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Variation of Long Leases of Flats

Mark Pawlowski

General Editor

Section 35(1) of the Landlord and Tenant Act 1987 (as amended by the Commonhold and Leasehold Reform Act 2002) provides that a party to a “long lease of a flat” may make an application to the appropriate tribunal (First-tier or Upper Tribunal) for an order varying the lease in such manner as is specified in the application. A long lease, however, is not regarded as a long lease of a flat if the demised premises consist of or include three or more flats contained in the same building; or the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies: s.35(6). (It should be noted that s.40 of the 1987 Act, as amended by the Housing Act 1988, also makes provision for the variation of insurance provisions of a lease of a dwelling other than a flat).

The appropriate tribunal, on such an application, may make an order varying the lease in such manner as is specified in the order: s.38(1), as amended by the 2002 Act. It is usual to annex a draft deed of rectification and variation to the originating application setting out the extent of the proposed variations to the lease. In this connection, s.38(8) provides that the tribunal may, instead of making an order varying a lease, make an order directing the parties to the lease to vary it in such manner as is specified in the order. The tribunal may also direct that a memorandum of variation of the lease effected by the order be endorsed on such documents as are specified by the order: s.38(9).

The variation will be binding not only on the parties to the lease for the time being but also on other persons (including any predecessors in title of those parties), whether or not they were parties to the proceedings: s.39(1). This will include any surety who has guaranteed the performance of any obligation varied by the order - the surety is, accordingly, taken to have guaranteed the performance of that obligation as so varied: s.39(2). It has been held that an order varying a lease under s.35(1) may have retrospective effect so that the tribunal has jurisdiction to order that the variation takes effect from a date prior to the date of the application: *Brickfield Properties Ltd v Botten* [2013] UKUT 133 (LC). The grounds on which an application under s.35(1) may be made are that the lease “fails to make satisfactory provision” with respect to one or more of the following matters:

- (a) the repair or maintenance of the flat in question, or the building containing the flat, or any land or or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;
- (b) the insurance of the building containing the flat or of any such land or building;

- (c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;
- (d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);
- (e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;
- (f) the computation of a service charge payable under the lease; and
- (g) such other matters as may be prescribed by regulations made by the Secretary of State.

In determining what constitutes “a reasonable standard of accommodation”, the court may have regard to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat, as well as other factors relating to the condition of any such common parts: s.35(3). In relation to a service charge payable under the lease, relevant factors will 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: s.35(3A). Section 35(4) further provides that a lease fails to make satisfactory provision with respect to the computation of service charge under it if:

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

Where an application is made under s.35(1) by any party to the lease, any other party to the lease may make an application to the relevant tribunal asking it, in the event of its deciding to make an order effecting any variation of the lease in pursuance of the original application, to

make an order which effects a corresponding variation of each of such one or more other leases as are specified in the application: s.36(1). Any such other lease must also be a long lease of a flat under which the landlord is the same as the landlord under the lease in the original application: s.36(2)(a). It need not, however, be a lease of a flat in the same building: s.36(2)(b).

Section 37 also permits an application to be made in respect of two or more leases for an order varying each of those leases in the same manner as is specified in the application: s.37(1). Here again, the leases must be long leases of flats under which the landlord is the same person, but they need not be leases of flats in the same building: s.37(2). The grounds for such an application are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect: s.37(3). There are detailed provisions as to the making of the application depending on the number of leases concerned: see, s.37(5) and (6).

Section 39(3) makes provision for the situation where the court order was not served on a relevant party. Such person may bring an action for damages for breach of statutory duty against the person by whom any such notice was so required to be served in respect of that person's failure to serve it and apply to the tribunal for the cancellation or modification of the variation in question: see further, s.39(4) and (5). The tribunal also has power to make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the tribunal considers he is likely to suffer as a result of the variation: s.38(10).

Failure to make satisfactory provision

A number of cases have considered the meaning of this phrase. In *Camden London Borough Council v Morath* [2019] UKUT 193 (LC), the Upper Tribunal held that the First-tier Tribunal had been correct to refuse a local authority landlord's application under s.35 to vary 28 subleases granted to the occupiers of flats. The fact that those sublessees made a lower contribution by way of service charges to the landlord's expenses than the sublessees of other flats in the same development did not mean that their subleases failed, for the purposes of s.35(2), to "make satisfactory provision" for the recovery of expenditure: see also, *Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC).

In *Triplerose Ltd v Stride* [2019] UKUT 99 (LC), on the other hand, the First-tier Tribunal was held to have been wrong to vary the terms of a tenant's lease of a flat by requiring it to contribute towards the cost of the repair and renewal of the main structure of the building in which the flat was situated and of employing staff or agents. The fact that the lease made no provision for the tenant to contribute towards those costs did not make it unsatisfactory for the purposes of s.35.

In *Simon v St Mildred's Court Resident Association Ltd* [2015] UKUT 508 (LC), the Upper Tribunal held that, when applying to vary more than eight leases, the requirement, under s.37(5)(b), that at least 75 per cent of the parties concerned consented to the application had to be satisfied before the application was made. Moreover, it had not been sufficient for a residents' association to ballot the relevant parties on the same day as issuing the application.

In *Shellpoint Trustees Ltd v Barnett* [2012] UKUT 375 (LC), the leases covered 365 flats within three blocks. The requisite majority of the tenants had supported the two variations sought by the landlords. The first variation involved the replacement of the communal boiler system, which was old and not working properly, with individual flat boilers. The second variation involved allowing the landlord to recover the management and legal costs of enforcing certain covenants through service charges - the proposed new clauses permitted the landlord to recover not just the normal costs to be expected in managing a block of flats but also the costs of enforcing covenants at their and/or the tenants' initiative, as well as the costs of forfeiture proceedings and the enforcement of covenants of particular interest to them. These variations represented a quid pro quo reached after negotiations between the landlord and the tenants. The Upper Tribunal, not surprisingly, refused to vary the leases so as to give effect to these changes. These went far beyond what was necessary to achieve the replacement of the communal boiler system. Moreover, it had not been appropriate for the landlord to use the problems with that system as an opportunity to substantially improve its contractual position by demanding new covenants unrelated to achieving the object of installing a new system. The jurisdiction under s.37 did not provide a statutory framework for implementing majority decisions or compromises with landlords; the jurisdiction was to vary leases in order to satisfactorily achieve a given object or objects. It would, in any event, have been inappropriate to make an order varying the leases since these additional variations would be likely to substantially prejudice the tenants and a compensatory award under s.38(10) would not afford them adequate redress.

Deed of Rectification and Variation

The following is a draft Deed of Rectification and Variation made pursuant to an order under s.35(1) of the Landlord and Tenant Act 1987:

This **DEED OF RECTIFICATION AND VARIATION** is made the [] day of [] 2020 BETWEEN [] of [] (hereinafter referred to as "the Lessor") of the one part and [] of [] (hereinafter called "the Lessee") of the other part

WHEREAS

1. This Deed is supplemental to a Lease (“the Lease”), dated [] and made between the Lessor of the one part and the Lessee of the other part whereby the leasehold flat known as [] (“the Flat”) was demised to the Lessee for a term of One hundred years from [] subject to the payment of the rents and the observance of the lessee’s covenants and conditions therein contained
2. The Lease is registered at HM Land Registry under Title Number []
3. As a result of errors the Lease did not reflect the true intention of the parties and the Lessor and Lessee have agreed it should be rectified and varied in the manner hereinafter appearing and the Lease should include additional covenants by the [Lessor] [Lessee] as are hereinafter contained

NOW THIS DEED WITNESSETH as follows:

1. The Lessor and the Lessee agree that the Lease is rectified and varied and shall henceforth take effect and be read and construed as follows:
 - (a) Clause [] of the Lease as set out in Paragraph 1 of the First Schedule hereto shall be rectified and is varied in the manner appearing in Paragraph 1 of the Second Schedule hereto
 - (b) That there shall be added to Clause [] of the Lease additional covenants by the [Lessor] [Lessee] as set out in the Third Schedule hereto
 - (c) That Clause [] of the Lease setting out the formula for calculating the service charge payable under the Lease for the Flat shall be rectified and is varied in the manner as set out in the Fourth Schedule hereto
 - (d) [Etc.]
2. The Lessor and the Lessee agree to jointly apply to HM Land Registry to make the necessary entries on the Register of Title [] in order to give effect to the rectification and variations contained in this Deed

IN WITNESS whereof the parties hereto have hereunto set their hands and seal the day and year first above written

THE FIRST SCHEDULE above referred to

THE SECOND SCHEDULE above referred to

THE THIRD SCHEDULE above referred to

THE FOURTH SCHEDULE above referred to

The law is stated as at 6 October 2021.