriously disadvantage the tenants', who had not negotiated for a lease on these terms but could then be invoiced for any amount, and if not paid within 21 days solicitors letters and costs would follow. Mr Stern must be paying his solicitor fortunes for this and the Respondents would have to pay it.
- e. The variations do not address Mr Stern's complaint about the inconsistency of calculating the proportions on rateable values. The draft variation uses the same term. In any event this issue was considered by a Tribunal in 2015 who had no trouble determining that the existing mechanism was sufficient for the landlord to recover service charges.
- f. There is no evidence that the lease lacks clarity or fails to provide satisfactorily for the landlord to carry out the services and charge for them. Mr Parmar stated that the current lease makes ample provision for this and that issues of uniformity or the passage of time, or being out of step with modern drafting, are not of themselves, enough to deem the lease unsatisfactory.
- g. The Applicant is seeking to change the fundamental agreement originally negotiated with the tenants and make a radical departure, when the terms of the current lease are satisfactory. This would have an effect on the value on the tenants' investment, for which they should be compensated.

35. Mrs Jinks gave evidence and said that she was happy with the lease in its current form. Mrs Jinks said that the Block had never been well managed. When Cottons were managing they had ignored a problem with the roof which she ended up paying £11,000.00 to fix. It had then taken years to get the money back from the Stern family. The upshot with the service charge was that there had never been any clarity about demands. She paid to have a drain unblocked this week, because from experience she knows that cost of the repairs when eventually done will end up tripling. Mrs Jinks said that she didn't trust the Sterns' and varying the lease won't change that. Although she had said in her statement that she did not object to changing the date of the service charge year, she now didn't agree to that either.
36. Mrs Jinks was asked why she hadn't made any payments since 2014. She said this was because she hadn't received a bill and was not aware of any outstanding bills. In the last 6 years Mr Jinks has only been invoiced for ground rent and she thinks, one other bill.
37. Mr Breslin said that he agreed with Mr Parmar and Mrs Jinks evidence. He said that you couldn't trust the Sterns to do the work properly and at the right price. Mr Breslin also said that he hadn't received any service charge bills in the last 5-6 years. He didn't have any particular objection to the change in the date of the service charge year if it made it easier for Mr Stern.
38. In response to the Respondents' evidence, Mr Stern said that Contratree had never been an absent landlord, it had always maintained a registered office address. Mrs Jinks had a contact number for over 15 years which was borne out by her admitting that she had been repaid for the roof repairs. Mr Stern said that the Respondents' had all made allegations about the Sterns but not one had raised a single argument to support any negative impact on them of the proposed variations. Mr Breslin interrupted to point out that he had been asked to take out a defective title indemnity policy precisely because he had an absent landlord.
39. Mr Murad objected to any variation to his lease despite the Tribunal explaining to him that his lease was seriously defective and a variation to include a reciprocal landlord covenant to keep the Block in good repair and to maintain comprehensive buildings insurance, was an advantage to him. He was unrepresented and did not appear to fully understand the issues that owning a flat with defective lease provisions might cause generally and in particular, on any future sale of the flat.

Tribunals deliberations

The type 'B' lease

40. The variations that the Applicant seeks are to resolve problems that are said to exist in:

- (i) calculating the tenants' proportion of the charge, *the proportions issue*;
 - (ii) the financial consequences of there being no interim charging provisions, *the interim charge issue*;
 - (iii) the lack of a default interest clause, *the default interest issue*;
 - (iv) the lack of uniformity with the type 'C' lease, *the updating issue*.
41. The draft provided by the Applicant runs to some 8 pages and is a comprehensive replacement of the existing service charge clauses with those found in the type 'C' leases.
42. Before it can make an order under section 38 of the 1987 Act the Tribunal must be satisfied that the lease fails to make satisfactory provision with respect to one or more of the matters specified in section 35(2). In this case the Applicant relies on sub-paragraphs (e) and (f). Whether the lease fails to make satisfactory provision is for the Tribunal to determine in all the circumstances of the case

The proportions issue

43. Reference to rateable values may be obsolete, as indeed will likely be the fate of many other provisions over the term of a 125 year lease. However, the proposed variation does not address the obsolete reference. It introduces an even more confusing method of calculating the "Service Charge" as meaning "such reasonable proportion based on the rateable value of the Total Expenditure.." whatever that is supposed to mean.
44. Furthermore, the need to imply a term to give business efficacy to a lease, is not necessarily, or even probably, an indication that the lease fails to make satisfactory provision for the matter in question. This same issue was considered by a residential property tribunal and referred to in its decision dated 9 December 2015 BIR/00CN/LIS/2015/0002. Mr Stern confirmed in those proceedings that as the flats were all two bedroomed and similar in size, he had apportioned the charges equally between all flats. The tribunal determined that although rateable values had been replaced by Council Tax bands (on which no evidence had been submitted), the decision of the managing agents to apportion the charges equally was reasonable, "indeed it is difficult to imagine an alternative practical approach" (paragraph 47). The Tribunal does not take issue with that approach and does not therefore find that the lease fails to make satisfactory provision for the calculation of the tenant's proportion.

The interim Charge issue

45. This issue assumes that the parties to the lease intended that the landlord should not have to incur service charge expenditure before recovering its expenses from the tenants. I can find nothing in the type 'A' lease or the type 'B' lease to support this and the Respondents' evidence directly contradicts any such assumption. If a service charge

liability is incurred by the landlord there are workable provisions in the type 'A' and type 'B' lease for it to recover these expenses from the tenant. The fact that it is now standard or usual to include terms for an interim charge does not mean the absence of such a term renders the lease unsatisfactory. The absence does not create a shortfall in the service charge it just means that the landlord will have to fund the costs of the services before recovering them from the tenants. That was the commercial deal struck by the parties to the leases.

46. Mr Stern gave some evidence of the landlord's financial position when asked about it at the hearing, but no evidence of financial hardship leading to major issues with structural repairs, was put forward in the Applicant's statement of case or witness statements. Furthermore, as on Mr Stern's evidence the landlord has not spent any money on the Blocks for some 4-5 years (save for insurance), it should have a substantial sum in hand to at least make a start on the outstanding repairs. Mr Stern's primary concern appears to be obtaining a right to refer any dispute concerning the service charge costs to the Tribunal before the landlord had to incur the costs. The Tribunal does not therefore find that the absence of interim charging terms renders the lease unsatisfactory in relation to the s35(2) factors.

The default interest issue.

47. Paragraph 3A of s35 makes specific reference to provision for default interest being a sub-paragraph (e) factor. The Tribunal agrees with Ms Mathers that the absence of a default interest term in a lease, which also has no provision for interim charging, is a factor that the Tribunal could take into account when determining whether the lease made satisfactory provision. However, the Tribunal was concerned about the Applicant's failure to seek this variation until, what was effectively, the day before the hearing. There is no default interest term within the 8 pages submitted as the Applicant's proposed variations. Ms Mathers has suggested that as the Applicant's application is in effect that the Leases should be updated in line with the type 'C' lease, it could be implied that the Applicant intended its application to include not just the 8 pages of proposed variations attached to the application, but also a term similar to that found at clause 4(7) of the type 'C' lease.
48. The Tribunal determined that although it might have exercised discretion to order a proportionate variation to address the lack of a default interest term, it would be procedurally unfair to the Respondents to order such a variation, given that the issue was first raised by the Applicant the day before the hearing.

The updating issue.

49. Ms Mathers accepted that s35 does not allow for general updating of the lease terms just because they are no longer in modern or conventional form. The issue is, are the terms satisfactory and workable? The Tribunal finds in relation to the type 'B' lease that clause 2(2) imposes

an obligation on the tenant to pay for the costs of the services set out in the sixth schedule by reference to a service charge year commencing on 29 September, in terms that are satisfactory. Clause 3(1) imposes a corresponding covenant on the landlord and clause 3(3) imposes a landlord covenant to insure the building, in terms that are satisfactory. The sixth schedule contains details of the costs and expenses to which the tenants' must contribute (including insurance costs and managing agent's costs for management of the building), in terms which are satisfactory and taken with clause 2(3) and 3(1) and (2), workable.

50. The Tribunal finds that although there may be a few specific matters that could have been considered under a s35 application (such as the default interest issue, had it been pleaded at the correct time), there is no evidence on which the Tribunal can conclude that the type 'B' lease fails to make satisfactory provision for the s35(e) and (f) factors in terms that would justify the wholesale re-writing of the service charge provisions which the Applicant seeks.

The type 'C' lease

51. The Tribunal finds that Mr Murad's lease of 801 C Warwick Road fails to make satisfactory provision for one or more of the s35 factors, in that it fails to impose a reciprocal covenant on the landlord to keep the building and common parts in repair, or include a landlord covenant to insure the building with a reciprocal tenant covenant to pay a fair proportion of the costs of such insurance. However, these factors could have been addressed by a short deed of variation and do not justify wholesale variation of the lease to bring it in line with the later type 'C' leases that the landlord chose to grant.
52. If the Applicant had submitted a deed of variation that specifically addressed the unsatisfactory terms of Mr Murad's lease, perhaps seeking terms similar to the type 'B' lease, it is likely that the Tribunal would have exercised discretion to order a variation, but it is not the role of the Tribunal to draft the terms of any proposed variation from scratch, and no variation of the lease of 801C Warwick Road is therefore ordered.

The no-prejudice issue

53. The Tribunal disagrees with the Applicant's submissions concerning lack of prejudice. The wholesale updating of the service charge provisions would have introduced new contractual obligations to contribute to a reserve fund, to pay an interim charge based on the landlord's assessment of anticipated costs, to pay default interest on late payments and to pay the landlord's professional fees on any dispute concerning the service charge. Given the history of the parties dealings, including the landlords decision not to render service charge demands

and accounts, or comply with its repairing covenant for over 5 years, it is facile to suggest that the extensive variations sought by the landlord would not operate prejudicially to the tenants. However, as the Tribunal has determined that it does not intend exercising discretion to vary the Leases it does not need to consider the issue of compensation and prejudice.

Application under s20C of the 1985 Act

54. The Fourth Respondent has applied for an order under s20C of the Landlord and Tenant Act 1985 for an order that all the costs incurred in these proceedings are not to be regarded as relevant costs to be taken into account when determining the amount of any service charge that is payable by the tenant.
55. This litigation has arisen due to the Applicant's perception that the leases need updating to make better and more uniform provision for the landlord to recover service charge costs and expenses. The application has failed for the reasons set out above. The landlord does not appear to have a contractual right to recover litigation costs and an order under this section is probably therefore unnecessary. However, for the avoidance of doubt and to forestall any conceivable argument on this point, the Tribunal considers it just and equitable to make an order in favour of the Respondents' so that all of the costs incurred by the Applicant landlord in connection with these 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 Respondents

Judge D Barlow

29 March 2021

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).

**APPENDIX
SCHEDULE OF RESPONDENTS AND LEASES**

Property Address	Lease Date	Owner name/Respondent	Freehold/Landlord
801C Warwick Road, Tyseley, Birmingham, B11 2EL	6 October 1979	Mr Said Murad	Contratree Limited
807B Warwick Road, Tyseley, Birmingham, B11 2EL	30 May 1985	Mr and Mrs L Walker	Contratree Limited
807C Warwick Road, Tyseley, Birmingham, B11 2EL	12 June 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
807D Warwick Road, Tyseley, Birmingham, B11 2EL	19 October 1987	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813A Warwick Road, Tyseley, Birmingham, B11 2EL	22 August 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813B Warwick Road, Tyseley, Birmingham, B11 2EL	28 November 1986	Ramesh Parmar, Rikesh Parmar and Jeana Parmar	Contratree Limited
813C Warwick Road, Tyseley, Birmingham, B11 2EL	3 February 1989	Mr Brendan E. Breslin and Mrs Maria B. Breslin	Contratree Limited



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference	:	BIR/00CN/LVT/2020/0001
Properties	:	7 Flats at 801-815 Warwick Road, Tyseley, Birmingham, as listed in Appendix 1.
Applicant	:	Contratree Limited
Representative	:	Bude Nathan Iwanier Solicitors
Respondents	:	The leaseholders as listed in Appendix 1.
Type of application	:	An application under section 35(1) of the Landlord and Tenant Act 1987
Tribunal Members:	:	Judge D Barlow Mrs S Hopkins
Date of Hearing	:	15 March 2021

DECISION

Covid-19 pandemic: description of hearing

This determination included a remote video hearing which has been consented to by the parties. The form of remote hearing was audio (**V:CVPREMOTE**). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing. The Applicant filed two composite bundles for the hearing referred to as the “Bundle” and the “Supplemental Bundle”. Reference in square brackets within the decision are to the page number in which the document appears in the respective bundle.

DECISION

- (1) We make no order to vary the Leases set out in Appendix 1.

REASONS

Background

1. The Applicant is the freehold proprietor of 801-815 Warwick Road, Tyseley, Birmingham, B11 2EL (“the Block”) registered under title number WM340520. The Block comprises a three-storey block with five commercial retail units on the ground floor (“the Shops”) and 10 residential flats on the first and second floor (“the Flats”).
2. The Respondents are the registered proprietors of leasehold interests in seven of the Flats as follows:
 - a. The First Respondent (Mr Murad) holds the term remaining on the lease of Flat 801C, dated 6 October 1979, between Horace Davis and Elaine Hyde, registered with title number WM173786. The lease predates the remaining Respondents’ leases by some years and is an old-style lease with defective provisions [pages 1-11 of the Supplemental Bundle];
 - b. The Second Respondents (Mr and Mrs Walker) hold the term remaining on the lease of Flat 807B, dated 30 May 1985, between the Applicant and Janice Foster, registered with title number WM352322 [pages 12-25 of the Supplemental Bundle];
 - c. The Third Respondents (Mr and Mrs Jinks) hold the terms remaining on three leases as follows:
 - i. Flat 807C, dated 16 June 1986, between the Applicant and Robert Runciman, registered with title number WM386099;
 - ii. Flat 807D, dated 19 October 1987, between the Applicant and Elizabeth Bird, registered with title number WM420707; and
 - iii. Flat 813A, dated 22 August 1986, between the Applicant and Terence Brown, registered with title number WM388652 [pages 26-76 of the Supplemental Bundle];
 - d. The Fourth Respondents (Mr Ramesh Parmar, Rikesh Parmar and Jeana Parmar) hold the term remaining on the lease of Flat 813B, dated 28 November 1986, between the Applicant and Sylvia Keyte, registered with title number WM632520 [pages 95-111 of the Supplemental Bundle]; and
 - e. The Fifth Respondents (Mr and Mrs Breslin) hold the term remaining on the lease of Flat 813C, dated 3 February 1989, between the Applicant and (1) Adrian Daniel and (2) Susan

Cashmore, registered with title number WM461290 [pages 77-94 of the Supplemental Bundle].

(The Second, Third, Fourth and Fifth Respondents' leases, were granted between 1985 -1989, are substantially the same and are collectively referred to as "the Leases")

3. There are two long lease residential flats which are not the subject of this application. Flat 813d and Flat 807a, which were granted in 1999 and 2000 respectively. They are on a more modern form of lease with extensive service charge provisions [pages 130-147 and 186-203 of the Supplemental Bundle].
4. There is a tenth residential flat which is owned by the Applicant and apparently also held on a modern form of lease (no copy was provided by the Applicant).
5. The five Shops are held on three commercial leases, which all contain an obligation by the tenant to pay a fair proportion of the costs incurred by the landlord in keeping the structural parts of the Block and various common parts in repair, decorated and lit [pages 148-185 and 204- 275 of the Supplemental Bundle].
6. There is a history of issues and disputes between the Respondents and the landlord's various managing agents, concerning maintenance of the Block, some of which have been the subject of previous applications to the county court and to this Tribunal. The Block is currently managed by Mr Simon Stern of Fountayne Managing Limited ("Fountayne"), whose family also manage the business of Contratree Limited. The Block was previously managed by Effective Management, another Stern family business and prior to that Cottons, a Birmingham based company. Since 2013 the Block has been managed by the Stern family, who also manage the business of Contratree Limited.
7. The issues between the parties stem from what appears to be poor management of the building over a period of years. The Respondents' say this is a consequence of neglect by a landlord that has effectively, been absent for a substantial period. Mr Stern says it is because the service charge provisions in the lease are such that efficient and effective collection of the service charge is impossible and prevents the landlord from complying with its repair and maintenance covenants.
8. The current position is that urgent repairs are required to meet fire safety standards, not least due to an external fire escape having been condemned as unusable, following Fire Risk Assessment carried out in 2019.

Relevant statutory provisions

9. The Tribunal's jurisdiction to vary residential long leases derives from section 35 in part IV of the **Landlord and Tenant Act 1987** ("the Act"). The relevant provisions of the Act provide as follows:

s35 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—*

...

(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.

...

(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.

S38 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.

...

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under s35 or s36 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.

...

Grounds of the application

10. In this case the Applicant seeks to rely upon sections 35(2)(e) and (f), namely that the lease fails to make satisfactory provision for the recovery by the landlord of expenditure incurred or to be incurred by it for the benefit of the leaseholders and fails to make satisfactory provision for the computation of the service charge payable under the lease.
11. Within the application, (which stood as the Applicant’s Statement of Case), the Applicant specified a single ground, which is - *“the leases granted at different times were not in uniform draft and the collection of service charges fairly between the parties is impossible”*. The Applicant expanded on this slightly in the witness statement of Simon Stern dated 22nd of July 2020, which was filed with the Bundle on 16 September 2020 [pages 268 to 270 of the Bundle]. In his witness statement, Mr Stern submits that the Applicant is entitled to the variations sought on two grounds. First because the existing leases do not all have the same service charge provisions; and secondly, because there is no provision for the landlord to levy an interim service charge to obtain money on account of anticipated charges. Mr Stern also submits that the proposed variations are not prejudicial in that they do not affect the existing statutory rights of the tenants to challenge specific service charge items.
12. At 3.30 pm on Friday 10 March 2021 (i.e. less than a business day before the hearing), a skeleton argument was filed by Ms Mathers on behalf of the Applicant. This, for the first time, clarified the specific S35(2) factors on which the application relies; and made new submissions on

the terms of the Leases which the Applicant contends are unsatisfactory with regard to those factors. They can be summarised as follows:

- a. The lessees' contribution is determined by reference to, now obsolete, rateable values and is therefore an unsatisfactory provision ("the proportions issue").
- b. There is no provision for collection of an interim charge to cover anticipated expenditure, which means that the landlord may have to wait up to 15 months for payment of expenses incurred just after the annual certificate date (24 June) ("the interim charge issue").
- c. There is no provision for charging interest on late payment of service charges, a matter that is specifically referred to in s35(3)(A) of the Act. When combined with the lack of any right to levy an interim charge, the lack of an interest charging term is unsatisfactory ("the default interest issue")
- d. The combined effect of the unsatisfactory terms is to render the Leases administratively cumbersome and inefficient to manage. Furthermore, as the Leases are not in a modern form it is appropriate for the Tribunal to go beyond varying the leases to address the above factors and update the service charge terms generally, to achieve a unified form of lease that is consistent with the later leases of 813d and 807a, granted in 1999 and 2000, ("the updating issue").
- e. The variations do not prejudice the Respondents ("the no prejudice issue").
- f. The proposed variations would make satisfactory provision for the computation and recovery of service charges due under the Leases.

The Leases

13. Mr Murad's lease of Flat 801c was granted in 1979. It is an old-style lease (which I will refer to as the type 'A' lease) that includes terms that would now be regarded as defective.

14. The remaining Leases (which I will refer to as the type 'B' lease) are in common form and all contain the following service charge provisions:

Clause 2(2) contains a lessee covenant to pay a "reasonable proportion based on rateable value of the costs expenses outgoings and matters mentioned in the Sixth Schedule hereto (the amount of such contribution to be ascertained and certified in writing by the surveyor for the time being of the lessor by 24 June in each year and the amount so certified shall be final and binding on the parties hereto) once a year on 29 September in each year commencing on 29 September."

Clause 3(1) contains a covenant by the lessor, subject to payment by the lessee of the contributions specified in clause 2(2) "well and substantially to maintain repair redecorate and renew:

- (a) *the structure and in particular the walls roof chimney stacks gutters and main water pipes of the said building*
- (b) *the gas and water pipes drains and electric cables and wire in under and upon the said building enjoyed or used by the Lessee in common with the owners and tenants of the other flats in the said building*
- (c) *the parts of the said building so enjoyed or used by the lessee or the tenants of the other flats in common as aforesaid and the boundary walls and fences of the said building*

Clause 3(2) is a covenant by the Lessor to insure the building and any fixtures or fittings that in the lessor's opinion it is prudent to insure "against loss or damage by fire storm Tempest and (if possible) aircraft explosion and damage by burst pipes in such sum as shall be considered by the lessors surveyors to be the full value thereof for two years loss of rent and cause all monies received in respect of any such insurance to be paid out in building repairing or otherwise reinstating the said building or the part thereof so destroyed and/or damaged."

The Sixth Schedule sets out the costs expenses outgoings and matters in respect of which the lessee is to make a contribution, as follows:

- (1) *the expense of maintaining repairing redecorating and renewing:*
 - (a) *the main structure and in particular the roof chimney stacks gutters foundations and main water pipes of the said building*
 - (b) *the gas and water pipes drains and electric cables and wires used by the lessee in common with the owners or tenants of the other flats*
 - (c) *all common parts of the said building*
 - (d) *the boundary walls and fences of the said building*
 - (e) *all sums payable by the lessor in performing the obligations under clause 3 (1) and (2) hereinbefore mentioned that are not specifically mentioned in this schedule the costs of cleaning and lighting any common parts of the said building*
- (2) *the costs of insurance and keeping insured throughout the term hereby created the said building and any part thereof any fixtures or fittings therein that in the Lessor's opinion it is prudent to insure against loss or damage by fire storm tempest and (if possible) aircraft explosion and damage by burst pipes and such other risks including two years loss of rent normally covered under a comprehensive insurance as the lessors shall determine.*
- (3) *All rates taxes and other outgoings (if any) payable in respect of the parts of the said building used by the lessee in common as aforesaid.*
- (4) *The fees of the lessors managing agents for the collection of the rents of the flats in the said building and for the general management thereof.*

15. Mr Murad's type 'A' lease, contains very limited terms that would now be regarded as defective. Clause 2(8) contains a tenant covenant to contribute a "rateable proportion according to user" of the costs of maintenance and repair of the structural parts of the building and the common parts and services. Exceptionally the lease does not contain any corresponding express positive obligation on the part of the landlord to maintain the common parts or the structure. Furthermore, there is no covenant for the landlord to insure the building and use any proceeds to re-instate, or for the tenant to contribute to the costs of any buildings insurance the landlord does maintain.

The proposed variations

16. The proposed variations are extensive. In essence they are a wholesale replacement of the existing clauses 2(2), 3(1) and (2) and the Sixth Schedule of the type 'B' lease, with provisions that are substantially the same as those contained in the more recent leases of 813d and 807a granted in 1999 and 2000 (which I will refer to as the "the type 'C' lease").
17. The main differences between the service charge provisions in the type 'B' lease and the type 'C' leases, which form the basis of the proposed variations, are as follows:
 - a. The accounting period is changed from commencing on 29 September to 1 January in each year [page 27 of the Bundle]
 - b. There is a new tenant covenant to pay an interim charge in addition to the service charge on the terms set out in a Schedule to the proposed variations, both charges to be recoverable as rent in arrear [page 27 of the Bundle].
 - c. The landlord covenant to maintain and keep the service charge items in substantial repair and condition is expanded to include the following additional matters:
 - i. The costs of employing caretakers, porters and gardeners and for the cost of repair maintenance, insurance, rates and notional rent for a caretaker's flat.
 - ii. The landlords decorating obligations are more particularised in terms of the treatment to be applied to surfaces.
 - iii. Additional insurance provisions in the event of reinstatement of the building proving impossible.
 - iv. New provisions for the costs of maintaining a communal television aerial, a coin operated telephone box, fire extinguishers, a lift and ancillary equipment.
 - v. A new provision for maintenance of an electric door entry system serving the main entrance, once installed.
 - vi. Provision for a reserve fund to be set aside to meet future expenditure the landlord reasonably expects to incur meeting its covenants.

- vii. New provisions for the costs of maintenance of gardens and communal dustbins.
 - viii. New provisions for recovering interest on borrowing to meet the costs of complying with the landlord's covenants.
 - ix. A new provision for recovering fees charged by a solicitor or other professional involved in recovering arrears of rent and/or service charge from any tenant [pages 28-31 of the Bundle].
- d. The Schedule to the proposed variation is drafted to reflect the Fifth Schedule of the type 'C' lease. There is a definition of 'Total Expenditure' at paragraph 1, which includes all expenditure incurred by the landlord in the relevant accounting period in carrying out its service charge duties including a notional rent for a caretaker's flat [pages 33-34 of the Bundle]
 - e. The 'Service Charge' is defined as "*such a reasonable proportion based on the rateable value of the Total Expenditure as is specified in sub-clause 1 of this clause or (in respect of the accounting period during which this Lease is executed) such proportion of such percentage as is attributable to the period from the date of this Lease to the 31st day of December next following*".
 - f. To the extent the Service Charge exceeds Interim Charge paid by the tenant, the excess is payable to the landlord within 21 days of service on the tenant of a Certificate (referred to in paragraph 6 of the Schedule) and in case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - g. The 'Interim Charge' is defined as such sum to be paid on account of the Service Charge in respect of each accounting period as the lessors of the managing agents shall specify at their discretion to be a fair and reasonable interim payment. The Interim Charge is to be paid by equal payments in advance on 1 January and first of July in each year and in the case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - h. Paragraph 6 provides that the landlord or its agents must Certify as soon as practicable after the expiry of each accounting period the Total Expenditure for that period, the amount of any Interim Charge paid by the tenant in respect of that period (together with any surplus carried forward), the amount of the Service Charge in respect of the accounting period and any excess or deficiency of the Service Charge over the Interim Charge [page 34 of the Bundle].
 - i. The Certificate is said to be conclusive and binding on the parties. The tenant can inspect the receipts and vouchers relating to the Total Expenditure on prior payment of any costs to be incurred by the landlord or the landlord's agents and the landlord will consider written objections signed by not less than 60% flat owners, to any items of expenditure. There is also what purports to be a binding arbitration clause [page 34 of the Bundle].

The parties submissions

The Applicant's case

18. The Applicant was represented at the hearing by Ms Wendy Mathers of counsel. Mr Stern of Fountayne, the landlord's managing agent, attended on behalf of the Applicant to give evidence.
19. Ms Mather's submissions largely confirmed the arguments put forward in her skeleton argument. She accepted that it was for the Applicant to establish that it had made out a ground under s35(2) for every variation proposed and that it was for the Applicant to demonstrate that the variation should be the one proposed by the Applicant (or some other variation under s38(4)).
20. One issue raised by the Tribunal concerned Ms Mathers argument concerning the lack of provision for interest on arrears of service charge and the proposal, in her skeleton argument, that the omission should be rectified by a charging clause with a proposed interest rate of 4% above the base rate of National Westminster Bank plc. The difficulty being that the proposed variation in the application contained no such term. The only variation proposed by the Applicant was that any default in payment of the service charge would be recoverable by the landlord as rent in arrear.
21. Ms Mathers submitted that as the variations were intended to bring the Leases in line with the format of the type 'C' leases the Tribunal could exercise discretion to include an additional variation along the lines of paragraph 4(7) of the modern leases, which made a similar provision for interest to be charged on arrears of rent and service charge [page 116 of the Bundle].
22. Ms Mathers accepted that the proposed variation went far beyond that necessary to address the lease terms that the Applicant says are unsatisfactory in relation to the s35(2) matters, but submitted that if the Tribunal determined that variations should be made to address those specific matters, then it could exercise discretion to go further and replicate the service charge provisions of the type 'C' lease to enable the Applicant to collect the service charge on an equal and well particularised basis.
23. The specific variations requested in paragraph 16(a)-(i) above were then considered in more detail. With some input from Mr Stern it was acknowledged by Ms Mathers that a substantial number of service charge items did not exist within the Block and could be deleted from the draft. These include references to the parking areas, garages, gardens, passenger lifts, communal dustbins and refuse disposal areas, a caretaker, a caretaker's flat, porters, staff gardeners, communal television aerials, coin operated telephone boxes, an electric door entry system and fire extinguishers. The clauses were apparently copied over

from the type 'C' lease, where they appear to have been included by the drafter without proper consideration of their relevance to the Block. The Block stands within a footprint that has a very small surrounding strip of land that the residential leaseholders do not use.

24. The definitions were largely the same as in the type 'B' lease. The change in the accounting period was intended to accommodate operation of the interim charge. Once the irrelevant items were deleted, there was no material change to the landlord's covenant in the type 'B' lease, to keep the remaining specified items in good and substantial repair. The main variations to the landlord's covenant are to include a right to maintain a reserve fund, a right to charge interest on sums borrowed to finance compliance with the landlord's covenant and a right to charge solicitor's fees and professional fees incurred in recovering arrears of service charge.
25. The main variations to the service charge mechanism are contained in the Schedule to the draft variation. The most significant of which would allow the landlord to levy an interim charge. Mr Stern gave evidence at the hearing on this point. He said that although the landlord could raise small sums of £10-15,000.00 by way of loans from family businesses, it could not borrow the substantial amounts needed to fully comply with the outstanding repairs in that way. Ms Mathers suggested that the limited income of the landlord company, meant that it should be viewed as akin to an RTM company that needed to raise funds to carry out the essential services. In evidence Mr Stern said the landlord's annual income was about £20-25,000.00 from the ground rents and Shops rents and a further £4-4,500.00 rental from another property in Sussex owned by the landlord.
26. Mr Stern said that after the previous Tribunal hearing in 2015, there remained arrears of service charges that could not be collected easily because it was clear that every demand would be challenged by the Respondents. The Applicant therefore decided that it would pay the Block insurance every year but would not do anything else unless absolutely necessary, such as fire safety works. As a consequence, no service charge demands or accounts have been sent to the residential tenants since 2016, and the Block has been largely un-maintained. In 2016 the arrears totalled some £45,000.00 but no action was taken by Mr Stern to recover the arrears because, in his words, each and every demand would be challenged.
27. Mr Stern explained that the main point of the variation was to bring forward any dispute about the service charge to the date on which the budget was set by the interim charge which importantly, was before the landlord had incurred the actual costs. Any dispute could be quickly referred to the Tribunal for a determination, before the landlord had to lay out substantial costs of maintenance and repair. At present the landlord was having to incur the service charge costs before it could invoice the tenants who then routinely then challenged the demands. Furthermore, the absence of a contractual provision for interest on

arrears, presented no incentive for the tenants' not to routinely challenge demands.

The Respondents' case

28. Mr Murad the First Respondent, attended the hearing and was permitted to make submissions in relation to the proposed variation of his lease, despite his not having participated in the proceedings prior to the hearing.
29. Mrs Jinks attended the hearing to represent the Third Respondent, having made brief submissions in writing on 25 June 2020.
30. Mr Ramesh Palmer and his son attended the hearing to represent the Fourth Respondent, Mr Palmer having made extensive written submissions in his Statement of Case dated 25th of June 2020.
31. Mr Breslin joined the hearing by telephone to represent the Fifth Respondent. Mr and Mrs Breslin had made brief submissions on 25 June 2020, which were substantially similar to those of Mr and Mrs Jinks.
32. It was evident from the written submissions of the Respondents, and confirmed at the hearing, that there has been a history of very poor relations between the landlord and the residential tenants of the Block. Mr Palmer said that it was important to note that the landlord Contratree Limited, the managing agent Fountayne, the previous managing agent, Effective Management are all companies owned and run by the Stern family and that over the years most of the correspondence has been between the leaseholders, Simon Stern and his mother Cipora Stern. Contratree, a Stern family company owned the block when the leases they are now seeking to vary were granted, and Contratree continued to own the block when the more recent leases were granted in 1999 and 2000. The Applicant had therefore chosen to create the inconsistent forms of lease that it now complains has made managing the service charge impossible.
33. Much of Mr Palmer's written evidence related to ongoing issues with the maintenance of the building and in particular the external fire escape which Mr Palmer states was deemed dangerous and non-usable by West Midlands Fire Service following an inspection in 2017. It was explained to Mr Palmer that while the Tribunal appreciated that these issues were of immense concern to the leaseholders, they were not matters that the Tribunal could make any findings or determination on, within the context of this application.
34. Mr Palmer specific objections to the application can be summarised as follows:
 - a. The new submissions made by the Applicant's counsel within the skeleton argument were filed less than a working day prior to the

hearing and then expanded on during the morning of the hearing. The submissions concerning a new term for interest on arrears of service charge at 4% over base rate, should be disregarded as the Respondents' have had no time to consider or respond effectively, which has seriously disadvantaged them. The Applicant did not include reference to a term for interest on arrears within its statement of case, the draft variations or Mr Stern's witness statement and the Tribunal should therefore reject counsel's submissions on this.

- b. The Tribunal should also reject any argument that the landlord cannot afford to meet the costs of the services – that has not formed any part of the Applicant's case until today and runs contrary to previous representations made to the Respondents.
- c. If Mr Stern thought he was owed £45,000.00 he could seek forfeiture. The reason he has not done so, is because he hasn't sent out any statements, bills or reminders in four years, and that is an indication of how poorly the property is managed. Mr Parmar said that he owned a lot of rental properties, the charges were about £500.00 per year, £1,400.00 if the Council managed them. All straightforward, all justified service charge demands which he paid. He was happy to pay any demands from Mr Stern that were properly justified and the reason Mr Stern has not issued demands, is that he knows he can't justify them. When the tenants' had previously challenged demands, Mr Stern had been unable to produce any invoices from the companies that he claimed had done the work.
- d. The introduction of an interim charge would seriously disadvantage the tenants', who had not negotiated for a lease on these terms but could then be invoiced for any amount, and if not paid within 21 days solicitors letters and costs would follow. Mr Stern must be paying his solicitor fortunes for this and the Respondents would have to pay it.
- e. The variations do not address Mr Stern's complaint about the inconsistency of calculating the proportions on rateable values. The draft variation uses the same term. In any event this issue was considered by a Tribunal in 2015 who had no trouble determining that the existing mechanism was sufficient for the landlord to recover service charges.
- f. There is no evidence that the lease lacks clarity or fails to provide satisfactorily for the landlord to carry out the services and charge for them. Mr Parmar stated that the current lease makes ample provision for this and that issues of uniformity or the passage of time, or being out of step with modern drafting, are not of themselves, enough to deem the lease unsatisfactory.
- g. The Applicant is seeking to change the fundamental agreement originally negotiated with the tenants and make a radical departure, when the terms of the current lease are satisfactory. This would have an effect on the value on the tenants' investment, for which they should be compensated.

35. Mrs Jinks gave evidence and said that she was happy with the lease in its current form. Mrs Jinks said that the Block had never been well managed. When Cottons were managing they had ignored a problem with the roof which she ended up paying £11,000.00 to fix. It had then taken years to get the money back from the Stern family. The upshot with the service charge was that there had never been any clarity about demands. She paid to have a drain unblocked this week, because from experience she knows that cost of the repairs when eventually done will end up tripling. Mrs Jinks said that she didn't trust the Sterns' and varying the lease won't change that. Although she had said in her statement that she did not object to changing the date of the service charge year, she now didn't agree to that either.
36. Mrs Jinks was asked why she hadn't made any payments since 2014. She said this was because she hadn't received a bill and was not aware of any outstanding bills. In the last 6 years Mr Jinks has only been invoiced for ground rent and she thinks, one other bill.
37. Mr Breslin said that he agreed with Mr Parmar and Mrs Jinks evidence. He said that you couldn't trust the Sterns to do the work properly and at the right price. Mr Breslin also said that he hadn't received any service charge bills in the last 5-6 years. He didn't have any particular objection to the change in the date of the service charge year if it made it easier for Mr Stern.
38. In response to the Respondents' evidence, Mr Stern said that Contratree had never been an absent landlord, it had always maintained a registered office address. Mrs Jinks had a contact number for over 15 years which was borne out by her admitting that she had been repaid for the roof repairs. Mr Stern said that the Respondents' had all made allegations about the Sterns but not one had raised a single argument to support any negative impact on them of the proposed variations. Mr Breslin interrupted to point out that he had been asked to take out a defective title indemnity policy precisely because he had an absent landlord.
39. Mr Murad objected to any variation to his lease despite the Tribunal explaining to him that his lease was seriously defective and a variation to include a reciprocal landlord covenant to keep the Block in good repair and to maintain comprehensive buildings insurance, was an advantage to him. He was unrepresented and did not appear to fully understand the issues that owning a flat with defective lease provisions might cause generally and in particular, on any future sale of the flat.

Tribunals deliberations

The type 'B' lease

40. The variations that the Applicant seeks are to resolve problems that are said to exist in:

- (i) calculating the tenants' proportion of the charge, *the proportions issue*;
 - (ii) the financial consequences of there being no interim charging provisions, *the interim charge issue*;
 - (iii) the lack of a default interest clause, *the default interest issue*;
 - (iv) the lack of uniformity with the type 'C' lease, *the updating issue*.
41. The draft provided by the Applicant runs to some 8 pages and is a comprehensive replacement of the existing service charge clauses with those found in the type 'C' leases.
42. Before it can make an order under section 38 of the 1987 Act the Tribunal must be satisfied that the lease fails to make satisfactory provision with respect to one or more of the matters specified in section 35(2). In this case the Applicant relies on sub-paragraphs (e) and (f). Whether the lease fails to make satisfactory provision is for the Tribunal to determine in all the circumstances of the case

The proportions issue

43. Reference to rateable values may be obsolete, as indeed will likely be the fate of many other provisions over the term of a 125 year lease. However, the proposed variation does not address the obsolete reference. It introduces an even more confusing method of calculating the "Service Charge" as meaning "such reasonable proportion based on the rateable value of the Total Expenditure.." whatever that is supposed to mean.
44. Furthermore, the need to imply a term to give business efficacy to a lease, is not necessarily, or even probably, an indication that the lease fails to make satisfactory provision for the matter in question. This same issue was considered by a residential property tribunal and referred to in its decision dated 9 December 2015 BIR/00CN/LIS/2015/0002. Mr Stern confirmed in those proceedings that as the flats were all two bedroomed and similar in size, he had apportioned the charges equally between all flats. The tribunal determined that although rateable values had been replaced by Council Tax bands (on which no evidence had been submitted), the decision of the managing agents to apportion the charges equally was reasonable, "indeed it is difficult to imagine an alternative practical approach" (paragraph 47). The Tribunal does not take issue with that approach and does not therefore find that the lease fails to make satisfactory provision for the calculation of the tenant's proportion.

The interim Charge issue

45. This issue assumes that the parties to the lease intended that the landlord should not have to incur service charge expenditure before recovering its expenses from the tenants. I can find nothing in the type 'A' lease or the type 'B' lease to support this and the Respondents' evidence directly contradicts any such assumption. If a service charge

liability is incurred by the landlord there are workable provisions in the type 'A' and type 'B' lease for it to recover these expenses from the tenant. The fact that it is now standard or usual to include terms for an interim charge does not mean the absence of such a term renders the lease unsatisfactory. The absence does not create a shortfall in the service charge it just means that the landlord will have to fund the costs of the services before recovering them from the tenants. That was the commercial deal struck by the parties to the leases.

46. Mr Stern gave some evidence of the landlord's financial position when asked about it at the hearing, but no evidence of financial hardship leading to major issues with structural repairs, was put forward in the Applicant's statement of case or witness statements. Furthermore, as on Mr Stern's evidence the landlord has not spent any money on the Blocks for some 4-5 years (save for insurance), it should have a substantial sum in hand to at least make a start on the outstanding repairs. Mr Stern's primary concern appears to be obtaining a right to refer any dispute concerning the service charge costs to the Tribunal before the landlord had to incur the costs. The Tribunal does not therefore find that the absence of interim charging terms renders the lease unsatisfactory in relation to the s35(2) factors.

The default interest issue.

47. Paragraph 3A of s35 makes specific reference to provision for default interest being a sub-paragraph (e) factor. The Tribunal agrees with Ms Mathers that the absence of a default interest term in a lease, which also has no provision for interim charging, is a factor that the Tribunal could take into account when determining whether the lease made satisfactory provision. However, the Tribunal was concerned about the Applicant's failure to seek this variation until, what was effectively, the day before the hearing. There is no default interest term within the 8 pages submitted as the Applicant's proposed variations. Ms Mathers has suggested that as the Applicant's application is in effect that the Leases should be updated in line with the type 'C' lease, it could be implied that the Applicant intended its application to include not just the 8 pages of proposed variations attached to the application, but also a term similar to that found at clause 4(7) of the type 'C' lease.
48. The Tribunal determined that although it might have exercised discretion to order a proportionate variation to address the lack of a default interest term, it would be procedurally unfair to the Respondents to order such a variation, given that the issue was first raised by the Applicant the day before the hearing.

The updating issue.

49. Ms Mathers accepted that s35 does not allow for general updating of the lease terms just because they are no longer in modern or conventional form. The issue is, are the terms satisfactory and workable? The Tribunal finds in relation to the type 'B' lease that clause 2(2) imposes

an obligation on the tenant to pay for the costs of the services set out in the sixth schedule by reference to a service charge year commencing on 29 September, in terms that are satisfactory. Clause 3(1) imposes a corresponding covenant on the landlord and clause 3(3) imposes a landlord covenant to insure the building, in terms that are satisfactory. The sixth schedule contains details of the costs and expenses to which the tenants' must contribute (including insurance costs and managing agent's costs for management of the building), in terms which are satisfactory and taken with clause 2(3) and 3(1) and (2), workable.

50. The Tribunal finds that although there may be a few specific matters that could have been considered under a s35 application (such as the default interest issue, had it been pleaded at the correct time), there is no evidence on which the Tribunal can conclude that the type 'B' lease fails to make satisfactory provision for the s35(e) and (f) factors in terms that would justify the wholesale re-writing of the service charge provisions which the Applicant seeks.

The type 'C' lease

51. The Tribunal finds that Mr Murad's lease of 801 C Warwick Road fails to make satisfactory provision for one or more of the s35 factors, in that it fails to impose a reciprocal covenant on the landlord to keep the building and common parts in repair, or include a landlord covenant to insure the building with a reciprocal tenant covenant to pay a fair proportion of the costs of such insurance. However, these factors could have been addressed by a short deed of variation and do not justify wholesale variation of the lease to bring it in line with the later type 'C' leases that the landlord chose to grant.
52. If the Applicant had submitted a deed of variation that specifically addressed the unsatisfactory terms of Mr Murad's lease, perhaps seeking terms similar to the type 'B' lease, it is likely that the Tribunal would have exercised discretion to order a variation, but it is not the role of the Tribunal to draft the terms of any proposed variation from scratch, and no variation of the lease of 801C Warwick Road is therefore ordered.

The no-prejudice issue

53. The Tribunal disagrees with the Applicant's submissions concerning lack of prejudice. The wholesale updating of the service charge provisions would have introduced new contractual obligations to contribute to a reserve fund, to pay an interim charge based on the landlord's assessment of anticipated costs, to pay default interest on late payments and to pay the landlord's professional fees on any dispute concerning the service charge. Given the history of the parties dealings, including the landlords decision not to render service charge demands

and accounts, or comply with its repairing covenant for over 5 years, it is facile to suggest that the extensive variations sought by the landlord would not operate prejudicially to the tenants. However, as the Tribunal has determined that it does not intend exercising discretion to vary the Leases it does not need to consider the issue of compensation and prejudice.

Application under s20C of the 1985 Act

54. The Fourth Respondent has applied for an order under s20C of the Landlord and Tenant Act 1985 for an order that all the costs incurred in these proceedings are not to be regarded as relevant costs to be taken into account when determining the amount of any service charge that is payable by the tenant.
55. This litigation has arisen due to the Applicant's perception that the leases need updating to make better and more uniform provision for the landlord to recover service charge costs and expenses. The application has failed for the reasons set out above. The landlord does not appear to have a contractual right to recover litigation costs and an order under this section is probably therefore unnecessary. However, for the avoidance of doubt and to forestall any conceivable argument on this point, the Tribunal considers it just and equitable to make an order in favour of the Respondents' so that all of the costs incurred by the Applicant landlord in connection with these 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 Respondents

Judge D Barlow

29 March 2021

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).

**APPENDIX
SCHEDULE OF RESPONDENTS AND LEASES**

Property Address	Lease Date	Owner name/Respondent	Freehold/Landlord
801C Warwick Road, Tyseley, Birmingham, B11 2EL	6 October 1979	Mr Said Murad	Contratree Limited
807B Warwick Road, Tyseley, Birmingham, B11 2EL	30 May 1985	Mr and Mrs L Walker	Contratree Limited
807C Warwick Road, Tyseley, Birmingham, B11 2EL	12 June 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
807D Warwick Road, Tyseley, Birmingham, B11 2EL	19 October 1987	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813A Warwick Road, Tyseley, Birmingham, B11 2EL	22 August 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813B Warwick Road, Tyseley, Birmingham, B11 2EL	28 November 1986	Ramesh Parmar, Rikesh Parmar and Jeana Parmar	Contratree Limited
813C Warwick Road, Tyseley, Birmingham, B11 2EL	3 February 1989	Mr Brendan E. Breslin and Mrs Maria B. Breslin	Contratree Limited



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference	:	BIR/00CN/LVT/2020/0001
Properties	:	7 Flats at 801-815 Warwick Road, Tyseley, Birmingham, as listed in Appendix 1.
Applicant	:	Contratree Limited
Representative	:	Bude Nathan Iwanier Solicitors
Respondents	:	The leaseholders as listed in Appendix 1.
Type of application	:	An application under section 35(1) of the Landlord and Tenant Act 1987
Tribunal Members:	:	Judge D Barlow Mrs S Hopkins
Date of Hearing	:	15 March 2021

DECISION

Covid-19 pandemic: description of hearing

This determination included a remote video hearing which has been consented to by the parties. The form of remote hearing was audio (**V:CVPREMOTE**). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing. The Applicant filed two composite bundles for the hearing referred to as the “Bundle” and the “Supplemental Bundle”. Reference in square brackets within the decision are to the page number in which the document appears in the respective bundle.

DECISION

(1) We make no order to vary the Leases set out in Appendix 1.

REASONS

Background

1. The Applicant is the freehold proprietor of 801-815 Warwick Road, Tyseley, Birmingham, B11 2EL (“the Block”) registered under title number WM340520. The Block comprises a three-storey block with five commercial retail units on the ground floor (“the Shops”) and 10 residential flats on the first and second floor (“the Flats”).
2. The Respondents are the registered proprietors of leasehold interests in seven of the Flats as follows:
 - a. The First Respondent (Mr Murad) holds the term remaining on the lease of Flat 801C, dated 6 October 1979, between Horace Davis and Elaine Hyde, registered with title number WM173786. The lease predates the remaining Respondents’ leases by some years and is an old-style lease with defective provisions [pages 1-11 of the Supplemental Bundle];
 - b. The Second Respondents (Mr and Mrs Walker) hold the term remaining on the lease of Flat 807B, dated 30 May 1985, between the Applicant and Janice Foster, registered with title number WM352322 [pages 12-25 of the Supplemental Bundle];
 - c. The Third Respondents (Mr and Mrs Jinks) hold the terms remaining on three leases as follows:
 - i. Flat 807C, dated 16 June 1986, between the Applicant and Robert Runciman, registered with title number WM386099;
 - ii. Flat 807D, dated 19 October 1987, between the Applicant and Elizabeth Bird, registered with title number WM420707; and
 - iii. Flat 813A, dated 22 August 1986, between the Applicant and Terence Brown, registered with title number WM388652 [pages 26-76 of the Supplemental Bundle];
 - d. The Fourth Respondents (Mr Ramesh Parmar, Rikesh Parmar and Jeana Parmar) hold the term remaining on the lease of Flat 813B, dated 28 November 1986, between the Applicant and Sylvia Keyte, registered with title number WM632520 [pages 95-111 of the Supplemental Bundle]; and
 - e. The Fifth Respondents (Mr and Mrs Breslin) hold the term remaining on the lease of Flat 813C, dated 3 February 1989, between the Applicant and (1) Adrian Daniel and (2) Susan

Cashmore, registered with title number WM461290 [pages 77-94 of the Supplemental Bundle].

(The Second, Third, Fourth and Fifth Respondents' leases, were granted between 1985 -1989, are substantially the same and are collectively referred to as "the Leases")

3. There are two long lease residential flats which are not the subject of this application. Flat 813d and Flat 807a, which were granted in 1999 and 2000 respectively. They are on a more modern form of lease with extensive service charge provisions [pages 130-147 and 186-203 of the Supplemental Bundle].
4. There is a tenth residential flat which is owned by the Applicant and apparently also held on a modern form of lease (no copy was provided by the Applicant).
5. The five Shops are held on three commercial leases, which all contain an obligation by the tenant to pay a fair proportion of the costs incurred by the landlord in keeping the structural parts of the Block and various common parts in repair, decorated and lit [pages 148-185 and 204- 275 of the Supplemental Bundle].
6. There is a history of issues and disputes between the Respondents and the landlord's various managing agents, concerning maintenance of the Block, some of which have been the subject of previous applications to the county court and to this Tribunal. The Block is currently managed by Mr Simon Stern of Fountayne Managing Limited ("Fountayne"), whose family also manage the business of Contratree Limited. The Block was previously managed by Effective Management, another Stern family business and prior to that Cottons, a Birmingham based company. Since 2013 the Block has been managed by the Stern family, who also manage the business of Contratree Limited.
7. The issues between the parties stem from what appears to be poor management of the building over a period of years. The Respondents' say this is a consequence of neglect by a landlord that has effectively, been absent for a substantial period. Mr Stern says it is because the service charge provisions in the lease are such that efficient and effective collection of the service charge is impossible and prevents the landlord from complying with its repair and maintenance covenants.
8. The current position is that urgent repairs are required to meet fire safety standards, not least due to an external fire escape having been condemned as unusable, following Fire Risk Assessment carried out in 2019.

Relevant statutory provisions

9. The Tribunal's jurisdiction to vary residential long leases derives from section 35 in part IV of the **Landlord and Tenant Act 1987** ("the Act"). The relevant provisions of the Act provide as follows:

s35 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—*

...

(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.

...

(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.

S38 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.

...

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under s35 or s36 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.

...

Grounds of the application

10. In this case the Applicant seeks to rely upon sections 35(2)(e) and (f), namely that the lease fails to make satisfactory provision for the recovery by the landlord of expenditure incurred or to be incurred by it for the benefit of the leaseholders and fails to make satisfactory provision for the computation of the service charge payable under the lease.
11. Within the application, (which stood as the Applicant's Statement of Case), the Applicant specified a single ground, which is - "*the leases granted at different times were not in uniform draft and the collection of service charges fairly between the parties is impossible*". The Applicant expanded on this slightly in the witness statement of Simon Stern dated 22nd of July 2020, which was filed with the Bundle on 16 September 2020 [pages 268 to 270 of the Bundle]. In his witness statement, Mr Stern submits that the Applicant is entitled to the variations sought on two grounds. First because the existing leases do not all have the same service charge provisions; and secondly, because there is no provision for the landlord to levy an interim service charge to obtain money on account of anticipated charges. Mr Stern also submits that the proposed variations are not prejudicial in that they do not affect the existing statutory rights of the tenants to challenge specific service charge items.
12. At 3.30 pm on Friday 10 March 2021 (i.e. less than a business day before the hearing), a skeleton argument was filed by Ms Mathers on behalf of the Applicant. This, for the first time, clarified the specific S35(2) factors on which the application relies; and made new submissions on

the terms of the Leases which the Applicant contends are unsatisfactory with regard to those factors. They can be summarised as follows:

- a. The lessees' contribution is determined by reference to, now obsolete, rateable values and is therefore an unsatisfactory provision ("the proportions issue").
- b. There is no provision for collection of an interim charge to cover anticipated expenditure, which means that the landlord may have to wait up to 15 months for payment of expenses incurred just after the annual certificate date (24 June) ("the interim charge issue").
- c. There is no provision for charging interest on late payment of service charges, a matter that is specifically referred to in s35(3)(A) of the Act. When combined with the lack of any right to levy an interim charge, the lack of an interest charging term is unsatisfactory ("the default interest issue")
- d. The combined effect of the unsatisfactory terms is to render the Leases administratively cumbersome and inefficient to manage. Furthermore, as the Leases are not in a modern form it is appropriate for the Tribunal to go beyond varying the leases to address the above factors and update the service charge terms generally, to achieve a unified form of lease that is consistent with the later leases of 813d and 807a, granted in 1999 and 2000, ("the updating issue").
- e. The variations do not prejudice the Respondents ("the no prejudice issue").
- f. The proposed variations would make satisfactory provision for the computation and recovery of service charges due under the Leases.

The Leases

13. Mr Murad's lease of Flat 801c was granted in 1979. It is an old-style lease (which I will refer to as the type 'A' lease) that includes terms that would now be regarded as defective.

14. The remaining Leases (which I will refer to as the type 'B' lease) are in common form and all contain the following service charge provisions:

Clause 2(2) contains a lessee covenant to pay a "reasonable proportion based on rateable value of the costs expenses outgoings and matters mentioned in the Sixth Schedule hereto (the amount of such contribution to be ascertained and certified in writing by the surveyor for the time being of the lessor by 24 June in each year and the amount so certified shall be final and binding on the parties hereto) once a year on 29 September in each year commencing on 29 September."

Clause 3(1) contains a covenant by the lessor, subject to payment by the lessee of the contributions specified in clause 2(2) "well and substantially to maintain repair redecorate and renew:

- (a) *the structure and in particular the walls roof chimney stacks gutters and main water pipes of the said building*
- (b) *the gas and water pipes drains and electric cables and wire in under and upon the said building enjoyed or used by the Lessee in common with the owners and tenants of the other flats in the said building*
- (c) *the parts of the said building so enjoyed or used by the lessee or the tenants of the other flats in common as aforesaid and the boundary walls and fences of the said building*

Clause 3(2) is a covenant by the Lessor to insure the building and any fixtures or fittings that in the lessor's opinion it is prudent to insure "against loss or damage by fire storm Tempest and (if possible) aircraft explosion and damage by burst pipes in such sum as shall be considered by the lessors surveyors to be the full value thereof for two years loss of rent and cause all monies received in respect of any such insurance to be paid out in building repairing or otherwise reinstating the said building or the part thereof so destroyed and/or damaged."

The Sixth Schedule sets out the costs expenses outgoings and matters in respect of which the lessee is to make a contribution, as follows:

- (1) *the expense of maintaining repairing redecorating and renewing:*
 - (a) *the main structure and in particular the roof chimney stacks gutters foundations and main water pipes of the said building*
 - (b) *the gas and water pipes drains and electric cables and wires used by the lessee in common with the owners or tenants of the other flats*
 - (c) *all common parts of the said building*
 - (d) *the boundary walls and fences of the said building*
 - (e) *all sums payable by the lessor in performing the obligations under clause 3 (1) and (2) hereinbefore mentioned that are not specifically mentioned in this schedule the costs of cleaning and lighting any common parts of the said building*
- (2) *the costs of insurance and keeping insured throughout the term hereby created the said building and any part thereof any fixtures or fittings therein that in the Lessor's opinion it is prudent to insure against loss or damage by fire storm tempest and (if possible) aircraft explosion and damage by burst pipes and such other risks including two years loss of rent normally covered under a comprehensive insurance as the lessors shall determine.*
- (3) *All rates taxes and other outgoings (if any) payable in respect of the parts of the said building used by the lessee in common as aforesaid.*
- (4) *The fees of the lessors managing agents for the collection of the rents of the flats in the said building and for the general management thereof.*

15. Mr Murad's type 'A' lease, contains very limited terms that would now be regarded as defective. Clause 2(8) contains a tenant covenant to contribute a "rateable proportion according to user" of the costs of maintenance and repair of the structural parts of the building and the common parts and services. Exceptionally the lease does not contain any corresponding express positive obligation on the part of the landlord to maintain the common parts or the structure. Furthermore, there is no covenant for the landlord to insure the building and use any proceeds to re-instate, or for the tenant to contribute to the costs of any buildings insurance the landlord does maintain.

The proposed variations

16. The proposed variations are extensive. In essence they are a wholesale replacement of the existing clauses 2(2), 3(1) and (2) and the Sixth Schedule of the type 'B' lease, with provisions that are substantially the same as those contained in the more recent leases of 813d and 807a granted in 1999 and 2000 (which I will refer to as the "the type 'C' lease").
17. The main differences between the service charge provisions in the type 'B' lease and the type 'C' leases, which form the basis of the proposed variations, are as follows:
 - a. The accounting period is changed from commencing on 29 September to 1 January in each year [page 27 of the Bundle]
 - b. There is a new tenant covenant to pay an interim charge in addition to the service charge on the terms set out in a Schedule to the proposed variations, both charges to be recoverable as rent in arrear [page27 of the Bundle].
 - c. The landlord covenant to maintain and keep the service charge items in substantial repair and condition is expanded to include the following additional matters:
 - i. The costs of employing caretakers, porters and gardeners and for the cost of repair maintenance, insurance, rates and notional rent for a caretaker's flat.
 - ii. The landlords decorating obligations are more particularised in terms of the treatment to be applied to surfaces.
 - iii. Additional insurance provisions in the event of reinstatement of the building proving impossible.
 - iv. New provisions for the costs of maintaining a communal television aerial, a coin operated telephone box, fire extinguishers, a lift and ancillary equipment.
 - v. A new provision for maintenance of an electric door entry system serving the main entrance, once installed.
 - vi. Provision for a reserve fund to be set aside to meet future expenditure the landlord reasonably expects to incur meeting its covenants.

- vii. New provisions for the costs of maintenance of gardens and communal dustbins.
 - viii. New provisions for recovering interest on borrowing to meet the costs of complying with the landlord's covenants.
 - ix. A new provision for recovering fees charged by a solicitor or other professional involved in recovering arrears of rent and/or service charge from any tenant [pages 28-31 of the Bundle].
- d. The Schedule to the proposed variation is drafted to reflect the Fifth Schedule of the type 'C' lease. There is a definition of 'Total Expenditure' at paragraph 1, which includes all expenditure incurred by the landlord in the relevant accounting period in carrying out its service charge duties including a notional rent for a caretaker's flat [pages 33-34 of the Bundle]
 - e. The 'Service Charge' is defined as "*such a reasonable proportion based on the rateable value of the Total Expenditure as is specified in sub-clause 1 of this clause or (in respect of the accounting period during which this Lease is executed) such proportion of such percentage as is attributable to the period from the date of this Lease to the 31st day of December next following*".
 - f. To the extent the Service Charge exceeds Interim Charge paid by the tenant, the excess is payable to the landlord within 21 days of service on the tenant of a Certificate (referred to in paragraph 6 of the Schedule) and in case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - g. The 'Interim Charge' is defined as such sum to be paid on account of the Service Charge in respect of each accounting period as the lessors of the managing agents shall specify at their discretion to be a fair and reasonable interim payment. The Interim Charge is to be paid by equal payments in advance on 1 January and first of July in each year and in the case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - h. Paragraph 6 provides that the landlord or its agents must Certify as soon as practicable after the expiry of each accounting period the Total Expenditure for that period, the amount of any Interim Charge paid by the tenant in respect of that period (together with any surplus carried forward), the amount of the Service Charge in respect of the accounting period and any excess or deficiency of the Service Charge over the Interim Charge [page 34 of the Bundle].
 - i. The Certificate is said to be conclusive and binding on the parties. The tenant can inspect the receipts and vouchers relating to the Total Expenditure on prior payment of any costs to be incurred by the landlord or the landlord's agents and the landlord will consider written objections signed by not less than 60% flat owners, to any items of expenditure. There is also what purports to be a binding arbitration clause [page 34 of the Bundle].

The parties submissions

The Applicant's case

18. The Applicant was represented at the hearing by Ms Wendy Mathers of counsel. Mr Stern of Fountayne, the landlord's managing agent, attended on behalf of the Applicant to give evidence.
19. Ms Mather's submissions largely confirmed the arguments put forward in her skeleton argument. She accepted that it was for the Applicant to establish that it had made out a ground under s35(2) for every variation proposed and that it was for the Applicant to demonstrate that the variation should be the one proposed by the Applicant (or some other variation under s38(4)).
20. One issue raised by the Tribunal concerned Ms Mathers argument concerning the lack of provision for interest on arrears of service charge and the proposal, in her skeleton argument, that the omission should be rectified by a charging clause with a proposed interest rate of 4% above the base rate of National Westminster Bank plc. The difficulty being that the proposed variation in the application contained no such term. The only variation proposed by the Applicant was that any default in payment of the service charge would be recoverable by the landlord as rent in arrear.
21. Ms Mathers submitted that as the variations were intended to bring the Leases in line with the format of the type 'C' leases the Tribunal could exercise discretion to include an additional variation along the lines of paragraph 4(7) of the modern leases, which made a similar provision for interest to be charged on arrears of rent and service charge [page 116 of the Bundle].
22. Ms Mathers accepted that the proposed variation went far beyond that necessary to address the lease terms that the Applicant says are unsatisfactory in relation to the s35(2) matters, but submitted that if the Tribunal determined that variations should be made to address those specific matters, then it could exercise discretion to go further and replicate the service charge provisions of the type 'C' lease to enable the Applicant to collect the service charge on an equal and well particularised basis.
23. The specific variations requested in paragraph 16(a)-(i) above were then considered in more detail. With some input from Mr Stern it was acknowledged by Ms Mathers that a substantial number of service charge items did not exist within the Block and could be deleted from the draft. These include references to the parking areas, garages, gardens, passenger lifts, communal dustbins and refuse disposal areas, a caretaker, a caretaker's flat, porters, staff gardeners, communal television aerials, coin operated telephone boxes, an electric door entry system and fire extinguishers. The clauses were apparently copied over

from the type 'C' lease, where they appear to have been included by the drafter without proper consideration of their relevance to the Block. The Block stands within a footprint that has a very small surrounding strip of land that the residential leaseholders do not use.

24. The definitions were largely the same as in the type 'B' lease. The change in the accounting period was intended to accommodate operation of the interim charge. Once the irrelevant items were deleted, there was no material change to the landlord's covenant in the type 'B' lease, to keep the remaining specified items in good and substantial repair. The main variations to the landlord's covenant are to include a right to maintain a reserve fund, a right to charge interest on sums borrowed to finance compliance with the landlord's covenant and a right to charge solicitor's fees and professional fees incurred in recovering arrears of service charge.
25. The main variations to the service charge mechanism are contained in the Schedule to the draft variation. The most significant of which would allow the landlord to levy an interim charge. Mr Stern gave evidence at the hearing on this point. He said that although the landlord could raise small sums of £10-15,000.00 by way of loans from family businesses, it could not borrow the substantial amounts needed to fully comply with the outstanding repairs in that way. Ms Mathers suggested that the limited income of the landlord company, meant that it should be viewed as akin to an RTM company that needed to raise funds to carry out the essential services. In evidence Mr Stern said the landlord's annual income was about £20-25,000.00 from the ground rents and Shops rents and a further £4-4,500.00 rental from another property in Sussex owned by the landlord.
26. Mr Stern said that after the previous Tribunal hearing in 2015, there remained arrears of service charges that could not be collected easily because it was clear that every demand would be challenged by the Respondents. The Applicant therefore decided that it would pay the Block insurance every year but would not do anything else unless absolutely necessary, such as fire safety works. As a consequence, no service charge demands or accounts have been sent to the residential tenants since 2016, and the Block has been largely un-maintained. In 2016 the arrears totalled some £45,000.00 but no action was taken by Mr Stern to recover the arrears because, in his words, each and every demand would be challenged.
27. Mr Stern explained that the main point of the variation was to bring forward any dispute about the service charge to the date on which the budget was set by the interim charge which importantly, was before the landlord had incurred the actual costs. Any dispute could be quickly referred to the Tribunal for a determination, before the landlord had to lay out substantial costs of maintenance and repair. At present the landlord was having to incur the service charge costs before it could invoice the tenants who then routinely then challenged the demands. Furthermore, the absence of a contractual provision for interest on

arrears, presented no incentive for the tenants' not to routinely challenge demands.

The Respondents' case

28. Mr Murad the First Respondent, attended the hearing and was permitted to make submissions in relation to the proposed variation of his lease, despite his not having participated in the proceedings prior to the hearing.
29. Mrs Jinks attended the hearing to represent the Third Respondent, having made brief submissions in writing on 25 June 2020.
30. Mr Ramesh Palmer and his son attended the hearing to represent the Fourth Respondent, Mr Palmer having made extensive written submissions in his Statement of Case dated 25th of June 2020.
31. Mr Breslin joined the hearing by telephone to represent the Fifth Respondent. Mr and Mrs Breslin had made brief submissions on 25 June 2020, which were substantially similar to those of Mr and Mrs Jinks.
32. It was evident from the written submissions of the Respondents, and confirmed at the hearing, that there has been a history of very poor relations between the landlord and the residential tenants of the Block. Mr Palmer said that it was important to note that the landlord Contratree Limited, the managing agent Fountayne, the previous managing agent, Effective Management are all companies owned and run by the Stern family and that over the years most of the correspondence has been between the leaseholders, Simon Stern and his mother Cipora Stern. Contratree, a Stern family company owned the block when the leases they are now seeking to vary were granted, and Contratree continued to own the block when the more recent leases were granted in 1999 and 2000. The Applicant had therefore chosen to create the inconsistent forms of lease that it now complains has made managing the service charge impossible.
33. Much of Mr Palmer's written evidence related to ongoing issues with the maintenance of the building and in particular the external fire escape which Mr Palmer states was deemed dangerous and non-usable by West Midlands Fire Service following an inspection in 2017. It was explained to Mr Palmer that while the Tribunal appreciated that these issues were of immense concern to the leaseholders, they were not matters that the Tribunal could make any findings or determination on, within the context of this application.
34. Mr Palmer specific objections to the application can be summarised as follows:
 - a. The new submissions made by the Applicant's counsel within the skeleton argument were filed less than a working day prior to the

hearing and then expanded on during the morning of the hearing. The submissions concerning a new term for interest on arrears of service charge at 4% over base rate, should be disregarded as the Respondents' have had no time to consider or respond effectively, which has seriously disadvantaged them. The Applicant did not include reference to a term for interest on arrears within its statement of case, the draft variations or Mr Stern's witness statement and the Tribunal should therefore reject counsel's submissions on this.

- b. The Tribunal should also reject any argument that the landlord cannot afford to meet the costs of the services – that has not formed any part of the Applicant's case until today and runs contrary to previous representations made to the Respondents.
- c. If Mr Stern thought he was owed £45,000.00 he could seek forfeiture. The reason he has not done so, is because he hasn't sent out any statements, bills or reminders in four years, and that is an indication of how poorly the property is managed. Mr Parmar said that he owned a lot of rental properties, the charges were about £500.00 per year, £1,400.00 if the Council managed them. All straightforward, all justified service charge demands which he paid. He was happy to pay any demands from Mr Stern that were properly justified and the reason Mr Stern has not issued demands, is that he knows he can't justify them. When the tenants' had previously challenged demands, Mr Stern had been unable to produce any invoices from the companies that he claimed had done the work.
- d. The introduction of an interim charge would seriously disadvantage the tenants', who had not negotiated for a lease on these terms but could then be invoiced for any amount, and if not paid within 21 days solicitors letters and costs would follow. Mr Stern must be paying his solicitor fortunes for this and the Respondents would have to pay it.
- e. The variations do not address Mr Stern's complaint about the inconsistency of calculating the proportions on rateable values. The draft variation uses the same term. In any event this issue was considered by a Tribunal in 2015 who had no trouble determining that the existing mechanism was sufficient for the landlord to recover service charges.
- f. There is no evidence that the lease lacks clarity or fails to provide satisfactorily for the landlord to carry out the services and charge for them. Mr Parmar stated that the current lease makes ample provision for this and that issues of uniformity or the passage of time, or being out of step with modern drafting, are not of themselves, enough to deem the lease unsatisfactory.
- g. The Applicant is seeking to change the fundamental agreement originally negotiated with the tenants and make a radical departure, when the terms of the current lease are satisfactory. This would have an effect on the value on the tenants' investment, for which they should be compensated.

35. Mrs Jinks gave evidence and said that she was happy with the lease in its current form. Mrs Jinks said that the Block had never been well managed. When Cottons were managing they had ignored a problem with the roof which she ended up paying £11,000.00 to fix. It had then taken years to get the money back from the Stern family. The upshot with the service charge was that there had never been any clarity about demands. She paid to have a drain unblocked this week, because from experience she knows that cost of the repairs when eventually done will end up tripling. Mrs Jinks said that she didn't trust the Sterns' and varying the lease won't change that. Although she had said in her statement that she did not object to changing the date of the service charge year, she now didn't agree to that either.
36. Mrs Jinks was asked why she hadn't made any payments since 2014. She said this was because she hadn't received a bill and was not aware of any outstanding bills. In the last 6 years Mr Jinks has only been invoiced for ground rent and she thinks, one other bill.
37. Mr Breslin said that he agreed with Mr Parmar and Mrs Jinks evidence. He said that you couldn't trust the Sterns to do the work properly and at the right price. Mr Breslin also said that he hadn't received any service charge bills in the last 5-6 years. He didn't have any particular objection to the change in the date of the service charge year if it made it easier for Mr Stern.
38. In response to the Respondents' evidence, Mr Stern said that Contratree had never been an absent landlord, it had always maintained a registered office address. Mrs Jinks had a contact number for over 15 years which was borne out by her admitting that she had been repaid for the roof repairs. Mr Stern said that the Respondents' had all made allegations about the Sterns but not one had raised a single argument to support any negative impact on them of the proposed variations. Mr Breslin interrupted to point out that he had been asked to take out a defective title indemnity policy precisely because he had an absent landlord.
39. Mr Murad objected to any variation to his lease despite the Tribunal explaining to him that his lease was seriously defective and a variation to include a reciprocal landlord covenant to keep the Block in good repair and to maintain comprehensive buildings insurance, was an advantage to him. He was unrepresented and did not appear to fully understand the issues that owning a flat with defective lease provisions might cause generally and in particular, on any future sale of the flat.

Tribunals deliberations

The type 'B' lease

40. The variations that the Applicant seeks are to resolve problems that are said to exist in:

- (i) calculating the tenants' proportion of the charge, *the proportions issue*;
 - (ii) the financial consequences of there being no interim charging provisions, *the interim charge issue*;
 - (iii) the lack of a default interest clause, *the default interest issue*;
 - (iv) the lack of uniformity with the type 'C' lease, *the updating issue*.
41. The draft provided by the Applicant runs to some 8 pages and is a comprehensive replacement of the existing service charge clauses with those found in the type 'C' leases.
42. Before it can make an order under section 38 of the 1987 Act the Tribunal must be satisfied that the lease fails to make satisfactory provision with respect to one or more of the matters specified in section 35(2). In this case the Applicant relies on sub-paragraphs (e) and (f). Whether the lease fails to make satisfactory provision is for the Tribunal to determine in all the circumstances of the case

The proportions issue

43. Reference to rateable values may be obsolete, as indeed will likely be the fate of many other provisions over the term of a 125 year lease. However, the proposed variation does not address the obsolete reference. It introduces an even more confusing method of calculating the "Service Charge" as meaning "such reasonable proportion based on the rateable value of the Total Expenditure.." whatever that is supposed to mean.
44. Furthermore, the need to imply a term to give business efficacy to a lease, is not necessarily, or even probably, an indication that the lease fails to make satisfactory provision for the matter in question. This same issue was considered by a residential property tribunal and referred to in its decision dated 9 December 2015 BIR/00CN/LIS/2015/0002. Mr Stern confirmed in those proceedings that as the flats were all two bedroomed and similar in size, he had apportioned the charges equally between all flats. The tribunal determined that although rateable values had been replaced by Council Tax bands (on which no evidence had been submitted), the decision of the managing agents to apportion the charges equally was reasonable, "indeed it is difficult to imagine an alternative practical approach" (paragraph 47). The Tribunal does not take issue with that approach and does not therefore find that the lease fails to make satisfactory provision for the calculation of the tenant's proportion.

The interim Charge issue

45. This issue assumes that the parties to the lease intended that the landlord should not have to incur service charge expenditure before recovering its expenses from the tenants. I can find nothing in the type 'A' lease or the type 'B' lease to support this and the Respondents' evidence directly contradicts any such assumption. If a service charge

liability is incurred by the landlord there are workable provisions in the type 'A' and type 'B' lease for it to recover these expenses from the tenant. The fact that it is now standard or usual to include terms for an interim charge does not mean the absence of such a term renders the lease unsatisfactory. The absence does not create a shortfall in the service charge it just means that the landlord will have to fund the costs of the services before recovering them from the tenants. That was the commercial deal struck by the parties to the leases.

46. Mr Stern gave some evidence of the landlord's financial position when asked about it at the hearing, but no evidence of financial hardship leading to major issues with structural repairs, was put forward in the Applicant's statement of case or witness statements. Furthermore, as on Mr Stern's evidence the landlord has not spent any money on the Blocks for some 4-5 years (save for insurance), it should have a substantial sum in hand to at least make a start on the outstanding repairs. Mr Stern's primary concern appears to be obtaining a right to refer any dispute concerning the service charge costs to the Tribunal before the landlord had to incur the costs. The Tribunal does not therefore find that the absence of interim charging terms renders the lease unsatisfactory in relation to the s35(2) factors.

The default interest issue.

47. Paragraph 3A of s35 makes specific reference to provision for default interest being a sub-paragraph (e) factor. The Tribunal agrees with Ms Mathers that the absence of a default interest term in a lease, which also has no provision for interim charging, is a factor that the Tribunal could take into account when determining whether the lease made satisfactory provision. However, the Tribunal was concerned about the Applicant's failure to seek this variation until, what was effectively, the day before the hearing. There is no default interest term within the 8 pages submitted as the Applicant's proposed variations. Ms Mathers has suggested that as the Applicant's application is in effect that the Leases should be updated in line with the type 'C' lease, it could be implied that the Applicant intended its application to include not just the 8 pages of proposed variations attached to the application, but also a term similar to that found at clause 4(7) of the type 'C' lease.
48. The Tribunal determined that although it might have exercised discretion to order a proportionate variation to address the lack of a default interest term, it would be procedurally unfair to the Respondents to order such a variation, given that the issue was first raised by the Applicant the day before the hearing.

The updating issue.

49. Ms Mathers accepted that s35 does not allow for general updating of the lease terms just because they are no longer in modern or conventional form. The issue is, are the terms satisfactory and workable? The Tribunal finds in relation to the type 'B' lease that clause 2(2) imposes

an obligation on the tenant to pay for the costs of the services set out in the sixth schedule by reference to a service charge year commencing on 29 September, in terms that are satisfactory. Clause 3(1) imposes a corresponding covenant on the landlord and clause 3(3) imposes a landlord covenant to insure the building, in terms that are satisfactory. The sixth schedule contains details of the costs and expenses to which the tenants' must contribute (including insurance costs and managing agent's costs for management of the building), in terms which are satisfactory and taken with clause 2(3) and 3(1) and (2), workable.

50. The Tribunal finds that although there may be a few specific matters that could have been considered under a s35 application (such as the default interest issue, had it been pleaded at the correct time), there is no evidence on which the Tribunal can conclude that the type 'B' lease fails to make satisfactory provision for the s35(e) and (f) factors in terms that would justify the wholesale re-writing of the service charge provisions which the Applicant seeks.

The type 'C' lease

51. The Tribunal finds that Mr Murad's lease of 801 C Warwick Road fails to make satisfactory provision for one or more of the s35 factors, in that it fails to impose a reciprocal covenant on the landlord to keep the building and common parts in repair, or include a landlord covenant to insure the building with a reciprocal tenant covenant to pay a fair proportion of the costs of such insurance. However, these factors could have been addressed by a short deed of variation and do not justify wholesale variation of the lease to bring it in line with the later type 'C' leases that the landlord chose to grant.
52. If the Applicant had submitted a deed of variation that specifically addressed the unsatisfactory terms of Mr Murad's lease, perhaps seeking terms similar to the type 'B' lease, it is likely that the Tribunal would have exercised discretion to order a variation, but it is not the role of the Tribunal to draft the terms of any proposed variation from scratch, and no variation of the lease of 801C Warwick Road is therefore ordered.

The no-prejudice issue

53. The Tribunal disagrees with the Applicant's submissions concerning lack of prejudice. The wholesale updating of the service charge provisions would have introduced new contractual obligations to contribute to a reserve fund, to pay an interim charge based on the landlord's assessment of anticipated costs, to pay default interest on late payments and to pay the landlord's professional fees on any dispute concerning the service charge. Given the history of the parties dealings, including the landlords decision not to render service charge demands

and accounts, or comply with its repairing covenant for over 5 years, it is facile to suggest that the extensive variations sought by the landlord would not operate prejudicially to the tenants. However, as the Tribunal has determined that it does not intend exercising discretion to vary the Leases it does not need to consider the issue of compensation and prejudice.

Application under s20C of the 1985 Act

54. The Fourth Respondent has applied for an order under s20C of the Landlord and Tenant Act 1985 for an order that all the costs incurred in these proceedings are not to be regarded as relevant costs to be taken into account when determining the amount of any service charge that is payable by the tenant.
55. This litigation has arisen due to the Applicant's perception that the leases need updating to make better and more uniform provision for the landlord to recover service charge costs and expenses. The application has failed for the reasons set out above. The landlord does not appear to have a contractual right to recover litigation costs and an order under this section is probably therefore unnecessary. However, for the avoidance of doubt and to forestall any conceivable argument on this point, the Tribunal considers it just and equitable to make an order in favour of the Respondents' so that all of the costs incurred by the Applicant landlord in connection with these 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 Respondents

Judge D Barlow

29 March 2021

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).

**APPENDIX
SCHEDULE OF RESPONDENTS AND LEASES**

Property Address	Lease Date	Owner name/Respondent	Freehold/Landlord
801C Warwick Road, Tyseley, Birmingham, B11 2EL	6 October 1979	Mr Said Murad	Contratree Limited
807B Warwick Road, Tyseley, Birmingham, B11 2EL	30 May 1985	Mr and Mrs L Walker	Contratree Limited
807C Warwick Road, Tyseley, Birmingham, B11 2EL	12 June 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
807D Warwick Road, Tyseley, Birmingham, B11 2EL	19 October 1987	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813A Warwick Road, Tyseley, Birmingham, B11 2EL	22 August 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813B Warwick Road, Tyseley, Birmingham, B11 2EL	28 November 1986	Ramesh Parmar, Rikesh Parmar and Jeana Parmar	Contratree Limited
813C Warwick Road, Tyseley, Birmingham, B11 2EL	3 February 1989	Mr Brendan E. Breslin and Mrs Maria B. Breslin	Contratree Limited



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference	:	BIR/00CN/LVT/2020/0001
Properties	:	7 Flats at 801-815 Warwick Road, Tyseley, Birmingham, as listed in Appendix 1.
Applicant	:	Contratree Limited
Representative	:	Bude Nathan Iwanier Solicitors
Respondents	:	The leaseholders as listed in Appendix 1.
Type of application	:	An application under section 35(1) of the Landlord and Tenant Act 1987
Tribunal Members:	:	Judge D Barlow Mrs S Hopkins
Date of Hearing	:	15 March 2021

DECISION

Covid-19 pandemic: description of hearing

This determination included a remote video hearing which has been consented to by the parties. The form of remote hearing was audio (**V:CVPREMOTE**). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing. The Applicant filed two composite bundles for the hearing referred to as the “Bundle” and the “Supplemental Bundle”. Reference in square brackets within the decision are to the page number in which the document appears in the respective bundle.

DECISION

- (1) We make no order to vary the Leases set out in Appendix 1.

REASONS

Background

1. The Applicant is the freehold proprietor of 801-815 Warwick Road, Tyseley, Birmingham, B11 2EL (“the Block”) registered under title number WM340520. The Block comprises a three-storey block with five commercial retail units on the ground floor (“the Shops”) and 10 residential flats on the first and second floor (“the Flats”).
2. The Respondents are the registered proprietors of leasehold interests in seven of the Flats as follows:
 - a. The First Respondent (Mr Murad) holds the term remaining on the lease of Flat 801C, dated 6 October 1979, between Horace Davis and Elaine Hyde, registered with title number WM173786. The lease predates the remaining Respondents’ leases by some years and is an old-style lease with defective provisions [pages 1-11 of the Supplemental Bundle];
 - b. The Second Respondents (Mr and Mrs Walker) hold the term remaining on the lease of Flat 807B, dated 30 May 1985, between the Applicant and Janice Foster, registered with title number WM352322 [pages 12-25 of the Supplemental Bundle];
 - c. The Third Respondents (Mr and Mrs Jinks) hold the terms remaining on three leases as follows:
 - i. Flat 807C, dated 16 June 1986, between the Applicant and Robert Runciman, registered with title number WM386099;
 - ii. Flat 807D, dated 19 October 1987, between the Applicant and Elizabeth Bird, registered with title number WM420707; and
 - iii. Flat 813A, dated 22 August 1986, between the Applicant and Terence Brown, registered with title number WM388652 [pages 26-76 of the Supplemental Bundle];
 - d. The Fourth Respondents (Mr Ramesh Parmar, Rikesh Parmar and Jeana Parmar) hold the term remaining on the lease of Flat 813B, dated 28 November 1986, between the Applicant and Sylvia Keyte, registered with title number WM632520 [pages 95-111 of the Supplemental Bundle]; and
 - e. The Fifth Respondents (Mr and Mrs Breslin) hold the term remaining on the lease of Flat 813C, dated 3 February 1989, between the Applicant and (1) Adrian Daniel and (2) Susan

Cashmore, registered with title number WM461290 [pages 77-94 of the Supplemental Bundle].

(The Second, Third, Fourth and Fifth Respondents' leases, were granted between 1985 -1989, are substantially the same and are collectively referred to as "the Leases")

3. There are two long lease residential flats which are not the subject of this application. Flat 813d and Flat 807a, which were granted in 1999 and 2000 respectively. They are on a more modern form of lease with extensive service charge provisions [pages 130-147 and 186-203 of the Supplemental Bundle].
4. There is a tenth residential flat which is owned by the Applicant and apparently also held on a modern form of lease (no copy was provided by the Applicant).
5. The five Shops are held on three commercial leases, which all contain an obligation by the tenant to pay a fair proportion of the costs incurred by the landlord in keeping the structural parts of the Block and various common parts in repair, decorated and lit [pages 148-185 and 204- 275 of the Supplemental Bundle].
6. There is a history of issues and disputes between the Respondents and the landlord's various managing agents, concerning maintenance of the Block, some of which have been the subject of previous applications to the county court and to this Tribunal. The Block is currently managed by Mr Simon Stern of Fountayne Managing Limited ("Fountayne"), whose family also manage the business of Contratree Limited. The Block was previously managed by Effective Management, another Stern family business and prior to that Cottons, a Birmingham based company. Since 2013 the Block has been managed by the Stern family, who also manage the business of Contratree Limited.
7. The issues between the parties stem from what appears to be poor management of the building over a period of years. The Respondents' say this is a consequence of neglect by a landlord that has effectively, been absent for a substantial period. Mr Stern says it is because the service charge provisions in the lease are such that efficient and effective collection of the service charge is impossible and prevents the landlord from complying with its repair and maintenance covenants.
8. The current position is that urgent repairs are required to meet fire safety standards, not least due to an external fire escape having been condemned as unusable, following Fire Risk Assessment carried out in 2019.

Relevant statutory provisions

9. The Tribunal's jurisdiction to vary residential long leases derives from section 35 in part IV of the **Landlord and Tenant Act 1987** ("the Act"). The relevant provisions of the Act provide as follows:

s35 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—*

...

(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.

...

(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.

S38 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.

...

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under s35 or s36 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.

...

Grounds of the application

10. In this case the Applicant seeks to rely upon sections 35(2)(e) and (f), namely that the lease fails to make satisfactory provision for the recovery by the landlord of expenditure incurred or to be incurred by it for the benefit of the leaseholders and fails to make satisfactory provision for the computation of the service charge payable under the lease.
11. Within the application, (which stood as the Applicant's Statement of Case), the Applicant specified a single ground, which is - "*the leases granted at different times were not in uniform draft and the collection of service charges fairly between the parties is impossible*". The Applicant expanded on this slightly in the witness statement of Simon Stern dated 22nd of July 2020, which was filed with the Bundle on 16 September 2020 [pages 268 to 270 of the Bundle]. In his witness statement, Mr Stern submits that the Applicant is entitled to the variations sought on two grounds. First because the existing leases do not all have the same service charge provisions; and secondly, because there is no provision for the landlord to levy an interim service charge to obtain money on account of anticipated charges. Mr Stern also submits that the proposed variations are not prejudicial in that they do not affect the existing statutory rights of the tenants to challenge specific service charge items.
12. At 3.30 pm on Friday 10 March 2021 (i.e. less than a business day before the hearing), a skeleton argument was filed by Ms Mathers on behalf of the Applicant. This, for the first time, clarified the specific S35(2) factors on which the application relies; and made new submissions on

the terms of the Leases which the Applicant contends are unsatisfactory with regard to those factors. They can be summarised as follows:

- a. The lessees' contribution is determined by reference to, now obsolete, rateable values and is therefore an unsatisfactory provision ("the proportions issue").
- b. There is no provision for collection of an interim charge to cover anticipated expenditure, which means that the landlord may have to wait up to 15 months for payment of expenses incurred just after the annual certificate date (24 June) ("the interim charge issue").
- c. There is no provision for charging interest on late payment of service charges, a matter that is specifically referred to in s35(3)(A) of the Act. When combined with the lack of any right to levy an interim charge, the lack of an interest charging term is unsatisfactory ("the default interest issue")
- d. The combined effect of the unsatisfactory terms is to render the Leases administratively cumbersome and inefficient to manage. Furthermore, as the Leases are not in a modern form it is appropriate for the Tribunal to go beyond varying the leases to address the above factors and update the service charge terms generally, to achieve a unified form of lease that is consistent with the later leases of 813d and 807a, granted in 1999 and 2000, ("the updating issue").
- e. The variations do not prejudice the Respondents ("the no prejudice issue").
- f. The proposed variations would make satisfactory provision for the computation and recovery of service charges due under the Leases.

The Leases

13. Mr Murad's lease of Flat 801c was granted in 1979. It is an old-style lease (which I will refer to as the type 'A' lease) that includes terms that would now be regarded as defective.

14. The remaining Leases (which I will refer to as the type 'B' lease) are in common form and all contain the following service charge provisions:

Clause 2(2) contains a lessee covenant to pay a "reasonable proportion based on rateable value of the costs expenses outgoings and matters mentioned in the Sixth Schedule hereto (the amount of such contribution to be ascertained and certified in writing by the surveyor for the time being of the lessor by 24 June in each year and the amount so certified shall be final and binding on the parties hereto) once a year on 29 September in each year commencing on 29 September."

Clause 3(1) contains a covenant by the lessor, subject to payment by the lessee of the contributions specified in clause 2(2) "well and substantially to maintain repair redecorate and renew:

- (a) *the structure and in particular the walls roof chimney stacks gutters and main water pipes of the said building*
- (b) *the gas and water pipes drains and electric cables and wire in under and upon the said building enjoyed or used by the Lessee in common with the owners and tenants of the other flats in the said building*
- (c) *the parts of the said building so enjoyed or used by the lessee or the tenants of the other flats in common as aforesaid and the boundary walls and fences of the said building*

Clause 3(2) is a covenant by the Lessor to insure the building and any fixtures or fittings that in the lessor's opinion it is prudent to insure "against loss or damage by fire storm Tempest and (if possible) aircraft explosion and damage by burst pipes in such sum as shall be considered by the lessors surveyors to be the full value thereof for two years loss of rent and cause all monies received in respect of any such insurance to be paid out in building repairing or otherwise reinstating the said building or the part thereof so destroyed and/or damaged."

The Sixth Schedule sets out the costs expenses outgoings and matters in respect of which the lessee is to make a contribution, as follows:

- (1) *the expense of maintaining repairing redecorating and renewing:*
 - (a) *the main structure and in particular the roof chimney stacks gutters foundations and main water pipes of the said building*
 - (b) *the gas and water pipes drains and electric cables and wires used by the lessee in common with the owners or tenants of the other flats*
 - (c) *all common parts of the said building*
 - (d) *the boundary walls and fences of the said building*
 - (e) *all sums payable by the lessor in performing the obligations under clause 3 (1) and (2) hereinbefore mentioned that are not specifically mentioned in this schedule the costs of cleaning and lighting any common parts of the said building*
- (2) *the costs of insurance and keeping insured throughout the term hereby created the said building and any part thereof any fixtures or fittings therein that in the Lessor's opinion it is prudent to insure against loss or damage by fire storm tempest and (if possible) aircraft explosion and damage by burst pipes and such other risks including two years loss of rent normally covered under a comprehensive insurance as the lessors shall determine.*
- (3) *All rates taxes and other outgoings (if any) payable in respect of the parts of the said building used by the lessee in common as aforesaid.*
- (4) *The fees of the lessors managing agents for the collection of the rents of the flats in the said building and for the general management thereof.*

15. Mr Murad's type 'A' lease, contains very limited terms that would now be regarded as defective. Clause 2(8) contains a tenant covenant to contribute a "rateable proportion according to user" of the costs of maintenance and repair of the structural parts of the building and the common parts and services. Exceptionally the lease does not contain any corresponding express positive obligation on the part of the landlord to maintain the common parts or the structure. Furthermore, there is no covenant for the landlord to insure the building and use any proceeds to re-instate, or for the tenant to contribute to the costs of any buildings insurance the landlord does maintain.

The proposed variations

16. The proposed variations are extensive. In essence they are a wholesale replacement of the existing clauses 2(2), 3(1) and (2) and the Sixth Schedule of the type 'B' lease, with provisions that are substantially the same as those contained in the more recent leases of 813d and 807a granted in 1999 and 2000 (which I will refer to as the "the type 'C' lease").
17. The main differences between the service charge provisions in the type 'B' lease and the type 'C' leases, which form the basis of the proposed variations, are as follows:
 - a. The accounting period is changed from commencing on 29 September to 1 January in each year [page 27 of the Bundle]
 - b. There is a new tenant covenant to pay an interim charge in addition to the service charge on the terms set out in a Schedule to the proposed variations, both charges to be recoverable as rent in arrear [page27 of the Bundle].
 - c. The landlord covenant to maintain and keep the service charge items in substantial repair and condition is expanded to include the following additional matters:
 - i. The costs of employing caretakers, porters and gardeners and for the cost of repair maintenance, insurance, rates and notional rent for a caretaker's flat.
 - ii. The landlords decorating obligations are more particularised in terms of the treatment to be applied to surfaces.
 - iii. Additional insurance provisions in the event of reinstatement of the building proving impossible.
 - iv. New provisions for the costs of maintaining a communal television aerial, a coin operated telephone box, fire extinguishers, a lift and ancillary equipment.
 - v. A new provision for maintenance of an electric door entry system serving the main entrance, once installed.
 - vi. Provision for a reserve fund to be set aside to meet future expenditure the landlord reasonably expects to incur meeting its covenants.

- vii. New provisions for the costs of maintenance of gardens and communal dustbins.
 - viii. New provisions for recovering interest on borrowing to meet the costs of complying with the landlord's covenants.
 - ix. A new provision for recovering fees charged by a solicitor or other professional involved in recovering arrears of rent and/or service charge from any tenant [pages 28-31 of the Bundle].
- d. The Schedule to the proposed variation is drafted to reflect the Fifth Schedule of the type 'C' lease. There is a definition of 'Total Expenditure' at paragraph 1, which includes all expenditure incurred by the landlord in the relevant accounting period in carrying out its service charge duties including a notional rent for a caretaker's flat [pages 33-34 of the Bundle]
 - e. The 'Service Charge' is defined as "*such a reasonable proportion based on the rateable value of the Total Expenditure as is specified in sub-clause 1 of this clause or (in respect of the accounting period during which this Lease is executed) such proportion of such percentage as is attributable to the period from the date of this Lease to the 31st day of December next following*".
 - f. To the extent the Service Charge exceeds Interim Charge paid by the tenant, the excess is payable to the landlord within 21 days of service on the tenant of a Certificate (referred to in paragraph 6 of the Schedule) and in case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - g. The 'Interim Charge' is defined as such sum to be paid on account of the Service Charge in respect of each accounting period as the lessors of the managing agents shall specify at their discretion to be a fair and reasonable interim payment. The Interim Charge is to be paid by equal payments in advance on 1 January and first of July in each year and in the case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - h. Paragraph 6 provides that the landlord or its agents must Certify as soon as practicable after the expiry of each accounting period the Total Expenditure for that period, the amount of any Interim Charge paid by the tenant in respect of that period (together with any surplus carried forward), the amount of the Service Charge in respect of the accounting period and any excess or deficiency of the Service Charge over the Interim Charge [page 34 of the Bundle].
 - i. The Certificate is said to be conclusive and binding on the parties. The tenant can inspect the receipts and vouchers relating to the Total Expenditure on prior payment of any costs to be incurred by the landlord or the landlord's agents and the landlord will consider written objections signed by not less than 60% flat owners, to any items of expenditure. There is also what purports to be a binding arbitration clause [page 34 of the Bundle].

The parties submissions

The Applicant's case

18. The Applicant was represented at the hearing by Ms Wendy Mathers of counsel. Mr Stern of Fountayne, the landlord's managing agent, attended on behalf of the Applicant to give evidence.
19. Ms Mather's submissions largely confirmed the arguments put forward in her skeleton argument. She accepted that it was for the Applicant to establish that it had made out a ground under s35(2) for every variation proposed and that it was for the Applicant to demonstrate that the variation should be the one proposed by the Applicant (or some other variation under s38(4)).
20. One issue raised by the Tribunal concerned Ms Mathers argument concerning the lack of provision for interest on arrears of service charge and the proposal, in her skeleton argument, that the omission should be rectified by a charging clause with a proposed interest rate of 4% above the base rate of National Westminster Bank plc. The difficulty being that the proposed variation in the application contained no such term. The only variation proposed by the Applicant was that any default in payment of the service charge would be recoverable by the landlord as rent in arrear.
21. Ms Mathers submitted that as the variations were intended to bring the Leases in line with the format of the type 'C' leases the Tribunal could exercise discretion to include an additional variation along the lines of paragraph 4(7) of the modern leases, which made a similar provision for interest to be charged on arrears of rent and service charge [page 116 of the Bundle].
22. Ms Mathers accepted that the proposed variation went far beyond that necessary to address the lease terms that the Applicant says are unsatisfactory in relation to the s35(2) matters, but submitted that if the Tribunal determined that variations should be made to address those specific matters, then it could exercise discretion to go further and replicate the service charge provisions of the type 'C' lease to enable the Applicant to collect the service charge on an equal and well particularised basis.
23. The specific variations requested in paragraph 16(a)-(i) above were then considered in more detail. With some input from Mr Stern it was acknowledged by Ms Mathers that a substantial number of service charge items did not exist within the Block and could be deleted from the draft. These include references to the parking areas, garages, gardens, passenger lifts, communal dustbins and refuse disposal areas, a caretaker, a caretaker's flat, porters, staff gardeners, communal television aerials, coin operated telephone boxes, an electric door entry system and fire extinguishers. The clauses were apparently copied over

from the type 'C' lease, where they appear to have been included by the drafter without proper consideration of their relevance to the Block. The Block stands within a footprint that has a very small surrounding strip of land that the residential leaseholders do not use.

24. The definitions were largely the same as in the type 'B' lease. The change in the accounting period was intended to accommodate operation of the interim charge. Once the irrelevant items were deleted, there was no material change to the landlord's covenant in the type 'B' lease, to keep the remaining specified items in good and substantial repair. The main variations to the landlord's covenant are to include a right to maintain a reserve fund, a right to charge interest on sums borrowed to finance compliance with the landlord's covenant and a right to charge solicitor's fees and professional fees incurred in recovering arrears of service charge.
25. The main variations to the service charge mechanism are contained in the Schedule to the draft variation. The most significant of which would allow the landlord to levy an interim charge. Mr Stern gave evidence at the hearing on this point. He said that although the landlord could raise small sums of £10-15,000.00 by way of loans from family businesses, it could not borrow the substantial amounts needed to fully comply with the outstanding repairs in that way. Ms Mathers suggested that the limited income of the landlord company, meant that it should be viewed as akin to an RTM company that needed to raise funds to carry out the essential services. In evidence Mr Stern said the landlord's annual income was about £20-25,000.00 from the ground rents and Shops rents and a further £4-4,500.00 rental from another property in Sussex owned by the landlord.
26. Mr Stern said that after the previous Tribunal hearing in 2015, there remained arrears of service charges that could not be collected easily because it was clear that every demand would be challenged by the Respondents. The Applicant therefore decided that it would pay the Block insurance every year but would not do anything else unless absolutely necessary, such as fire safety works. As a consequence, no service charge demands or accounts have been sent to the residential tenants since 2016, and the Block has been largely un-maintained. In 2016 the arrears totalled some £45,000.00 but no action was taken by Mr Stern to recover the arrears because, in his words, each and every demand would be challenged.
27. Mr Stern explained that the main point of the variation was to bring forward any dispute about the service charge to the date on which the budget was set by the interim charge which importantly, was before the landlord had incurred the actual costs. Any dispute could be quickly referred to the Tribunal for a determination, before the landlord had to lay out substantial costs of maintenance and repair. At present the landlord was having to incur the service charge costs before it could invoice the tenants who then routinely then challenged the demands. Furthermore, the absence of a contractual provision for interest on

arrears, presented no incentive for the tenants' not to routinely challenge demands.

The Respondents' case

28. Mr Murad the First Respondent, attended the hearing and was permitted to make submissions in relation to the proposed variation of his lease, despite his not having participated in the proceedings prior to the hearing.
29. Mrs Jinks attended the hearing to represent the Third Respondent, having made brief submissions in writing on 25 June 2020.
30. Mr Ramesh Palmer and his son attended the hearing to represent the Fourth Respondent, Mr Palmer having made extensive written submissions in his Statement of Case dated 25th of June 2020.
31. Mr Breslin joined the hearing by telephone to represent the Fifth Respondent. Mr and Mrs Breslin had made brief submissions on 25 June 2020, which were substantially similar to those of Mr and Mrs Jinks.
32. It was evident from the written submissions of the Respondents, and confirmed at the hearing, that there has been a history of very poor relations between the landlord and the residential tenants of the Block. Mr Palmer said that it was important to note that the landlord Contratree Limited, the managing agent Fountayne, the previous managing agent, Effective Management are all companies owned and run by the Stern family and that over the years most of the correspondence has been between the leaseholders, Simon Stern and his mother Cipora Stern. Contratree, a Stern family company owned the block when the leases they are now seeking to vary were granted, and Contratree continued to own the block when the more recent leases were granted in 1999 and 2000. The Applicant had therefore chosen to create the inconsistent forms of lease that it now complains has made managing the service charge impossible.
33. Much of Mr Palmer's written evidence related to ongoing issues with the maintenance of the building and in particular the external fire escape which Mr Palmer states was deemed dangerous and non-usable by West Midlands Fire Service following an inspection in 2017. It was explained to Mr Palmer that while the Tribunal appreciated that these issues were of immense concern to the leaseholders, they were not matters that the Tribunal could make any findings or determination on, within the context of this application.
34. Mr Palmer specific objections to the application can be summarised as follows:
 - a. The new submissions made by the Applicant's counsel within the skeleton argument were filed less than a working day prior to the

hearing and then expanded on during the morning of the hearing. The submissions concerning a new term for interest on arrears of service charge at 4% over base rate, should be disregarded as the Respondents' have had no time to consider or respond effectively, which has seriously disadvantaged them. The Applicant did not include reference to a term for interest on arrears within its statement of case, the draft variations or Mr Stern's witness statement and the Tribunal should therefore reject counsel's submissions on this.

- b. The Tribunal should also reject any argument that the landlord cannot afford to meet the costs of the services – that has not formed any part of the Applicant's case until today and runs contrary to previous representations made to the Respondents.
- c. If Mr Stern thought he was owed £45,000.00 he could seek forfeiture. The reason he has not done so, is because he hasn't sent out any statements, bills or reminders in four years, and that is an indication of how poorly the property is managed. Mr Parmar said that he owned a lot of rental properties, the charges were about £500.00 per year, £1,400.00 if the Council managed them. All straightforward, all justified service charge demands which he paid. He was happy to pay any demands from Mr Stern that were properly justified and the reason Mr Stern has not issued demands, is that he knows he can't justify them. When the tenants' had previously challenged demands, Mr Stern had been unable to produce any invoices from the companies that he claimed had done the work.
- d. The introduction of an interim charge would seriously disadvantage the tenants', who had not negotiated for a lease on these terms but could then be invoiced for any amount, and if not paid within 21 days solicitors letters and costs would follow. Mr Stern must be paying his solicitor fortunes for this and the Respondents would have to pay it.
- e. The variations do not address Mr Stern's complaint about the inconsistency of calculating the proportions on rateable values. The draft variation uses the same term. In any event this issue was considered by a Tribunal in 2015 who had no trouble determining that the existing mechanism was sufficient for the landlord to recover service charges.
- f. There is no evidence that the lease lacks clarity or fails to provide satisfactorily for the landlord to carry out the services and charge for them. Mr Parmar stated that the current lease makes ample provision for this and that issues of uniformity or the passage of time, or being out of step with modern drafting, are not of themselves, enough to deem the lease unsatisfactory.
- g. The Applicant is seeking to change the fundamental agreement originally negotiated with the tenants and make a radical departure, when the terms of the current lease are satisfactory. This would have an effect on the value on the tenants' investment, for which they should be compensated.

35. Mrs Jinks gave evidence and said that she was happy with the lease in its current form. Mrs Jinks said that the Block had never been well managed. When Cottons were managing they had ignored a problem with the roof which she ended up paying £11,000.00 to fix. It had then taken years to get the money back from the Stern family. The upshot with the service charge was that there had never been any clarity about demands. She paid to have a drain unblocked this week, because from experience she knows that cost of the repairs when eventually done will end up tripling. Mrs Jinks said that she didn't trust the Sterns' and varying the lease won't change that. Although she had said in her statement that she did not object to changing the date of the service charge year, she now didn't agree to that either.
36. Mrs Jinks was asked why she hadn't made any payments since 2014. She said this was because she hadn't received a bill and was not aware of any outstanding bills. In the last 6 years Mr Jinks has only been invoiced for ground rent and she thinks, one other bill.
37. Mr Breslin said that he agreed with Mr Parmar and Mrs Jinks evidence. He said that you couldn't trust the Sterns to do the work properly and at the right price. Mr Breslin also said that he hadn't received any service charge bills in the last 5-6 years. He didn't have any particular objection to the change in the date of the service charge year if it made it easier for Mr Stern.
38. In response to the Respondents' evidence, Mr Stern said that Contratree had never been an absent landlord, it had always maintained a registered office address. Mrs Jinks had a contact number for over 15 years which was borne out by her admitting that she had been repaid for the roof repairs. Mr Stern said that the Respondents' had all made allegations about the Sterns but not one had raised a single argument to support any negative impact on them of the proposed variations. Mr Breslin interrupted to point out that he had been asked to take out a defective title indemnity policy precisely because he had an absent landlord.
39. Mr Murad objected to any variation to his lease despite the Tribunal explaining to him that his lease was seriously defective and a variation to include a reciprocal landlord covenant to keep the Block in good repair and to maintain comprehensive buildings insurance, was an advantage to him. He was unrepresented and did not appear to fully understand the issues that owning a flat with defective lease provisions might cause generally and in particular, on any future sale of the flat.

Tribunals deliberations

The type 'B' lease

40. The variations that the Applicant seeks are to resolve problems that are said to exist in:

- (i) calculating the tenants' proportion of the charge, *the proportions issue*;
 - (ii) the financial consequences of there being no interim charging provisions, *the interim charge issue*;
 - (iii) the lack of a default interest clause, *the default interest issue*;
 - (iv) the lack of uniformity with the type 'C' lease, *the updating issue*.
41. The draft provided by the Applicant runs to some 8 pages and is a comprehensive replacement of the existing service charge clauses with those found in the type 'C' leases.
42. Before it can make an order under section 38 of the 1987 Act the Tribunal must be satisfied that the lease fails to make satisfactory provision with respect to one or more of the matters specified in section 35(2). In this case the Applicant relies on sub-paragraphs (e) and (f). Whether the lease fails to make satisfactory provision is for the Tribunal to determine in all the circumstances of the case

The proportions issue

43. Reference to rateable values may be obsolete, as indeed will likely be the fate of many other provisions over the term of a 125 year lease. However, the proposed variation does not address the obsolete reference. It introduces an even more confusing method of calculating the "Service Charge" as meaning "such reasonable proportion based on the rateable value of the Total Expenditure.." whatever that is supposed to mean.
44. Furthermore, the need to imply a term to give business efficacy to a lease, is not necessarily, or even probably, an indication that the lease fails to make satisfactory provision for the matter in question. This same issue was considered by a residential property tribunal and referred to in its decision dated 9 December 2015 BIR/00CN/LIS/2015/0002. Mr Stern confirmed in those proceedings that as the flats were all two bedroomed and similar in size, he had apportioned the charges equally between all flats. The tribunal determined that although rateable values had been replaced by Council Tax bands (on which no evidence had been submitted), the decision of the managing agents to apportion the charges equally was reasonable, "indeed it is difficult to imagine an alternative practical approach" (paragraph 47). The Tribunal does not take issue with that approach and does not therefore find that the lease fails to make satisfactory provision for the calculation of the tenant's proportion.

The interim Charge issue

45. This issue assumes that the parties to the lease intended that the landlord should not have to incur service charge expenditure before recovering its expenses from the tenants. I can find nothing in the type 'A' lease or the type 'B' lease to support this and the Respondents' evidence directly contradicts any such assumption. If a service charge

liability is incurred by the landlord there are workable provisions in the type 'A' and type 'B' lease for it to recover these expenses from the tenant. The fact that it is now standard or usual to include terms for an interim charge does not mean the absence of such a term renders the lease unsatisfactory. The absence does not create a shortfall in the service charge it just means that the landlord will have to fund the costs of the services before recovering them from the tenants. That was the commercial deal struck by the parties to the leases.

46. Mr Stern gave some evidence of the landlord's financial position when asked about it at the hearing, but no evidence of financial hardship leading to major issues with structural repairs, was put forward in the Applicant's statement of case or witness statements. Furthermore, as on Mr Stern's evidence the landlord has not spent any money on the Blocks for some 4-5 years (save for insurance), it should have a substantial sum in hand to at least make a start on the outstanding repairs. Mr Stern's primary concern appears to be obtaining a right to refer any dispute concerning the service charge costs to the Tribunal before the landlord had to incur the costs. The Tribunal does not therefore find that the absence of interim charging terms renders the lease unsatisfactory in relation to the s35(2) factors.

The default interest issue.

47. Paragraph 3A of s35 makes specific reference to provision for default interest being a sub-paragraph (e) factor. The Tribunal agrees with Ms Mathers that the absence of a default interest term in a lease, which also has no provision for interim charging, is a factor that the Tribunal could take into account when determining whether the lease made satisfactory provision. However, the Tribunal was concerned about the Applicant's failure to seek this variation until, what was effectively, the day before the hearing. There is no default interest term within the 8 pages submitted as the Applicant's proposed variations. Ms Mathers has suggested that as the Applicant's application is in effect that the Leases should be updated in line with the type 'C' lease, it could be implied that the Applicant intended its application to include not just the 8 pages of proposed variations attached to the application, but also a term similar to that found at clause 4(7) of the type 'C' lease.
48. The Tribunal determined that although it might have exercised discretion to order a proportionate variation to address the lack of a default interest term, it would be procedurally unfair to the Respondents to order such a variation, given that the issue was first raised by the Applicant the day before the hearing.

The updating issue.

49. Ms Mathers accepted that s35 does not allow for general updating of the lease terms just because they are no longer in modern or conventional form. The issue is, are the terms satisfactory and workable? The Tribunal finds in relation to the type 'B' lease that clause 2(2) imposes

an obligation on the tenant to pay for the costs of the services set out in the sixth schedule by reference to a service charge year commencing on 29 September, in terms that are satisfactory. Clause 3(1) imposes a corresponding covenant on the landlord and clause 3(3) imposes a landlord covenant to insure the building, in terms that are satisfactory. The sixth schedule contains details of the costs and expenses to which the tenants' must contribute (including insurance costs and managing agent's costs for management of the building), in terms which are satisfactory and taken with clause 2(3) and 3(1) and (2), workable.

50. The Tribunal finds that although there may be a few specific matters that could have been considered under a s35 application (such as the default interest issue, had it been pleaded at the correct time), there is no evidence on which the Tribunal can conclude that the type 'B' lease fails to make satisfactory provision for the s35(e) and (f) factors in terms that would justify the wholesale re-writing of the service charge provisions which the Applicant seeks.

The type 'C' lease

51. The Tribunal finds that Mr Murad's lease of 801 C Warwick Road fails to make satisfactory provision for one or more of the s35 factors, in that it fails to impose a reciprocal covenant on the landlord to keep the building and common parts in repair, or include a landlord covenant to insure the building with a reciprocal tenant covenant to pay a fair proportion of the costs of such insurance. However, these factors could have been addressed by a short deed of variation and do not justify wholesale variation of the lease to bring it in line with the later type 'C' leases that the landlord chose to grant.
52. If the Applicant had submitted a deed of variation that specifically addressed the unsatisfactory terms of Mr Murad's lease, perhaps seeking terms similar to the type 'B' lease, it is likely that the Tribunal would have exercised discretion to order a variation, but it is not the role of the Tribunal to draft the terms of any proposed variation from scratch, and no variation of the lease of 801C Warwick Road is therefore ordered.

The no-prejudice issue

53. The Tribunal disagrees with the Applicant's submissions concerning lack of prejudice. The wholesale updating of the service charge provisions would have introduced new contractual obligations to contribute to a reserve fund, to pay an interim charge based on the landlord's assessment of anticipated costs, to pay default interest on late payments and to pay the landlord's professional fees on any dispute concerning the service charge. Given the history of the parties dealings, including the landlords decision not to render service charge demands

and accounts, or comply with its repairing covenant for over 5 years, it is facile to suggest that the extensive variations sought by the landlord would not operate prejudicially to the tenants. However, as the Tribunal has determined that it does not intend exercising discretion to vary the Leases it does not need to consider the issue of compensation and prejudice.

Application under s20C of the 1985 Act

54. The Fourth Respondent has applied for an order under s20C of the Landlord and Tenant Act 1985 for an order that all the costs incurred in these proceedings are not to be regarded as relevant costs to be taken into account when determining the amount of any service charge that is payable by the tenant.
55. This litigation has arisen due to the Applicant's perception that the leases need updating to make better and more uniform provision for the landlord to recover service charge costs and expenses. The application has failed for the reasons set out above. The landlord does not appear to have a contractual right to recover litigation costs and an order under this section is probably therefore unnecessary. However, for the avoidance of doubt and to forestall any conceivable argument on this point, the Tribunal considers it just and equitable to make an order in favour of the Respondents' so that all of the costs incurred by the Applicant landlord in connection with these 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 Respondents

Judge D Barlow

29 March 2021

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).

**APPENDIX
SCHEDULE OF RESPONDENTS AND LEASES**

Property Address	Lease Date	Owner name/Respondent	Freehold/Landlord
801C Warwick Road, Tyseley, Birmingham, B11 2EL	6 October 1979	Mr Said Murad	Contratree Limited
807B Warwick Road, Tyseley, Birmingham, B11 2EL	30 May 1985	Mr and Mrs L Walker	Contratree Limited
807C Warwick Road, Tyseley, Birmingham, B11 2EL	12 June 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
807D Warwick Road, Tyseley, Birmingham, B11 2EL	19 October 1987	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813A Warwick Road, Tyseley, Birmingham, B11 2EL	22 August 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813B Warwick Road, Tyseley, Birmingham, B11 2EL	28 November 1986	Ramesh Parmar, Rikesh Parmar and Jeana Parmar	Contratree Limited
813C Warwick Road, Tyseley, Birmingham, B11 2EL	3 February 1989	Mr Brendan E. Breslin and Mrs Maria B. Breslin	Contratree Limited



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference	:	BIR/00CN/LVT/2020/0001
Properties	:	7 Flats at 801-815 Warwick Road, Tyseley, Birmingham, as listed in Appendix 1.
Applicant	:	Contratree Limited
Representative	:	Bude Nathan Iwanier Solicitors
Respondents	:	The leaseholders as listed in Appendix 1.
Type of application	:	An application under section 35(1) of the Landlord and Tenant Act 1987
Tribunal Members:	:	Judge D Barlow Mrs S Hopkins
Date of Hearing	:	15 March 2021

DECISION

Covid-19 pandemic: description of hearing

This determination included a remote video hearing which has been consented to by the parties. The form of remote hearing was audio (**V:CVPREMOTE**). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing. The Applicant filed two composite bundles for the hearing referred to as the “Bundle” and the “Supplemental Bundle”. Reference in square brackets within the decision are to the page number in which the document appears in the respective bundle.

DECISION

(1) We make no order to vary the Leases set out in Appendix 1.

REASONS

Background

1. The Applicant is the freehold proprietor of 801-815 Warwick Road, Tyseley, Birmingham, B11 2EL (“the Block”) registered under title number WM340520. The Block comprises a three-storey block with five commercial retail units on the ground floor (“the Shops”) and 10 residential flats on the first and second floor (“the Flats”).
2. The Respondents are the registered proprietors of leasehold interests in seven of the Flats as follows:
 - a. The First Respondent (Mr Murad) holds the term remaining on the lease of Flat 801C, dated 6 October 1979, between Horace Davis and Elaine Hyde, registered with title number WM173786. The lease predates the remaining Respondents’ leases by some years and is an old-style lease with defective provisions [pages 1-11 of the Supplemental Bundle];
 - b. The Second Respondents (Mr and Mrs Walker) hold the term remaining on the lease of Flat 807B, dated 30 May 1985, between the Applicant and Janice Foster, registered with title number WM352322 [pages 12-25 of the Supplemental Bundle];
 - c. The Third Respondents (Mr and Mrs Jinks) hold the terms remaining on three leases as follows:
 - i. Flat 807C, dated 16 June 1986, between the Applicant and Robert Runciman, registered with title number WM386099;
 - ii. Flat 807D, dated 19 October 1987, between the Applicant and Elizabeth Bird, registered with title number WM420707; and
 - iii. Flat 813A, dated 22 August 1986, between the Applicant and Terence Brown, registered with title number WM388652 [pages 26-76 of the Supplemental Bundle];
 - d. The Fourth Respondents (Mr Ramesh Parmar, Rikesh Parmar and Jeana Parmar) hold the term remaining on the lease of Flat 813B, dated 28 November 1986, between the Applicant and Sylvia Keyte, registered with title number WM632520 [pages 95-111 of the Supplemental Bundle]; and
 - e. The Fifth Respondents (Mr and Mrs Breslin) hold the term remaining on the lease of Flat 813C, dated 3 February 1989, between the Applicant and (1) Adrian Daniel and (2) Susan

Cashmore, registered with title number WM461290 [pages 77-94 of the Supplemental Bundle] .

(The Second, Third, Fourth and Fifth Respondents' leases, were granted between 1985 -1989, are substantially the same and are collectively referred to as "the Leases")

3. There are two long lease residential flats which are not the subject of this application. Flat 813d and Flat 807a, which were granted in 1999 and 2000 respectively. They are on a more modern form of lease with extensive service charge provisions [pages 130-147 and 186-203 of the Supplemental Bundle].
4. There is a tenth residential flat which is owned by the Applicant and apparently also held on a modern form of lease (no copy was provided by the Applicant).
5. The five Shops are held on three commercial leases, which all contain an obligation by the tenant to pay a fair proportion of the costs incurred by the landlord in keeping the structural parts of the Block and various common parts in repair, decorated and lit [pages 148-185 and 204- 275 of the Supplemental Bundle].
6. There is a history of issues and disputes between the Respondents and the landlord's various managing agents, concerning maintenance of the Block, some of which have been the subject of previous applications to the county court and to this Tribunal. The Block is currently managed by Mr Simon Stern of Fountayne Managing Limited ("Fountayne"), whose family also manage the business of Contratree Limited. The Block was previously managed by Effective Management, another Stern family business and prior to that Cottons, a Birmingham based company. Since 2013 the Block has been managed by the Stern family, who also manage the business of Contratree Limited.
7. The issues between the parties stem from what appears to be poor management of the building over a period of years. The Respondents' say this is a consequence of neglect by a landlord that has effectively, been absent for a substantial period. Mr Stern says it is because the service charge provisions in the lease are such that efficient and effective collection of the service charge is impossible and prevents the landlord from complying with its repair and maintenance covenants.
8. The current position is that urgent repairs are required to meet fire safety standards, not least due to an external fire escape having been condemned as unusable, following Fire Risk Assessment carried out in 2019.

Relevant statutory provisions

9. The Tribunal's jurisdiction to vary residential long leases derives from section 35 in part IV of the **Landlord and Tenant Act 1987** ("the Act"). The relevant provisions of the Act provide as follows:

s35 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—*

...

(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.

...

(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.

S38 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.

...

(4) *The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under s35 or s36 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.*

...

Grounds of the application

10. In this case the Applicant seeks to rely upon sections 35(2)(e) and (f), namely that the lease fails to make satisfactory provision for the recovery by the landlord of expenditure incurred or to be incurred by it for the benefit of the leaseholders and fails to make satisfactory provision for the computation of the service charge payable under the lease.
11. Within the application, (which stood as the Applicant's Statement of Case), the Applicant specified a single ground, which is - "*the leases granted at different times were not in uniform draft and the collection of service charges fairly between the parties is impossible*". The Applicant expanded on this slightly in the witness statement of Simon Stern dated 22nd of July 2020, which was filed with the Bundle on 16 September 2020 [pages 268 to 270 of the Bundle]. In his witness statement, Mr Stern submits that the Applicant is entitled to the variations sought on two grounds. First because the existing leases do not all have the same service charge provisions; and secondly, because there is no provision for the landlord to levy an interim service charge to obtain money on account of anticipated charges. Mr Stern also submits that the proposed variations are not prejudicial in that they do not affect the existing statutory rights of the tenants to challenge specific service charge items.
12. At 3.30 pm on Friday 10 March 2021 (i.e. less than a business day before the hearing), a skeleton argument was filed by Ms Mathers on behalf of the Applicant. This, for the first time, clarified the specific S35(2) factors on which the application relies; and made new submissions on

the terms of the Leases which the Applicant contends are unsatisfactory with regard to those factors. They can be summarised as follows:

- a. The lessees' contribution is determined by reference to, now obsolete, rateable values and is therefore an unsatisfactory provision ("the proportions issue").
- b. There is no provision for collection of an interim charge to cover anticipated expenditure, which means that the landlord may have to wait up to 15 months for payment of expenses incurred just after the annual certificate date (24 June) ("the interim charge issue").
- c. There is no provision for charging interest on late payment of service charges, a matter that is specifically referred to in s35(3)(A) of the Act. When combined with the lack of any right to levy an interim charge, the lack of an interest charging term is unsatisfactory ("the default interest issue")
- d. The combined effect of the unsatisfactory terms is to render the Leases administratively cumbersome and inefficient to manage. Furthermore, as the Leases are not in a modern form it is appropriate for the Tribunal to go beyond varying the leases to address the above factors and update the service charge terms generally, to achieve a unified form of lease that is consistent with the later leases of 813d and 807a, granted in 1999 and 2000, ("the updating issue").
- e. The variations do not prejudice the Respondents ("the no prejudice issue").
- f. The proposed variations would make satisfactory provision for the computation and recovery of service charges due under the Leases.

The Leases

13. Mr Murad's lease of Flat 801c was granted in 1979. It is an old-style lease (which I will refer to as the type 'A' lease) that includes terms that would now be regarded as defective.

14. The remaining Leases (which I will refer to as the type 'B' lease) are in common form and all contain the following service charge provisions:

Clause 2(2) contains a lessee covenant to pay a "reasonable proportion based on rateable value of the costs expenses outgoings and matters mentioned in the Sixth Schedule hereto (the amount of such contribution to be ascertained and certified in writing by the surveyor for the time being of the lessor by 24 June in each year and the amount so certified shall be final and binding on the parties hereto) once a year on 29 September in each year commencing on 29 September."

Clause 3(1) contains a covenant by the lessor, subject to payment by the lessee of the contributions specified in clause 2(2) "well and substantially to maintain repair redecorate and renew:

- (a) *the structure and in particular the walls roof chimney stacks gutters and main water pipes of the said building*
- (b) *the gas and water pipes drains and electric cables and wire in under and upon the said building enjoyed or used by the Lessee in common with the owners and tenants of the other flats in the said building*
- (c) *the parts of the said building so enjoyed or used by the lessee or the tenants of the other flats in common as aforesaid and the boundary walls and fences of the said building*

Clause 3(2) is a covenant by the Lessor to insure the building and any fixtures or fittings that in the lessor's opinion it is prudent to insure "against loss or damage by fire storm Tempest and (if possible) aircraft explosion and damage by burst pipes in such sum as shall be considered by the lessors surveyors to be the full value thereof for two years loss of rent and cause all monies received in respect of any such insurance to be paid out in building repairing or otherwise reinstating the said building or the part thereof so destroyed and/or damaged."

The Sixth Schedule sets out the costs expenses outgoings and matters in respect of which the lessee is to make a contribution, as follows:

- (1) *the expense of maintaining repairing redecorating and renewing:*
 - (a) *the main structure and in particular the roof chimney stacks gutters foundations and main water pipes of the said building*
 - (b) *the gas and water pipes drains and electric cables and wires used by the lessee in common with the owners or tenants of the other flats*
 - (c) *all common parts of the said building*
 - (d) *the boundary walls and fences of the said building*
 - (e) *all sums payable by the lessor in performing the obligations under clause 3 (1) and (2) hereinbefore mentioned that are not specifically mentioned in this schedule the costs of cleaning and lighting any common parts of the said building*
- (2) *the costs of insurance and keeping insured throughout the term hereby created the said building and any part thereof any fixtures or fittings therein that in the Lessor's opinion it is prudent to insure against loss or damage by fire storm tempest and (if possible) aircraft explosion and damage by burst pipes and such other risks including two years loss of rent normally covered under a comprehensive insurance as the lessors shall determine.*
- (3) *All rates taxes and other outgoings (if any) payable in respect of the parts of the said building used by the lessee in common as aforesaid.*
- (4) *The fees of the lessors managing agents for the collection of the rents of the flats in the said building and for the general management thereof.*

15. Mr Murad's type 'A' lease, contains very limited terms that would now be regarded as defective. Clause 2(8) contains a tenant covenant to contribute a "rateable proportion according to user" of the costs of maintenance and repair of the structural parts of the building and the common parts and services. Exceptionally the lease does not contain any corresponding express positive obligation on the part of the landlord to maintain the common parts or the structure. Furthermore, there is no covenant for the landlord to insure the building and use any proceeds to re-instate, or for the tenant to contribute to the costs of any buildings insurance the landlord does maintain.

The proposed variations

16. The proposed variations are extensive. In essence they are a wholesale replacement of the existing clauses 2(2), 3(1) and (2) and the Sixth Schedule of the type 'B' lease, with provisions that are substantially the same as those contained in the more recent leases of 813d and 807a granted in 1999 and 2000 (which I will refer to as the "the type 'C' lease").
17. The main differences between the service charge provisions in the type 'B' lease and the type 'C' leases, which form the basis of the proposed variations, are as follows:
 - a. The accounting period is changed from commencing on 29 September to 1 January in each year [page 27 of the Bundle]
 - b. There is a new tenant covenant to pay an interim charge in addition to the service charge on the terms set out in a Schedule to the proposed variations, both charges to be recoverable as rent in arrear [page27 of the Bundle].
 - c. The landlord covenant to maintain and keep the service charge items in substantial repair and condition is expanded to include the following additional matters:
 - i. The costs of employing caretakers, porters and gardeners and for the cost of repair maintenance, insurance, rates and notional rent for a caretaker's flat.
 - ii. The landlords decorating obligations are more particularised in terms of the treatment to be applied to surfaces.
 - iii. Additional insurance provisions in the event of reinstatement of the building proving impossible.
 - iv. New provisions for the costs of maintaining a communal television aerial, a coin operated telephone box, fire extinguishers, a lift and ancillary equipment.
 - v. A new provision for maintenance of an electric door entry system serving the main entrance, once installed.
 - vi. Provision for a reserve fund to be set aside to meet future expenditure the landlord reasonably expects to incur meeting its covenants.

- vii. New provisions for the costs of maintenance of gardens and communal dustbins.
 - viii. New provisions for recovering interest on borrowing to meet the costs of complying with the landlord's covenants.
 - ix. A new provision for recovering fees charged by a solicitor or other professional involved in recovering arrears of rent and/or service charge from any tenant [pages 28-31 of the Bundle].
- d. The Schedule to the proposed variation is drafted to reflect the Fifth Schedule of the type 'C' lease. There is a definition of 'Total Expenditure' at paragraph 1, which includes all expenditure incurred by the landlord in the relevant accounting period in carrying out its service charge duties including a notional rent for a caretaker's flat [pages 33-34 of the Bundle]
 - e. The 'Service Charge' is defined as "*such a reasonable proportion based on the rateable value of the Total Expenditure as is specified in sub-clause 1 of this clause or (in respect of the accounting period during which this Lease is executed) such proportion of such percentage as is attributable to the period from the date of this Lease to the 31st day of December next following*".
 - f. To the extent the Service Charge exceeds Interim Charge paid by the tenant, the excess is payable to the landlord within 21 days of service on the tenant of a Certificate (referred to in paragraph 6 of the Schedule) and in case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - g. The 'Interim Charge' is defined as such sum to be paid on account of the Service Charge in respect of each accounting period as the lessors of the managing agents shall specify at their discretion to be a fair and reasonable interim payment. The Interim Charge is to be paid by equal payments in advance on 1 January and first of July in each year and in the case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - h. Paragraph 6 provides that the landlord or its agents must Certify as soon as practicable after the expiry of each accounting period the Total Expenditure for that period, the amount of any Interim Charge paid by the tenant in respect of that period (together with any surplus carried forward), the amount of the Service Charge in respect of the accounting period and any excess or deficiency of the Service Charge over the Interim Charge [page 34 of the Bundle].
 - i. The Certificate is said to be conclusive and binding on the parties. The tenant can inspect the receipts and vouchers relating to the Total Expenditure on prior payment of any costs to be incurred by the landlord or the landlord's agents and the landlord will consider written objections signed by not less than 60% flat owners, to any items of expenditure. There is also what purports to be a binding arbitration clause [page 34 of the Bundle].

The parties submissions

The Applicant's case

18. The Applicant was represented at the hearing by Ms Wendy Mathers of counsel. Mr Stern of Fountayne, the landlord's managing agent, attended on behalf of the Applicant to give evidence.
19. Ms Mather's submissions largely confirmed the arguments put forward in her skeleton argument. She accepted that it was for the Applicant to establish that it had made out a ground under s35(2) for every variation proposed and that it was for the Applicant to demonstrate that the variation should be the one proposed by the Applicant (or some other variation under s38(4)).
20. One issue raised by the Tribunal concerned Ms Mathers argument concerning the lack of provision for interest on arrears of service charge and the proposal, in her skeleton argument, that the omission should be rectified by a charging clause with a proposed interest rate of 4% above the base rate of National Westminster Bank plc. The difficulty being that the proposed variation in the application contained no such term. The only variation proposed by the Applicant was that any default in payment of the service charge would be recoverable by the landlord as rent in arrear.
21. Ms Mathers submitted that as the variations were intended to bring the Leases in line with the format of the type 'C' leases the Tribunal could exercise discretion to include an additional variation along the lines of paragraph 4(7) of the modern leases, which made a similar provision for interest to be charged on arrears of rent and service charge [page 116 of the Bundle].
22. Ms Mathers accepted that the proposed variation went far beyond that necessary to address the lease terms that the Applicant says are unsatisfactory in relation to the s35(2) matters, but submitted that if the Tribunal determined that variations should be made to address those specific matters, then it could exercise discretion to go further and replicate the service charge provisions of the type 'C' lease to enable the Applicant to collect the service charge on an equal and well particularised basis.
23. The specific variations requested in paragraph 16(a)-(i) above were then considered in more detail. With some input from Mr Stern it was acknowledged by Ms Mathers that a substantial number of service charge items did not exist within the Block and could be deleted from the draft. These include references to the parking areas, garages, gardens, passenger lifts, communal dustbins and refuse disposal areas, a caretaker, a caretaker's flat, porters, staff gardeners, communal television aerials, coin operated telephone boxes, an electric door entry system and fire extinguishers. The clauses were apparently copied over

from the type 'C' lease, where they appear to have been included by the drafter without proper consideration of their relevance to the Block. The Block stands within a footprint that has a very small surrounding strip of land that the residential leaseholders do not use.

24. The definitions were largely the same as in the type 'B' lease. The change in the accounting period was intended to accommodate operation of the interim charge. Once the irrelevant items were deleted, there was no material change to the landlord's covenant in the type 'B' lease, to keep the remaining specified items in good and substantial repair. The main variations to the landlord's covenant are to include a right to maintain a reserve fund, a right to charge interest on sums borrowed to finance compliance with the landlord's covenant and a right to charge solicitor's fees and professional fees incurred in recovering arrears of service charge.
25. The main variations to the service charge mechanism are contained in the Schedule to the draft variation. The most significant of which would allow the landlord to levy an interim charge. Mr Stern gave evidence at the hearing on this point. He said that although the landlord could raise small sums of £10-15,000.00 by way of loans from family businesses, it could not borrow the substantial amounts needed to fully comply with the outstanding repairs in that way. Ms Mathers suggested that the limited income of the landlord company, meant that it should be viewed as akin to an RTM company that needed to raise funds to carry out the essential services. In evidence Mr Stern said the landlord's annual income was about £20-25,000.00 from the ground rents and Shops rents and a further £4-4,500.00 rental from another property in Sussex owned by the landlord.
26. Mr Stern said that after the previous Tribunal hearing in 2015, there remained arrears of service charges that could not be collected easily because it was clear that every demand would be challenged by the Respondents. The Applicant therefore decided that it would pay the Block insurance every year but would not do anything else unless absolutely necessary, such as fire safety works. As a consequence, no service charge demands or accounts have been sent to the residential tenants since 2016, and the Block has been largely un-maintained. In 2016 the arrears totalled some £45,000.00 but no action was taken by Mr Stern to recover the arrears because, in his words, each and every demand would be challenged.
27. Mr Stern explained that the main point of the variation was to bring forward any dispute about the service charge to the date on which the budget was set by the interim charge which importantly, was before the landlord had incurred the actual costs. Any dispute could be quickly referred to the Tribunal for a determination, before the landlord had to lay out substantial costs of maintenance and repair. At present the landlord was having to incur the service charge costs before it could invoice the tenants who then routinely then challenged the demands. Furthermore, the absence of a contractual provision for interest on

arrears, presented no incentive for the tenants' not to routinely challenge demands.

The Respondents' case

28. Mr Murad the First Respondent, attended the hearing and was permitted to make submissions in relation to the proposed variation of his lease, despite his not having participated in the proceedings prior to the hearing.
29. Mrs Jinks attended the hearing to represent the Third Respondent, having made brief submissions in writing on 25 June 2020.
30. Mr Ramesh Palmer and his son attended the hearing to represent the Fourth Respondent, Mr Palmer having made extensive written submissions in his Statement of Case dated 25th of June 2020.
31. Mr Breslin joined the hearing by telephone to represent the Fifth Respondent. Mr and Mrs Breslin had made brief submissions on 25 June 2020, which were substantially similar to those of Mr and Mrs Jinks.
32. It was evident from the written submissions of the Respondents, and confirmed at the hearing, that there has been a history of very poor relations between the landlord and the residential tenants of the Block. Mr Palmer said that it was important to note that the landlord Contratree Limited, the managing agent Fountayne, the previous managing agent, Effective Management are all companies owned and run by the Stern family and that over the years most of the correspondence has been between the leaseholders, Simon Stern and his mother Cipora Stern. Contratree, a Stern family company owned the block when the leases they are now seeking to vary were granted, and Contratree continued to own the block when the more recent leases were granted in 1999 and 2000. The Applicant had therefore chosen to create the inconsistent forms of lease that it now complains has made managing the service charge impossible.
33. Much of Mr Palmer's written evidence related to ongoing issues with the maintenance of the building and in particular the external fire escape which Mr Palmer states was deemed dangerous and non-usable by West Midlands Fire Service following an inspection in 2017. It was explained to Mr Palmer that while the Tribunal appreciated that these issues were of immense concern to the leaseholders, they were not matters that the Tribunal could make any findings or determination on, within the context of this application.
34. Mr Palmer specific objections to the application can be summarised as follows:
 - a. The new submissions made by the Applicant's counsel within the skeleton argument were filed less than a working day prior to the

hearing and then expanded on during the morning of the hearing. The submissions concerning a new term for interest on arrears of service charge at 4% over base rate, should be disregarded as the Respondents' have had no time to consider or respond effectively, which has seriously disadvantaged them. The Applicant did not include reference to a term for interest on arrears within its statement of case, the draft variations or Mr Stern's witness statement and the Tribunal should therefore reject counsel's submissions on this.

- b. The Tribunal should also reject any argument that the landlord cannot afford to meet the costs of the services – that has not formed any part of the Applicant's case until today and runs contrary to previous representations made to the Respondents.
- c. If Mr Stern thought he was owed £45,000.00 he could seek forfeiture. The reason he has not done so, is because he hasn't sent out any statements, bills or reminders in four years, and that is an indication of how poorly the property is managed. Mr Parmar said that he owned a lot of rental properties, the charges were about £500.00 per year, £1,400.00 if the Council managed them. All straightforward, all justified service charge demands which he paid. He was happy to pay any demands from Mr Stern that were properly justified and the reason Mr Stern has not issued demands, is that he knows he can't justify them. When the tenants' had previously challenged demands, Mr Stern had been unable to produce any invoices from the companies that he claimed had done the work.
- d. The introduction of an interim charge would seriously disadvantage the tenants', who had not negotiated for a lease on these terms but could then be invoiced for any amount, and if not paid within 21 days solicitors letters and costs would follow. Mr Stern must be paying his solicitor fortunes for this and the Respondents would have to pay it.
- e. The variations do not address Mr Stern's complaint about the inconsistency of calculating the proportions on rateable values. The draft variation uses the same term. In any event this issue was considered by a Tribunal in 2015 who had no trouble determining that the existing mechanism was sufficient for the landlord to recover service charges.
- f. There is no evidence that the lease lacks clarity or fails to provide satisfactorily for the landlord to carry out the services and charge for them. Mr Parmar stated that the current lease makes ample provision for this and that issues of uniformity or the passage of time, or being out of step with modern drafting, are not of themselves, enough to deem the lease unsatisfactory.
- g. The Applicant is seeking to change the fundamental agreement originally negotiated with the tenants and make a radical departure, when the terms of the current lease are satisfactory. This would have an effect on the value on the tenants' investment, for which they should be compensated.

35. Mrs Jinks gave evidence and said that she was happy with the lease in its current form. Mrs Jinks said that the Block had never been well managed. When Cottons were managing they had ignored a problem with the roof which she ended up paying £11,000.00 to fix. It had then taken years to get the money back from the Stern family. The upshot with the service charge was that there had never been any clarity about demands. She paid to have a drain unblocked this week, because from experience she knows that cost of the repairs when eventually done will end up tripling. Mrs Jinks said that she didn't trust the Sterns' and varying the lease won't change that. Although she had said in her statement that she did not object to changing the date of the service charge year, she now didn't agree to that either.
36. Mrs Jinks was asked why she hadn't made any payments since 2014. She said this was because she hadn't received a bill and was not aware of any outstanding bills. In the last 6 years Mr Jinks has only been invoiced for ground rent and she thinks, one other bill.
37. Mr Breslin said that he agreed with Mr Parmar and Mrs Jinks evidence. He said that you couldn't trust the Sterns to do the work properly and at the right price. Mr Breslin also said that he hadn't received any service charge bills in the last 5-6 years. He didn't have any particular objection to the change in the date of the service charge year if it made it easier for Mr Stern.
38. In response to the Respondents' evidence, Mr Stern said that Contratree had never been an absent landlord, it had always maintained a registered office address. Mrs Jinks had a contact number for over 15 years which was borne out by her admitting that she had been repaid for the roof repairs. Mr Stern said that the Respondents' had all made allegations about the Sterns but not one had raised a single argument to support any negative impact on them of the proposed variations. Mr Breslin interrupted to point out that he had been asked to take out a defective title indemnity policy precisely because he had an absent landlord.
39. Mr Murad objected to any variation to his lease despite the Tribunal explaining to him that his lease was seriously defective and a variation to include a reciprocal landlord covenant to keep the Block in good repair and to maintain comprehensive buildings insurance, was an advantage to him. He was unrepresented and did not appear to fully understand the issues that owning a flat with defective lease provisions might cause generally and in particular, on any future sale of the flat.

Tribunals deliberations

The type 'B' lease

40. The variations that the Applicant seeks are to resolve problems that are said to exist in:

- (i) calculating the tenants' proportion of the charge, *the proportions issue*;
 - (ii) the financial consequences of there being no interim charging provisions, *the interim charge issue*;
 - (iii) the lack of a default interest clause, *the default interest issue*;
 - (iv) the lack of uniformity with the type 'C' lease, *the updating issue*.
41. The draft provided by the Applicant runs to some 8 pages and is a comprehensive replacement of the existing service charge clauses with those found in the type 'C' leases.
42. Before it can make an order under section 38 of the 1987 Act the Tribunal must be satisfied that the lease fails to make satisfactory provision with respect to one or more of the matters specified in section 35(2). In this case the Applicant relies on sub-paragraphs (e) and (f). Whether the lease fails to make satisfactory provision is for the Tribunal to determine in all the circumstances of the case

The proportions issue

43. Reference to rateable values may be obsolete, as indeed will likely be the fate of many other provisions over the term of a 125 year lease. However, the proposed variation does not address the obsolete reference. It introduces an even more confusing method of calculating the "Service Charge" as meaning "such reasonable proportion based on the rateable value of the Total Expenditure.." whatever that is supposed to mean.
44. Furthermore, the need to imply a term to give business efficacy to a lease, is not necessarily, or even probably, an indication that the lease fails to make satisfactory provision for the matter in question. This same issue was considered by a residential property tribunal and referred to in its decision dated 9 December 2015 BIR/00CN/LIS/2015/0002. Mr Stern confirmed in those proceedings that as the flats were all two bedroomed and similar in size, he had apportioned the charges equally between all flats. The tribunal determined that although rateable values had been replaced by Council Tax bands (on which no evidence had been submitted), the decision of the managing agents to apportion the charges equally was reasonable, "indeed it is difficult to imagine an alternative practical approach" (paragraph 47). The Tribunal does not take issue with that approach and does not therefore find that the lease fails to make satisfactory provision for the calculation of the tenant's proportion.

The interim Charge issue

45. This issue assumes that the parties to the lease intended that the landlord should not have to incur service charge expenditure before recovering its expenses from the tenants. I can find nothing in the type 'A' lease or the type 'B' lease to support this and the Respondents' evidence directly contradicts any such assumption. If a service charge

liability is incurred by the landlord there are workable provisions in the type 'A' and type 'B' lease for it to recover these expenses from the tenant. The fact that it is now standard or usual to include terms for an interim charge does not mean the absence of such a term renders the lease unsatisfactory. The absence does not create a shortfall in the service charge it just means that the landlord will have to fund the costs of the services before recovering them from the tenants. That was the commercial deal struck by the parties to the leases.

46. Mr Stern gave some evidence of the landlord's financial position when asked about it at the hearing, but no evidence of financial hardship leading to major issues with structural repairs, was put forward in the Applicant's statement of case or witness statements. Furthermore, as on Mr Stern's evidence the landlord has not spent any money on the Blocks for some 4-5 years (save for insurance), it should have a substantial sum in hand to at least make a start on the outstanding repairs. Mr Stern's primary concern appears to be obtaining a right to refer any dispute concerning the service charge costs to the Tribunal before the landlord had to incur the costs. The Tribunal does not therefore find that the absence of interim charging terms renders the lease unsatisfactory in relation to the s35(2) factors.

The default interest issue.

47. Paragraph 3A of s35 makes specific reference to provision for default interest being a sub-paragraph (e) factor. The Tribunal agrees with Ms Mathers that the absence of a default interest term in a lease, which also has no provision for interim charging, is a factor that the Tribunal could take into account when determining whether the lease made satisfactory provision. However, the Tribunal was concerned about the Applicant's failure to seek this variation until, what was effectively, the day before the hearing. There is no default interest term within the 8 pages submitted as the Applicant's proposed variations. Ms Mathers has suggested that as the Applicant's application is in effect that the Leases should be updated in line with the type 'C' lease, it could be implied that the Applicant intended its application to include not just the 8 pages of proposed variations attached to the application, but also a term similar to that found at clause 4(7) of the type 'C' lease.
48. The Tribunal determined that although it might have exercised discretion to order a proportionate variation to address the lack of a default interest term, it would be procedurally unfair to the Respondents to order such a variation, given that the issue was first raised by the Applicant the day before the hearing.

The updating issue.

49. Ms Mathers accepted that s35 does not allow for general updating of the lease terms just because they are no longer in modern or conventional form. The issue is, are the terms satisfactory and workable? The Tribunal finds in relation to the type 'B' lease that clause 2(2) imposes

an obligation on the tenant to pay for the costs of the services set out in the sixth schedule by reference to a service charge year commencing on 29 September, in terms that are satisfactory. Clause 3(1) imposes a corresponding covenant on the landlord and clause 3(3) imposes a landlord covenant to insure the building, in terms that are satisfactory. The sixth schedule contains details of the costs and expenses to which the tenants' must contribute (including insurance costs and managing agent's costs for management of the building), in terms which are satisfactory and taken with clause 2(3) and 3(1) and (2), workable.

50. The Tribunal finds that although there may be a few specific matters that could have been considered under a s35 application (such as the default interest issue, had it been pleaded at the correct time), there is no evidence on which the Tribunal can conclude that the type 'B' lease fails to make satisfactory provision for the s35(e) and (f) factors in terms that would justify the wholesale re-writing of the service charge provisions which the Applicant seeks.

The type 'C' lease

51. The Tribunal finds that Mr Murad's lease of 801 C Warwick Road fails to make satisfactory provision for one or more of the s35 factors, in that it fails to impose a reciprocal covenant on the landlord to keep the building and common parts in repair, or include a landlord covenant to insure the building with a reciprocal tenant covenant to pay a fair proportion of the costs of such insurance. However, these factors could have been addressed by a short deed of variation and do not justify wholesale variation of the lease to bring it in line with the later type 'C' leases that the landlord chose to grant.
52. If the Applicant had submitted a deed of variation that specifically addressed the unsatisfactory terms of Mr Murad's lease, perhaps seeking terms similar to the type 'B' lease, it is likely that the Tribunal would have exercised discretion to order a variation, but it is not the role of the Tribunal to draft the terms of any proposed variation from scratch, and no variation of the lease of 801C Warwick Road is therefore ordered.

The no-prejudice issue

53. The Tribunal disagrees with the Applicant's submissions concerning lack of prejudice. The wholesale updating of the service charge provisions would have introduced new contractual obligations to contribute to a reserve fund, to pay an interim charge based on the landlord's assessment of anticipated costs, to pay default interest on late payments and to pay the landlord's professional fees on any dispute concerning the service charge. Given the history of the parties dealings, including the landlords decision not to render service charge demands

and accounts, or comply with its repairing covenant for over 5 years, it is facile to suggest that the extensive variations sought by the landlord would not operate prejudicially to the tenants. However, as the Tribunal has determined that it does not intend exercising discretion to vary the Leases it does not need to consider the issue of compensation and prejudice.

Application under s20C of the 1985 Act

54. The Fourth Respondent has applied for an order under s20C of the Landlord and Tenant Act 1985 for an order that all the costs incurred in these proceedings are not to be regarded as relevant costs to be taken into account when determining the amount of any service charge that is payable by the tenant.
55. This litigation has arisen due to the Applicant's perception that the leases need updating to make better and more uniform provision for the landlord to recover service charge costs and expenses. The application has failed for the reasons set out above. The landlord does not appear to have a contractual right to recover litigation costs and an order under this section is probably therefore unnecessary. However, for the avoidance of doubt and to forestall any conceivable argument on this point, the Tribunal considers it just and equitable to make an order in favour of the Respondents' so that all of the costs incurred by the Applicant landlord in connection with these 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 Respondents

Judge D Barlow

29 March 2021

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).

**APPENDIX
SCHEDULE OF RESPONDENTS AND LEASES**

Property Address	Lease Date	Owner name/Respondent	Freehold/Landlord
801C Warwick Road, Tyseley, Birmingham, B11 2EL	6 October 1979	Mr Said Murad	Contratree Limited
807B Warwick Road, Tyseley, Birmingham, B11 2EL	30 May 1985	Mr and Mrs L Walker	Contratree Limited
807C Warwick Road, Tyseley, Birmingham, B11 2EL	12 June 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
807D Warwick Road, Tyseley, Birmingham, B11 2EL	19 October 1987	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813A Warwick Road, Tyseley, Birmingham, B11 2EL	22 August 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813B Warwick Road, Tyseley, Birmingham, B11 2EL	28 November 1986	Ramesh Parmar, Rikesh Parmar and Jeana Parmar	Contratree Limited
813C Warwick Road, Tyseley, Birmingham, B11 2EL	3 February 1989	Mr Brendan E. Breslin and Mrs Maria B. Breslin	Contratree Limited



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case reference	:	BIR/00CN/LVT/2020/0001
Properties	:	7 Flats at 801-815 Warwick Road, Tyseley, Birmingham, as listed in Appendix 1.
Applicant	:	Contratree Limited
Representative	:	Bude Nathan Iwanier Solicitors
Respondents	:	The leaseholders as listed in Appendix 1.
Type of application	:	An application under section 35(1) of the Landlord and Tenant Act 1987
Tribunal Members:	:	Judge D Barlow Mrs S Hopkins
Date of Hearing	:	15 March 2021

DECISION

Covid-19 pandemic: description of hearing

This determination included a remote video hearing which has been consented to by the parties. The form of remote hearing was audio (**V:CVPREMOTE**). A face-to-face hearing was not held because it was not practicable, no-one requested the same, and all issues could be determined in a remote hearing. The Applicant filed two composite bundles for the hearing referred to as the “Bundle” and the “Supplemental Bundle”. Reference in square brackets within the decision are to the page number in which the document appears in the respective bundle.

DECISION

- (1) We make no order to vary the Leases set out in Appendix 1.

REASONS

Background

1. The Applicant is the freehold proprietor of 801-815 Warwick Road, Tyseley, Birmingham, B11 2EL (“the Block”) registered under title number WM340520. The Block comprises a three-storey block with five commercial retail units on the ground floor (“the Shops”) and 10 residential flats on the first and second floor (“the Flats”).
2. The Respondents are the registered proprietors of leasehold interests in seven of the Flats as follows:
 - a. The First Respondent (Mr Murad) holds the term remaining on the lease of Flat 801C, dated 6 October 1979, between Horace Davis and Elaine Hyde, registered with title number WM173786. The lease predates the remaining Respondents’ leases by some years and is an old-style lease with defective provisions [pages 1-11 of the Supplemental Bundle];
 - b. The Second Respondents (Mr and Mrs Walker) hold the term remaining on the lease of Flat 807B, dated 30 May 1985, between the Applicant and Janice Foster, registered with title number WM352322 [pages 12-25 of the Supplemental Bundle];
 - c. The Third Respondents (Mr and Mrs Jinks) hold the terms remaining on three leases as follows:
 - i. Flat 807C, dated 16 June 1986, between the Applicant and Robert Runciman, registered with title number WM386099;
 - ii. Flat 807D, dated 19 October 1987, between the Applicant and Elizabeth Bird, registered with title number WM420707; and
 - iii. Flat 813A, dated 22 August 1986, between the Applicant and Terence Brown, registered with title number WM388652 [pages 26-76 of the Supplemental Bundle];
 - d. The Fourth Respondents (Mr Ramesh Parmar, Rikesh Parmar and Jeana Parmar) hold the term remaining on the lease of Flat 813B, dated 28 November 1986, between the Applicant and Sylvia Keyte, registered with title number WM632520 [pages 95-111 of the Supplemental Bundle]; and
 - e. The Fifth Respondents (Mr and Mrs Breslin) hold the term remaining on the lease of Flat 813C, dated 3 February 1989, between the Applicant and (1) Adrian Daniel and (2) Susan

Cashmore, registered with title number WM461290 [pages 77-94 of the Supplemental Bundle] .

(The Second, Third, Fourth and Fifth Respondents' leases, were granted between 1985 -1989, are substantially the same and are collectively referred to as "the Leases")

3. There are two long lease residential flats which are not the subject of this application. Flat 813d and Flat 807a, which were granted in 1999 and 2000 respectively. They are on a more modern form of lease with extensive service charge provisions [pages 130-147 and 186-203 of the Supplemental Bundle].
4. There is a tenth residential flat which is owned by the Applicant and apparently also held on a modern form of lease (no copy was provided by the Applicant).
5. The five Shops are held on three commercial leases, which all contain an obligation by the tenant to pay a fair proportion of the costs incurred by the landlord in keeping the structural parts of the Block and various common parts in repair, decorated and lit [pages 148-185 and 204- 275 of the Supplemental Bundle].
6. There is a history of issues and disputes between the Respondents and the landlord's various managing agents, concerning maintenance of the Block, some of which have been the subject of previous applications to the county court and to this Tribunal. The Block is currently managed by Mr Simon Stern of Fountayne Managing Limited ("Fountayne"), whose family also manage the business of Contratree Limited. The Block was previously managed by Effective Management, another Stern family business and prior to that Cottons, a Birmingham based company. Since 2013 the Block has been managed by the Stern family, who also manage the business of Contratree Limited.
7. The issues between the parties stem from what appears to be poor management of the building over a period of years. The Respondents' say this is a consequence of neglect by a landlord that has effectively, been absent for a substantial period. Mr Stern says it is because the service charge provisions in the lease are such that efficient and effective collection of the service charge is impossible and prevents the landlord from complying with its repair and maintenance covenants.
8. The current position is that urgent repairs are required to meet fire safety standards, not least due to an external fire escape having been condemned as unusable, following Fire Risk Assessment carried out in 2019.

Relevant statutory provisions

9. The Tribunal's jurisdiction to vary residential long leases derives from section 35 in part IV of the **Landlord and Tenant Act 1987** ("the Act"). The relevant provisions of the Act provide as follows:

s35 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—*

...

(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.

...

(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.

S38 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.

...

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under s35 or s36 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.

...

Grounds of the application

10. In this case the Applicant seeks to rely upon sections 35(2)(e) and (f), namely that the lease fails to make satisfactory provision for the recovery by the landlord of expenditure incurred or to be incurred by it for the benefit of the leaseholders and fails to make satisfactory provision for the computation of the service charge payable under the lease.
11. Within the application, (which stood as the Applicant's Statement of Case), the Applicant specified a single ground, which is - "*the leases granted at different times were not in uniform draft and the collection of service charges fairly between the parties is impossible*". The Applicant expanded on this slightly in the witness statement of Simon Stern dated 22nd of July 2020, which was filed with the Bundle on 16 September 2020 [pages 268 to 270 of the Bundle]. In his witness statement, Mr Stern submits that the Applicant is entitled to the variations sought on two grounds. First because the existing leases do not all have the same service charge provisions; and secondly, because there is no provision for the landlord to levy an interim service charge to obtain money on account of anticipated charges. Mr Stern also submits that the proposed variations are not prejudicial in that they do not affect the existing statutory rights of the tenants to challenge specific service charge items.
12. At 3.30 pm on Friday 10 March 2021 (i.e. less than a business day before the hearing), a skeleton argument was filed by Ms Mathers on behalf of the Applicant. This, for the first time, clarified the specific S35(2) factors on which the application relies; and made new submissions on

the terms of the Leases which the Applicant contends are unsatisfactory with regard to those factors. They can be summarised as follows:

- a. The lessees' contribution is determined by reference to, now obsolete, rateable values and is therefore an unsatisfactory provision ("the proportions issue").
- b. There is no provision for collection of an interim charge to cover anticipated expenditure, which means that the landlord may have to wait up to 15 months for payment of expenses incurred just after the annual certificate date (24 June) ("the interim charge issue").
- c. There is no provision for charging interest on late payment of service charges, a matter that is specifically referred to in s35(3)(A) of the Act. When combined with the lack of any right to levy an interim charge, the lack of an interest charging term is unsatisfactory ("the default interest issue")
- d. The combined effect of the unsatisfactory terms is to render the Leases administratively cumbersome and inefficient to manage. Furthermore, as the Leases are not in a modern form it is appropriate for the Tribunal to go beyond varying the leases to address the above factors and update the service charge terms generally, to achieve a unified form of lease that is consistent with the later leases of 813d and 807a, granted in 1999 and 2000, ("the updating issue").
- e. The variations do not prejudice the Respondents ("the no prejudice issue").
- f. The proposed variations would make satisfactory provision for the computation and recovery of service charges due under the Leases.

The Leases

13. Mr Murad's lease of Flat 801c was granted in 1979. It is an old-style lease (which I will refer to as the type 'A' lease) that includes terms that would now be regarded as defective.

14. The remaining Leases (which I will refer to as the type 'B' lease) are in common form and all contain the following service charge provisions:

Clause 2(2) contains a lessee covenant to pay a "reasonable proportion based on rateable value of the costs expenses outgoings and matters mentioned in the Sixth Schedule hereto (the amount of such contribution to be ascertained and certified in writing by the surveyor for the time being of the lessor by 24 June in each year and the amount so certified shall be final and binding on the parties hereto) once a year on 29 September in each year commencing on 29 September."

Clause 3(1) contains a covenant by the lessor, subject to payment by the lessee of the contributions specified in clause 2(2) "well and substantially to maintain repair redecorate and renew:

- (a) *the structure and in particular the walls roof chimney stacks gutters and main water pipes of the said building*
- (b) *the gas and water pipes drains and electric cables and wire in under and upon the said building enjoyed or used by the Lessee in common with the owners and tenants of the other flats in the said building*
- (c) *the parts of the said building so enjoyed or used by the lessee or the tenants of the other flats in common as aforesaid and the boundary walls and fences of the said building*

Clause 3(2) is a covenant by the Lessor to insure the building and any fixtures or fittings that in the lessor's opinion it is prudent to insure "against loss or damage by fire storm Tempest and (if possible) aircraft explosion and damage by burst pipes in such sum as shall be considered by the lessors surveyors to be the full value thereof for two years loss of rent and cause all monies received in respect of any such insurance to be paid out in building repairing or otherwise reinstating the said building or the part thereof so destroyed and/or damaged."

The Sixth Schedule sets out the costs expenses outgoings and matters in respect of which the lessee is to make a contribution, as follows:

- (1) *the expense of maintaining repairing redecorating and renewing:*
 - (a) *the main structure and in particular the roof chimney stacks gutters foundations and main water pipes of the said building*
 - (b) *the gas and water pipes drains and electric cables and wires used by the lessee in common with the owners or tenants of the other flats*
 - (c) *all common parts of the said building*
 - (d) *the boundary walls and fences of the said building*
 - (e) *all sums payable by the lessor in performing the obligations under clause 3 (1) and (2) hereinbefore mentioned that are not specifically mentioned in this schedule the costs of cleaning and lighting any common parts of the said building*
- (2) *the costs of insurance and keeping insured throughout the term hereby created the said building and any part thereof any fixtures or fittings therein that in the Lessor's opinion it is prudent to insure against loss or damage by fire storm tempest and (if possible) aircraft explosion and damage by burst pipes and such other risks including two years loss of rent normally covered under a comprehensive insurance as the lessors shall determine.*
- (3) *All rates taxes and other outgoings (if any) payable in respect of the parts of the said building used by the lessee in common as aforesaid.*
- (4) *The fees of the lessors managing agents for the collection of the rents of the flats in the said building and for the general management thereof.*

15. Mr Murad's type 'A' lease, contains very limited terms that would now be regarded as defective. Clause 2(8) contains a tenant covenant to contribute a "rateable proportion according to user" of the costs of maintenance and repair of the structural parts of the building and the common parts and services. Exceptionally the lease does not contain any corresponding express positive obligation on the part of the landlord to maintain the common parts or the structure. Furthermore, there is no covenant for the landlord to insure the building and use any proceeds to re-instate, or for the tenant to contribute to the costs of any buildings insurance the landlord does maintain.

The proposed variations

16. The proposed variations are extensive. In essence they are a wholesale replacement of the existing clauses 2(2), 3(1) and (2) and the Sixth Schedule of the type 'B' lease, with provisions that are substantially the same as those contained in the more recent leases of 813d and 807a granted in 1999 and 2000 (which I will refer to as the "the type 'C' lease").
17. The main differences between the service charge provisions in the type 'B' lease and the type 'C' leases, which form the basis of the proposed variations, are as follows:
 - a. The accounting period is changed from commencing on 29 September to 1 January in each year [page 27 of the Bundle]
 - b. There is a new tenant covenant to pay an interim charge in addition to the service charge on the terms set out in a Schedule to the proposed variations, both charges to be recoverable as rent in arrear [page27 of the Bundle].
 - c. The landlord covenant to maintain and keep the service charge items in substantial repair and condition is expanded to include the following additional matters:
 - i. The costs of employing caretakers, porters and gardeners and for the cost of repair maintenance, insurance, rates and notional rent for a caretaker's flat.
 - ii. The landlords decorating obligations are more particularised in terms of the treatment to be applied to surfaces.
 - iii. Additional insurance provisions in the event of reinstatement of the building proving impossible.
 - iv. New provisions for the costs of maintaining a communal television aerial, a coin operated telephone box, fire extinguishers, a lift and ancillary equipment.
 - v. A new provision for maintenance of an electric door entry system serving the main entrance, once installed.
 - vi. Provision for a reserve fund to be set aside to meet future expenditure the landlord reasonably expects to incur meeting its covenants.

- vii. New provisions for the costs of maintenance of gardens and communal dustbins.
 - viii. New provisions for recovering interest on borrowing to meet the costs of complying with the landlord's covenants.
 - ix. A new provision for recovering fees charged by a solicitor or other professional involved in recovering arrears of rent and/or service charge from any tenant [pages 28-31 of the Bundle].
- d. The Schedule to the proposed variation is drafted to reflect the Fifth Schedule of the type 'C' lease. There is a definition of 'Total Expenditure' at paragraph 1, which includes all expenditure incurred by the landlord in the relevant accounting period in carrying out its service charge duties including a notional rent for a caretaker's flat [pages 33-34 of the Bundle]
 - e. The 'Service Charge' is defined as "*such a reasonable proportion based on the rateable value of the Total Expenditure as is specified in sub-clause 1 of this clause or (in respect of the accounting period during which this Lease is executed) such proportion of such percentage as is attributable to the period from the date of this Lease to the 31st day of December next following*".
 - f. To the extent the Service Charge exceeds Interim Charge paid by the tenant, the excess is payable to the landlord within 21 days of service on the tenant of a Certificate (referred to in paragraph 6 of the Schedule) and in case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - g. The 'Interim Charge' is defined as such sum to be paid on account of the Service Charge in respect of each accounting period as the lessors of the managing agents shall specify at their discretion to be a fair and reasonable interim payment. The Interim Charge is to be paid by equal payments in advance on 1 January and first of July in each year and in the case of default shall be recoverable from the tenant as rent in arrear [page 33 of the Bundle].
 - h. Paragraph 6 provides that the landlord or its agents must Certify as soon as practicable after the expiry of each accounting period the Total Expenditure for that period, the amount of any Interim Charge paid by the tenant in respect of that period (together with any surplus carried forward), the amount of the Service Charge in respect of the accounting period and any excess or deficiency of the Service Charge over the Interim Charge [page 34 of the Bundle].
 - i. The Certificate is said to be conclusive and binding on the parties. The tenant can inspect the receipts and vouchers relating to the Total Expenditure on prior payment of any costs to be incurred by the landlord or the landlord's agents and the landlord will consider written objections signed by not less than 60% flat owners, to any items of expenditure. There is also what purports to be a binding arbitration clause [page 34 of the Bundle].

The parties submissions

The Applicant's case

18. The Applicant was represented at the hearing by Ms Wendy Mathers of counsel. Mr Stern of Fountayne, the landlord's managing agent, attended on behalf of the Applicant to give evidence.
19. Ms Mather's submissions largely confirmed the arguments put forward in her skeleton argument. She accepted that it was for the Applicant to establish that it had made out a ground under s35(2) for every variation proposed and that it was for the Applicant to demonstrate that the variation should be the one proposed by the Applicant (or some other variation under s38(4)).
20. One issue raised by the Tribunal concerned Ms Mathers argument concerning the lack of provision for interest on arrears of service charge and the proposal, in her skeleton argument, that the omission should be rectified by a charging clause with a proposed interest rate of 4% above the base rate of National Westminster Bank plc. The difficulty being that the proposed variation in the application contained no such term. The only variation proposed by the Applicant was that any default in payment of the service charge would be recoverable by the landlord as rent in arrear.
21. Ms Mathers submitted that as the variations were intended to bring the Leases in line with the format of the type 'C' leases the Tribunal could exercise discretion to include an additional variation along the lines of paragraph 4(7) of the modern leases, which made a similar provision for interest to be charged on arrears of rent and service charge [page 116 of the Bundle].
22. Ms Mathers accepted that the proposed variation went far beyond that necessary to address the lease terms that the Applicant says are unsatisfactory in relation to the s35(2) matters, but submitted that if the Tribunal determined that variations should be made to address those specific matters, then it could exercise discretion to go further and replicate the service charge provisions of the type 'C' lease to enable the Applicant to collect the service charge on an equal and well particularised basis.
23. The specific variations requested in paragraph 16(a)-(i) above were then considered in more detail. With some input from Mr Stern it was acknowledged by Ms Mathers that a substantial number of service charge items did not exist within the Block and could be deleted from the draft. These include references to the parking areas, garages, gardens, passenger lifts, communal dustbins and refuse disposal areas, a caretaker, a caretaker's flat, porters, staff gardeners, communal television aerials, coin operated telephone boxes, an electric door entry system and fire extinguishers. The clauses were apparently copied over

from the type 'C' lease, where they appear to have been included by the drafter without proper consideration of their relevance to the Block. The Block stands within a footprint that has a very small surrounding strip of land that the residential leaseholders do not use.

24. The definitions were largely the same as in the type 'B' lease. The change in the accounting period was intended to accommodate operation of the interim charge. Once the irrelevant items were deleted, there was no material change to the landlord's covenant in the type 'B' lease, to keep the remaining specified items in good and substantial repair. The main variations to the landlord's covenant are to include a right to maintain a reserve fund, a right to charge interest on sums borrowed to finance compliance with the landlord's covenant and a right to charge solicitor's fees and professional fees incurred in recovering arrears of service charge.
25. The main variations to the service charge mechanism are contained in the Schedule to the draft variation. The most significant of which would allow the landlord to levy an interim charge. Mr Stern gave evidence at the hearing on this point. He said that although the landlord could raise small sums of £10-15,000.00 by way of loans from family businesses, it could not borrow the substantial amounts needed to fully comply with the outstanding repairs in that way. Ms Mathers suggested that the limited income of the landlord company, meant that it should be viewed as akin to an RTM company that needed to raise funds to carry out the essential services. In evidence Mr Stern said the landlord's annual income was about £20-25,000.00 from the ground rents and Shops rents and a further £4-4,500.00 rental from another property in Sussex owned by the landlord.
26. Mr Stern said that after the previous Tribunal hearing in 2015, there remained arrears of service charges that could not be collected easily because it was clear that every demand would be challenged by the Respondents. The Applicant therefore decided that it would pay the Block insurance every year but would not do anything else unless absolutely necessary, such as fire safety works. As a consequence, no service charge demands or accounts have been sent to the residential tenants since 2016, and the Block has been largely un-maintained. In 2016 the arrears totalled some £45,000.00 but no action was taken by Mr Stern to recover the arrears because, in his words, each and every demand would be challenged.
27. Mr Stern explained that the main point of the variation was to bring forward any dispute about the service charge to the date on which the budget was set by the interim charge which importantly, was before the landlord had incurred the actual costs. Any dispute could be quickly referred to the Tribunal for a determination, before the landlord had to lay out substantial costs of maintenance and repair. At present the landlord was having to incur the service charge costs before it could invoice the tenants who then routinely then challenged the demands. Furthermore, the absence of a contractual provision for interest on

arrears, presented no incentive for the tenants' not to routinely challenge demands.

The Respondents' case

28. Mr Murad the First Respondent, attended the hearing and was permitted to make submissions in relation to the proposed variation of his lease, despite his not having participated in the proceedings prior to the hearing.
29. Mrs Jinks attended the hearing to represent the Third Respondent, having made brief submissions in writing on 25 June 2020.
30. Mr Ramesh Palmer and his son attended the hearing to represent the Fourth Respondent, Mr Palmer having made extensive written submissions in his Statement of Case dated 25th of June 2020.
31. Mr Breslin joined the hearing by telephone to represent the Fifth Respondent. Mr and Mrs Breslin had made brief submissions on 25 June 2020, which were substantially similar to those of Mr and Mrs Jinks.
32. It was evident from the written submissions of the Respondents, and confirmed at the hearing, that there has been a history of very poor relations between the landlord and the residential tenants of the Block. Mr Palmer said that it was important to note that the landlord Contratree Limited, the managing agent Fountayne, the previous managing agent, Effective Management are all companies owned and run by the Stern family and that over the years most of the correspondence has been between the leaseholders, Simon Stern and his mother Cipora Stern. Contratree, a Stern family company owned the block when the leases they are now seeking to vary were granted, and Contratree continued to own the block when the more recent leases were granted in 1999 and 2000. The Applicant had therefore chosen to create the inconsistent forms of lease that it now complains has made managing the service charge impossible.
33. Much of Mr Palmer's written evidence related to ongoing issues with the maintenance of the building and in particular the external fire escape which Mr Palmer states was deemed dangerous and non-usable by West Midlands Fire Service following an inspection in 2017. It was explained to Mr Palmer that while the Tribunal appreciated that these issues were of immense concern to the leaseholders, they were not matters that the Tribunal could make any findings or determination on, within the context of this application.
34. Mr Palmer specific objections to the application can be summarised as follows:
 - a. The new submissions made by the Applicant's counsel within the skeleton argument were filed less than a working day prior to the

hearing and then expanded on during the morning of the hearing. The submissions concerning a new term for interest on arrears of service charge at 4% over base rate, should be disregarded as the Respondents' have had no time to consider or respond effectively, which has seriously disadvantaged them. The Applicant did not include reference to a term for interest on arrears within its statement of case, the draft variations or Mr Stern's witness statement and the Tribunal should therefore reject counsel's submissions on this.

- b. The Tribunal should also reject any argument that the landlord cannot afford to meet the costs of the services – that has not formed any part of the Applicant's case until today and runs contrary to previous representations made to the Respondents.
- c. If Mr Stern thought he was owed £45,000.00 he could seek forfeiture. The reason he has not done so, is because he hasn't sent out any statements, bills or reminders in four years, and that is an indication of how poorly the property is managed. Mr Parmar said that he owned a lot of rental properties, the charges were about £500.00 per year, £1,400.00 if the Council managed them. All straightforward, all justified service charge demands which he paid. He was happy to pay any demands from Mr Stern that were properly justified and the reason Mr Stern has not issued demands, is that he knows he can't justify them. When the tenants' had previously challenged demands, Mr Stern had been unable to produce any invoices from the companies that he claimed had done the work.
- d. The introduction of an interim charge would seriously disadvantage the tenants', who had not negotiated for a lease on these terms but could then be invoiced for any amount, and if not paid within 21 days solicitors letters and costs would follow. Mr Stern must be paying his solicitor fortunes for this and the Respondents would have to pay it.
- e. The variations do not address Mr Stern's complaint about the inconsistency of calculating the proportions on rateable values. The draft variation uses the same term. In any event this issue was considered by a Tribunal in 2015 who had no trouble determining that the existing mechanism was sufficient for the landlord to recover service charges.
- f. There is no evidence that the lease lacks clarity or fails to provide satisfactorily for the landlord to carry out the services and charge for them. Mr Parmar stated that the current lease makes ample provision for this and that issues of uniformity or the passage of time, or being out of step with modern drafting, are not of themselves, enough to deem the lease unsatisfactory.
- g. The Applicant is seeking to change the fundamental agreement originally negotiated with the tenants and make a radical departure, when the terms of the current lease are satisfactory. This would have an effect on the value on the tenants' investment, for which they should be compensated.

35. Mrs Jinks gave evidence and said that she was happy with the lease in its current form. Mrs Jinks said that the Block had never been well managed. When Cottons were managing they had ignored a problem with the roof which she ended up paying £11,000.00 to fix. It had then taken years to get the money back from the Stern family. The upshot with the service charge was that there had never been any clarity about demands. She paid to have a drain unblocked this week, because from experience she knows that cost of the repairs when eventually done will end up tripling. Mrs Jinks said that she didn't trust the Sterns' and varying the lease won't change that. Although she had said in her statement that she did not object to changing the date of the service charge year, she now didn't agree to that either.
36. Mrs Jinks was asked why she hadn't made any payments since 2014. She said this was because she hadn't received a bill and was not aware of any outstanding bills. In the last 6 years Mr Jinks has only been invoiced for ground rent and she thinks, one other bill.
37. Mr Breslin said that he agreed with Mr Parmar and Mrs Jinks evidence. He said that you couldn't trust the Sterns to do the work properly and at the right price. Mr Breslin also said that he hadn't received any service charge bills in the last 5-6 years. He didn't have any particular objection to the change in the date of the service charge year if it made it easier for Mr Stern.
38. In response to the Respondents' evidence, Mr Stern said that Contratree had never been an absent landlord, it had always maintained a registered office address. Mrs Jinks had a contact number for over 15 years which was borne out by her admitting that she had been repaid for the roof repairs. Mr Stern said that the Respondents' had all made allegations about the Sterns but not one had raised a single argument to support any negative impact on them of the proposed variations. Mr Breslin interrupted to point out that he had been asked to take out a defective title indemnity policy precisely because he had an absent landlord.
39. Mr Murad objected to any variation to his lease despite the Tribunal explaining to him that his lease was seriously defective and a variation to include a reciprocal landlord covenant to keep the Block in good repair and to maintain comprehensive buildings insurance, was an advantage to him. He was unrepresented and did not appear to fully understand the issues that owning a flat with defective lease provisions might cause generally and in particular, on any future sale of the flat.

Tribunals deliberations

The type 'B' lease

40. The variations that the Applicant seeks are to resolve problems that are said to exist in:

- (i) calculating the tenants' proportion of the charge, *the proportions issue*;
 - (ii) the financial consequences of there being no interim charging provisions, *the interim charge issue*;
 - (iii) the lack of a default interest clause, *the default interest issue*;
 - (iv) the lack of uniformity with the type 'C' lease, *the updating issue*.
41. The draft provided by the Applicant runs to some 8 pages and is a comprehensive replacement of the existing service charge clauses with those found in the type 'C' leases.
42. Before it can make an order under section 38 of the 1987 Act the Tribunal must be satisfied that the lease fails to make satisfactory provision with respect to one or more of the matters specified in section 35(2). In this case the Applicant relies on sub-paragraphs (e) and (f). Whether the lease fails to make satisfactory provision is for the Tribunal to determine in all the circumstances of the case

The proportions issue

43. Reference to rateable values may be obsolete, as indeed will likely be the fate of many other provisions over the term of a 125 year lease. However, the proposed variation does not address the obsolete reference. It introduces an even more confusing method of calculating the "Service Charge" as meaning "such reasonable proportion based on the rateable value of the Total Expenditure.." whatever that is supposed to mean.
44. Furthermore, the need to imply a term to give business efficacy to a lease, is not necessarily, or even probably, an indication that the lease fails to make satisfactory provision for the matter in question. This same issue was considered by a residential property tribunal and referred to in its decision dated 9 December 2015 BIR/00CN/LIS/2015/0002. Mr Stern confirmed in those proceedings that as the flats were all two bedroomed and similar in size, he had apportioned the charges equally between all flats. The tribunal determined that although rateable values had been replaced by Council Tax bands (on which no evidence had been submitted), the decision of the managing agents to apportion the charges equally was reasonable, "indeed it is difficult to imagine an alternative practical approach" (paragraph 47). The Tribunal does not take issue with that approach and does not therefore find that the lease fails to make satisfactory provision for the calculation of the tenant's proportion.

The interim Charge issue

45. This issue assumes that the parties to the lease intended that the landlord should not have to incur service charge expenditure before recovering its expenses from the tenants. I can find nothing in the type 'A' lease or the type 'B' lease to support this and the Respondents' evidence directly contradicts any such assumption. If a service charge

liability is incurred by the landlord there are workable provisions in the type 'A' and type 'B' lease for it to recover these expenses from the tenant. The fact that it is now standard or usual to include terms for an interim charge does not mean the absence of such a term renders the lease unsatisfactory. The absence does not create a shortfall in the service charge it just means that the landlord will have to fund the costs of the services before recovering them from the tenants. That was the commercial deal struck by the parties to the leases.

46. Mr Stern gave some evidence of the landlord's financial position when asked about it at the hearing, but no evidence of financial hardship leading to major issues with structural repairs, was put forward in the Applicant's statement of case or witness statements. Furthermore, as on Mr Stern's evidence the landlord has not spent any money on the Blocks for some 4-5 years (save for insurance), it should have a substantial sum in hand to at least make a start on the outstanding repairs. Mr Stern's primary concern appears to be obtaining a right to refer any dispute concerning the service charge costs to the Tribunal before the landlord had to incur the costs. The Tribunal does not therefore find that the absence of interim charging terms renders the lease unsatisfactory in relation to the s35(2) factors.

The default interest issue.

47. Paragraph 3A of s35 makes specific reference to provision for default interest being a sub-paragraph (e) factor. The Tribunal agrees with Ms Mathers that the absence of a default interest term in a lease, which also has no provision for interim charging, is a factor that the Tribunal could take into account when determining whether the lease made satisfactory provision. However, the Tribunal was concerned about the Applicant's failure to seek this variation until, what was effectively, the day before the hearing. There is no default interest term within the 8 pages submitted as the Applicant's proposed variations. Ms Mathers has suggested that as the Applicant's application is in effect that the Leases should be updated in line with the type 'C' lease, it could be implied that the Applicant intended its application to include not just the 8 pages of proposed variations attached to the application, but also a term similar to that found at clause 4(7) of the type 'C' lease.
48. The Tribunal determined that although it might have exercised discretion to order a proportionate variation to address the lack of a default interest term, it would be procedurally unfair to the Respondents to order such a variation, given that the issue was first raised by the Applicant the day before the hearing.

The updating issue.

49. Ms Mathers accepted that s35 does not allow for general updating of the lease terms just because they are no longer in modern or conventional form. The issue is, are the terms satisfactory and workable? The Tribunal finds in relation to the type 'B' lease that clause 2(2) imposes

an obligation on the tenant to pay for the costs of the services set out in the sixth schedule by reference to a service charge year commencing on 29 September, in terms that are satisfactory. Clause 3(1) imposes a corresponding covenant on the landlord and clause 3(3) imposes a landlord covenant to insure the building, in terms that are satisfactory. The sixth schedule contains details of the costs and expenses to which the tenants' must contribute (including insurance costs and managing agent's costs for management of the building), in terms which are satisfactory and taken with clause 2(3) and 3(1) and (2), workable.

50. The Tribunal finds that although there may be a few specific matters that could have been considered under a s35 application (such as the default interest issue, had it been pleaded at the correct time), there is no evidence on which the Tribunal can conclude that the type 'B' lease fails to make satisfactory provision for the s35(e) and (f) factors in terms that would justify the wholesale re-writing of the service charge provisions which the Applicant seeks.

The type 'C' lease

51. The Tribunal finds that Mr Murad's lease of 801 C Warwick Road fails to make satisfactory provision for one or more of the s35 factors, in that it fails to impose a reciprocal covenant on the landlord to keep the building and common parts in repair, or include a landlord covenant to insure the building with a reciprocal tenant covenant to pay a fair proportion of the costs of such insurance. However, these factors could have been addressed by a short deed of variation and do not justify wholesale variation of the lease to bring it in line with the later type 'C' leases that the landlord chose to grant.
52. If the Applicant had submitted a deed of variation that specifically addressed the unsatisfactory terms of Mr Murad's lease, perhaps seeking terms similar to the type 'B' lease, it is likely that the Tribunal would have exercised discretion to order a variation, but it is not the role of the Tribunal to draft the terms of any proposed variation from scratch, and no variation of the lease of 801C Warwick Road is therefore ordered.

The no-prejudice issue

53. The Tribunal disagrees with the Applicant's submissions concerning lack of prejudice. The wholesale updating of the service charge provisions would have introduced new contractual obligations to contribute to a reserve fund, to pay an interim charge based on the landlord's assessment of anticipated costs, to pay default interest on late payments and to pay the landlord's professional fees on any dispute concerning the service charge. Given the history of the parties dealings, including the landlords decision not to render service charge demands

and accounts, or comply with its repairing covenant for over 5 years, it is facile to suggest that the extensive variations sought by the landlord would not operate prejudicially to the tenants. However, as the Tribunal has determined that it does not intend exercising discretion to vary the Leases it does not need to consider the issue of compensation and prejudice.

Application under s20C of the 1985 Act

54. The Fourth Respondent has applied for an order under s20C of the Landlord and Tenant Act 1985 for an order that all the costs incurred in these proceedings are not to be regarded as relevant costs to be taken into account when determining the amount of any service charge that is payable by the tenant.
55. This litigation has arisen due to the Applicant's perception that the leases need updating to make better and more uniform provision for the landlord to recover service charge costs and expenses. The application has failed for the reasons set out above. The landlord does not appear to have a contractual right to recover litigation costs and an order under this section is probably therefore unnecessary. However, for the avoidance of doubt and to forestall any conceivable argument on this point, the Tribunal considers it just and equitable to make an order in favour of the Respondents' so that all of the costs incurred by the Applicant landlord in connection with these 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 Respondents

Judge D Barlow

29 March 2021

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).

**APPENDIX
SCHEDULE OF RESPONDENTS AND LEASES**

Property Address	Lease Date	Owner name/Respondent	Freehold/Landlord
801C Warwick Road, Tyseley, Birmingham, B11 2EL	6 October 1979	Mr Said Murad	Contratree Limited
807B Warwick Road, Tyseley, Birmingham, B11 2EL	30 May 1985	Mr and Mrs L Walker	Contratree Limited
807C Warwick Road, Tyseley, Birmingham, B11 2EL	12 June 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
807D Warwick Road, Tyseley, Birmingham, B11 2EL	19 October 1987	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813A Warwick Road, Tyseley, Birmingham, B11 2EL	22 August 1986	Mr Graham Jinks and Mrs Mary Jinks	Contratree Limited
813B Warwick Road, Tyseley, Birmingham, B11 2EL	28 November 1986	Ramesh Parmar, Rikesh Parmar and Jeana Parmar	Contratree Limited
813C Warwick Road, Tyseley, Birmingham, B11 2EL	3 February 1989	Mr Brendan E. Breslin and Mrs Maria B. Breslin	Contratree Limited