UPPER TRIBUNAL (LANDS CHAMBER)

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LANDLORD AND TENANT – service charges – variation of lease – whether lease fails to make satisfactory provision for repair or maintenance – whether compensation payable for any loss or damage suffered by lessee – appeal allowed – sections 35 and 38 Landlord and Tenant Act 1987

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

TRIPLEROSE LIMITED **Appellant**

and

MS BRONWEN STRIDE **Respondent**

Re: 11 Crossfield Road,
London,
NW3 4NS

Judge John Behrens and A J Trott FRICS

Royal Courts of Justice

14 March 2019

Justin Bates and Ayesha Omar, instructed by Scott Cohen Solicitors, for the Appellant
Ms Bronwen Stride appeared on her own behalf as a litigant in person.

The following cases are referred to in this decision:

Cleary v Lakeside Developments Limited [2011] UKUT 264 (LC)
Shellpoint Trustees v Barnett [2012] UKUT 375 (LC)
Fairbairn v Etal Court Maintenance Ltd [2015] UKUT 639 (LC)
Nailrile Limited v Earl Cadogan [2009] RVR 95

DECISION

Introduction

1. This is an appeal against a decision of the First-tier Tribunal ("the F-tT") dated 27 March 2018. It concerns 11 Crossfield Road, London NW3 4NS, a late Victorian four-storey terraced house with basement in Belsize Park. The house is divided into four flats. Each of the flats has approximately 100 years remaining on their leases.

2. Triplerose Ltd ("Triplerose") is the lessee of the lower ground floor flat ("basement"); the other floors are let to Ms Teasdale, Ms Stride and Ms Ging. Ms Teasdale and Ms Ging occupy their flats though they may be empty; Triplerose and Ms Stride have sublet although the basement is currently on the market to let. The landlord of all four flats is House of Hector Ltd ("House of Hector"). House of Hector is a lessee-owned company with the sole purpose of holding the freehold of 11 Crossfield Road. The freehold is held by Ms Teasdale, Ms Stride and Ms Ging who are also directors.

3. The basement flat has its own entrance accessible by steps from the common frontage. It does not share any of the common parts of the building.

4. The problem at the heart of this case is that the four leases do not contain the same provisions for the payment of the service charge. In particular, Triplerose's lease provides that its only obligation is to contribute to the external painting. On this basis Triplerose is not liable to make any contribution towards the repair or renewal of the main structure of the building or the employment of staff or agents by the lessor for the performance of its obligations under the lease.

5. On 20 September 2017 Triplerose applied to the F-tT for an order under section 27A of the Landlord and Tenant Act 1985 as to whether a service charge is payable under its lease and, if so, the amount. Its contention was that many of the items could not be categorised as external painting and decorating. On 18 December 2017 House of Hector made a cross application to vary the terms of the basement lease under section 35 of the Landlord & Tenant Act 1987 ("the 1987 Act"). The F-tT decided to deal with both applications at the same time.

6. The hearing took place on 22 March 2018. After refusing an application for an adjournment the F-tT proceeded to deal with both applications. By its decision dated 27 March 2018 the F-tT varied the lease in three ways, two of which were relatively uncontroversial. It deleted an obsolete reference to the Fifth Schedule and it corrected an obvious mistake in relation to Triplerose's obligation to contribute to the insurance premiums. The controversial amendment compelled Triplerose to contribute one quarter of the cost of repair and renewal of the main structure of the building, and of the cost of any staff or agents employed by the landlord. The amendments were to take effect from the date of the order with the result that Triplerose was not liable for the controversial items of the service charge that had accrued

before that date. No compensation was awarded to Triplerose under section 38(10) of the 1987 Act.

7. Permission to appeal was refused by the F-tT on 1 May 2018 but subsequently granted by the Deputy President on 13 July 2018. In granting permission he said it was arguable that the mere fact that the allocation of responsibility for contributions by lessees towards the maintenance of the building is not in standard form and favours one lessee over others, is not a sufficient basis on which to treat those arrangements as unsatisfactory for the purpose of section 35 of the 1987 Act. The Deputy President also directed that the appeal would be a review of the decision with a view to a rehearing. He gave permission to either party to call an expert.

8. House of Hector did not file a respondent's notice and accordingly ceased to be a party to the appeal with effect from an order of the registrar dated 21 September 2018. On that date Ms Stride was added as a party to the appeal as the respondent. According to her skeleton argument it was impossible to get the necessary quorum to enable House of Hector to oppose the appeal. She appears in her capacity as the lessee of the first floor flat.

9. At the appeal Triplerose relied on the expert opinion of Mr Jason Mellor DipSurvPrac who produced a report dated 3 January 2019 relating to the compensation payable. Triplerose were represented by Mr Justin Bates and Ms Ayesha Omar, both of Counsel; Ms Stride represented herself as a litigant in person. Both Mr Bates and Ms Stride produced helpful skeleton arguments for which we are grateful. Ms Stride also produced several additional documents including quotations for painting the exterior of the building and for the scaffolding necessary and the sale details of the upper ground and first floor flats and letting details of the basement flat

The lease

10. The basement lease is dated 17 November 1994. It is made between Itshak Goldenberg and Ram Matza (the lessor) and Goma Properties Ltd (the lessee). The lease is for a term of 125 years from 25 May 1994. The premium for the lease was £47,500 and the ground rent was £100 p.a. increasing by £100 p.a. every 33 years so that the last 25 years will be at a rent of £400 p.a.

11. The lessee's covenants are contained in clause 3 and the lessor's covenants are in clause 4. For the purpose of this decision it is only necessary to consider the lessee's obligations to contribute in clause 3(iii)(a) and the Fourth Schedule; clause 3(iv) and the lessor's obligations in clauses 4(c), (d) and (g). Insofar as relevant these clauses provide:

> Clause 3(iii)(a)
>
> "to contribute and pay to the Lessor … one equal fourth part of the costs charges expenses outgoings and matters mentioned in the Fourth Schedule … and one equal one-third of such matters mentioned in the Fifth Schedule …"

Clause 3(iv)

"To pay on demand one quarter of the insurance premiums payable by the Lessor for maintaining the insurance of the Building in accordance with clause 4(g) [sic] of this lease."

Fourth Schedule

"Costs expenses outgoings and matters in respect of which the Lessee is to contribute one-third of the cost under clause 3(iii) above.

The costs charges expenses and outgoings from time to time incurred by the Lessor in performing the obligations and each of them contained in clause 4(d)."

The lease contains no Fifth Schedule.

Clause 4(c)

"that (subject to the Lessee's contribution and payment hereinbefore provided) the Lessor will maintain repair and keep in good and substantial repair and renew the main structure of the Building …"

Clause 4(d)

"that (subject to contribution and payment as aforesaid) the Lessor will paint and decorate the exterior parts of the Building usually or previously painted or decorated in such manner as the Lessor shall from time to time in its discretion think fit."

Clause 4(f)(i)

"that the Lessor will at all times … insure and keep insured the Building against loss and damage …"

Clause 4(g)

"Provided always it is hereby agreed that the Lessor may employ and pay such staff or agents for the performance of its obligations as it shall think fit."

The other leases

12. As pointed out in the introduction the leases of the four flats do not present a consistent picture:

The upper ground floor lease

13. This lease is dated 1 September 1994. It is made between the same lessor and Nishit Kotecha. It was let for a term of 125 years from 25 March 1994 at a premium of £138,000. The ground rent provisions are the same as those in the basement lease. The structure of the covenants is identical to that in the basement lease. However, there are some differences in the numbering in that clause 4(d) is an additional clause. This clause provides that the lessor will keep the internal common parts of the building clean, lighted, maintained and decorated. This addition means the obligation to insure is in clause 4(g)(i) rather than 4(f)(i). There is, however, a real difference in the Fourth and Fifth Schedules.

14. The Fourth Schedule provides for the lessee to contribute one quarter of the costs of all the lessor's obligations in clause 4 (other than clause 4(d)) and the costs of employing managing agents. The Fifth Schedule provides for the lessee to contribute one third of the cost of complying with clause 4(d).

The first floor lease

15. This lease is dated 30 January 1995. It is made between the same lessor and David and Galia Goldenberg (who may be related). It is for the same term and at the same rents as the other two leases. The premium was £59,900. The structure of the covenants is identical to that of the other two leases. But the lease does not contain the additional clause 4(d) that is found in the upper ground floor lease. The Fourth and Fifth Schedules appear to have gone badly awry. Both schedules refer to an obligation to contribute one third, whereas the Fourth Schedule should refer to a contribution of one quarter (see clause 3(iii)(a)). The only clause referred to in the Fourth Schedule is clause 4(d). This is the exterior painting clause. The Fifth Schedule simply refers to (unspecified) clause (d).

16. On 8 May 1998 the parties executed a Deed of Variation. Under that deed the lessee agreed to contribute one quarter of the cost of repairing and maintaining the main structure of the building and one third of the cost of painting the internal common parts. There was no obligation to contribute to external painting thereafter.

The top floor lease

17. This lease is dated 20 August 1996. It is made between the same lessor and Ram Matza (i.e one of the landlords). It is for the same term and at the same rents as the other three leases. There was no premium. The structure of the covenants is the same as the other three leases. The Fourth Schedule (one quarter contribution) includes all the obligations of the lessor except for clause 4(d) (the exterior painting clause) and also the costs of employing managing agents. The Fifth Schedule (one third contribution) included just clause 4(d).

18. Each of the other leases provided at clause 3(iv) for a lessee's contribution of one quarter to the lessor's cost of building insurance.

Summary

19. In her skeleton argument Ms Stride produced a helpful table which we have amended. We have omitted the column headed "Exterior Outlay" as it does not appear in the leases and have added the appropriate fraction provided for by the leases.

Flat	**Date of lease**	**Insurance**	**Structural repair & maintenance**	**Management**	**Exterior painting and decoration**	**Interior decoration (common parts)**
Upper ground	1/9/94	1/4	1/4	1/4	1/4	1/3
Lower ground	17/11/94	1/4			1/4[1]	
First floor	30/1/95					
	8/5/98 Deed of variation	1/4	1/4			1/3
Top floor	20/8/96	1/4	1/4	1/4	1/3	
Total fraction		100%	3/4	1/2	5/6	2/3

20. Thus it will be seen that as currently drafted the leases provide for the lessor to recover:

[1] Ms Stride submitted that the obligation was 1/3 and not 1/4. We are however satisfied that (especially having regard to the lease of the Upper Ground Floor which was part of the background information), that the intention was that the fraction for the Fourth Schedule was 1/4 and for the Fifth (where it existed) was 1/3.

(a) All of the insurance costs;

(b) 5/6 of the external painting and decorating costs;

(c) 3/4 of the external structural repair and maintenance costs;

(d) 1/2 of the management costs[2]; and

(e) 2/3 of internal decoration (common parts) costs.

21. The effect of the variation as ordered by the F-tT would be to allow recovery of all the structural repair costs and 3/4 of the management costs. The remaining fractions would be unaltered.

The amounts of the service charge

22. In its application Triplerose disputed its liability for the years 2014-2015, 2015-2016, 2016 -2017, and 2017- 2018. According to its application the sums involved can be seen from the following table:

	2014-2015	**2015-2016**	**2016-2017**	**2017-2018**
	(£)	**(£)**	**(£)**	**(£)**
Insurance		1,580.67	1,580.67	1,659.70
Maintenance		432	432	500
Electricity		704.79	704.79	90
Gutter Cleaning				180
Managing Agent		1,824	1,824	1,824
Professional Fees		13	13	13
TOTAL	5,152	4,704.46	4,704.46	4,266.70

23. It will be seen that nothing (unless included in the maintenance figure) has been spent on structural repairs or external painting in recent years. The effect of the F-tT's decision is that Triplerose had to contribute its share of the insurance premiums but that all the other items were not recoverable under its lease. We were told by Ms Stride that Triplerose has still not paid any

[2] The clause relating to management costs is unusual in that it allows a levy of 12.5% of the costs incurred by the landlord if no managing agent is employed.

part of its share of the insurance premium. Mr Bates was not in a position either to confirm or deny it. Although it is not relevant to any point we have to decide, if it is true that the share of the premiums has not been paid we regard it as regrettable and hope that it will be remedied promptly. We cannot see that there could be any defence to an action in the county court for the recovery of Triplerose's share of the premiums with interest.

The provisions of the 1987 Act

24. The relevant provisions are sections 35 and 38 of the Act which provide:

> 35 Application by party to lease for variation of lease
>
> (1) Any party to a long lease of a flat may make an application to the appropriate tribunal for an order varying the lease in such manner as is specified in the application.
>
> (2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely –
>
> (a) the repair or maintenance of –
>
> (i) the flat in question, or
>
> (ii) the building containing the flat, or
>
> (iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;
>
> (b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);
>
> (c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;
>
> (d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease;

(g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include –

(a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and

(b) other factors relating to the condition of any such common parts.

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if –

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

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

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

38 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 subsection (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order...

(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…

(10) Where a tribunal makes an order under this section varying a lease the tribunal may, if it thinks fit, 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.

Authorities

25. Mr Bates pointed out that although there are a number of authorities of this Tribunal on this part of the 1987 Act none of the cases have reached the Court of Appeal. This lack of appellate guidance, he said, makes it difficult for advisers confidently to predict outcomes in what he described as a highly specialised niche area of the law.

26. He did, however, refer us to a number of authorities of this Tribunal which do give considerable guidance as to the correct approach. One of the cases to which our attention was drawn was *Cleary v Lakeside Developments Limited* [2011] UKUT 264 (LC). This was a decision of the President – George Bartlett QC. The detailed facts do not matter. It is sufficient to cite from paragraph 20 of the decision:

> "The case for the landlord, as recorded at paragraph 7 of the LVT's decision was that the leases of flats 1, 3, 4 and 5 failed to make satisfactory provision for the recovery of such expenditure 'in that they fail to make any provision for the payment of management fees despite the fact that flats 2 and 6 are liable to pay those fees and despite the fact that the applicant, as a corporate body, does in fact employ a managing agent.' The lessor's statement of case in the LVT said: 'The current arrangement means that the costs are apportioned between the landlord and two of the leaseholders, yet all the leaseholders receive the benefits.'"

The President made a number of observations about this part of the 1987 Act in paragraphs 26, 27, 30 and 31:

> "26. What the LVT had to be satisfied about was that … each of the four leases failed to make satisfactory provision with respect to the recovery by the lessor of expenditure incurred by it for the benefit of the lessee. The case for the lessor was that at present the cost to the lessor of employing a manager are borne by the lessor, with contributions from two of the lessees. It is this which is said to be unsatisfactory and the new provision is designed to change…
>
> 27. The case for the lessor, as I have said, was that at present the cost[s] to the lessor of employing a manager are borne by the lessor, with contributions from two of the lessees. There is, however, nothing unsatisfactory about that in itself. It is the result of the contractual arrangements freely entered into between lessor and lessees. In the case of two flats the lessor and the lessees have agreed, in provisions expressed slightly differently, that the lessee should be obliged to pay a contribution towards the cost of management. But it is notable that in the most recent lease modification, that contained in the surrender and lease of flat 1, no such provision was included despite the fact that the lease provisions were substantially altered in other respects. If the absence of a management fee provision was unsatisfactory Lakeside could have ensured that it was included. The surrender and lease was entered into on 31 August 2006, two years only before the application was made to vary its terms and the terms of the other three leases. There is, in my judgment, nothing arguably 'unsatisfactory' in the fact that two lessees pay a contribution to the lessor's costs of management and four do not. It simply reflects different contractual provisions that do not appear to cause any difficulty in interpretation or application.
>
> …
>
> 30. I note also that in the LVT *Bath* case the tribunal varied leases so as to provide for the payment by the lessees of an annual sum for the costs and expenses of management. It concluded that it was in the interests of the lessees for management of the building to ensure that the tasks associated with its insurance and maintenance should be carried out properly and that this should be done in order to maintain the value of the lessees' investments as well as the amenities of the property. The level of income generated was such that it presented a risk of future neglect. That was a fully reasoned decision based on the evidence that the LVT had before it. I can see that there may be circumstances where the financial position of the lessor may make the absence of a lessee's covenant to pay for the cost of management unsatisfactory. This could be the case, for instance, where there was an RTM company with no other source of income. But evidence would be needed to show that there was a particular need in the circumstances of the case. In the present case, in my judgment, there was no evidence on which the LVT could conclude that the absence of such a provision was unsatisfactory.

> 31. The LVT determined that no compensation should be paid under section 38(1) of the Act (under which it had power, if it thought fit, to make an order for the provision of compensation in respect of any loss or disadvantage that any lessee was likely to suffer as a result of the variation). It said (see above) that 'no proper evidence' had been advanced by the lessees to show that the new clause 'would necessarily result' in the diminution in value of their leases or as to the extent of such diminution in value. It is not, of course, the case that a loss or disadvantage is only to be measured in terms of the diminution in value of a party's interest in the property, and it is on the face of it hard to see how a requirement that the lessees should have to pay £200 a year for something for which they at present pay nothing would not be a loss or disadvantage requiring the payment of compensation. However, as I am satisfied that the LVT was wrong to direct the variation, this matter does not arise for determination."

27. Ms Stride helpfully drew our attention to a passage from paragraph 98 of *Shellpoint Trustees v Barnett* [2012] UKUT 245[3]. In that passage His Honour Judge Gerald and Mr Trott reiterated the point made by the President in the last three sentences of paragraph 30 of *Cleary*. In those circumstances it is not necessary to set it out in full.

28. Mr Bates also drew our attention to the decision of the Deputy President in *Fairbairn v Etal Court Maintenance Ltd* [2015] UKUT 639 (LC) for an observation he made at paragraph 42:

> "Nor do I consider that it is of practical significance to the interpretation of the lease that the respondent is apparently a company without means other than those available to it directly from its members in that capacity, or through the service charge from the same people in their capacity as leaseholder. In particular it cannot be assumed that all expenditure by the respondent company must have been intended to be reimbursed through the service charge. If a liability is incurred which cannot be met through the service charge it will be for the members either to fund that liability voluntarily or face the risk of the respondent becoming insolvent. That is a characteristic of all leaseholder owned landlords or management companies."

As Mr Bates pointed out the issue in *Fairbairn* was one of construction. It did not concern the 1987 Act at all. However, he submitted that the points made in that paragraph were relevant.

The reasoning of the F-tT

29. The first question the F-tT had to decide was whether the lease made satisfactory provision in relation to the matters set out in sections 35(2) and (3). It summarised the lessor's submissions in paragraphs 15 and 16 of its decision. In summary the lessor submitted that the proposed variations were "absolutely standard" provisions to be found in most leases, that House of Hector was a corporate vehicle for holding the freehold of the building with no other

[3] [2012] UKUT 375 (LC).

assets. Its only income is the service charge. Accordingly, if Triplerose did not contribute to the upkeep of the building its upkeep would be at risk. Accordingly, Triplerose would be prejudiced if the variations were *not* made.

30. In paragraphs 24 and 25 of the decision the F-tT agreed with these submissions. It pointed out that House of Hector is a single asset entity. If there was no contribution from Triplerose in relation to structural repairs this could affect the integrity of the building. Furthermore, it was not satisfactory that Triplerose should be subsidised by the three other tenants in the building.

31. In paragraph 27 of the decision the F-tT dealt with the question of prejudice and compensation. It was not satisfied that Triplerose would suffer any prejudice from the variations. It pointed out that the variation put in order an otherwise disorganised lease making the property manageable and avoiding potential litigation in the future. It thought it "entirely possible" that a potential purchaser might find the lease less attractive than the varied lease. Secondly, it said that there was no evidence before it upon which a finding of prejudice could be made although either party could have brought evidence of prejudice. Thirdly, it thought that the "improved position of the property would benefit Triplerose in the long run".

Mr Bates's submissions

Satisfactory provision

32. Mr Bates's primary submission was that the F-tT was wrong to find that the provisions in the lease were unsatisfactory. He submitted that the reasoning of the F-tT was inconsistent with *Cleary*. The fact that the proposed variation was "standard" or "common" was irrelevant. There was nothing even arguably unsatisfactory about the fact that different tenants pay different proportions of the expenses. It simply reflects different contractual provisions that do not appear to cause any difficulty in interpretation or application.

33. Mr Bates pointed out that the F-tT had not in fact identified under which provision of section 35 it was acting. This might be important because different considerations apply to the different headings.

34. Mr Bates said that all the leases contain an obligation by the lessor to repair the structure which prima facie is a satisfactory provision. Even though the original lessor was not a lessee owned company he accepted that the question whether the provision was satisfactory had to be considered at the time of the application to vary. Thus, the position could change from time to time. He also accepted there may be circumstances where the financial position of the lessor may make the absence of a lessee's covenant to pay for the cost of management unsatisfactory. However, as pointed out by the President in *Cleary* and by His Honour Judge Gerald in *Shellpoint* there would need to be evidence of a particular need in the circumstances of the case. Mr Bates said that there is no such evidence here. These leases have so far been in existence for over 20 years without any substantial problems. There is no evidence of any major disrepair. Indeed, Mr Mellor who gave evidence before us described the state of repair as quite good. Any

shortfall in the service charge has in fact been made good by the three shareholders of House of Hector. The sums involved have not been large and there is no evidence that there has been any difficulty. Mr Bates also pointed out that House of Hector was entitled to the ground rents from the lessees.

Prejudice and compensation.

35. Mr Bates submitted that the F-tT's approach was logically inconsistent. In order to understand this it is necessary to look at the history of the application to vary the lease. The written application to vary (signed by Ms Stride on behalf of House of Hector) was dated 18 December 2017. It was considered by Judge Timothy Powell on 22 December 2017. No oral case management hearing was ordered. Directions were given that the application to vary the lease and the lessee's section 27A application would be heard together on 22 March 2017. Those directions made provision for statements of case and hearing bundles but made no provision for expert evidence. 22 March 2017 was accordingly the first actual hearing of the application. At the hearing counsel for Triplerose applied for an adjournment in respect of the application to vary the lease so that expert evidence could be obtained on the question of compensation. This was refused by the F-tT. In so refusing it pointed out that there was an expert member of the panel and that these cases are often not assisted by expert evidence. Mr Bates submitted that it was logically inconsistent for the F-tT to refuse to adjourn on the basis that there was an expert surveyor on the panel and then to refuse compensation on the ground that there was no expert evidence to support it.

Ms Stride's submissions

36. Ms Stride started her submissions by complaining about the behaviour of Triplerose. She pointed out that it was a large investment company with large assets which was in effect taking advantage of the other tenants who were far less able to look after themselves.

37. She went on to explain the difficulties surrounding House of Hector. Initially no-one had realised that there were difficulties with these leases. However, after these proceedings had been commenced and they had realised that they each had different obligations under their leases conflicts of interest had arisen between them. Furthermore, the other two shareholders were often absent. One was in America and the other had apparently left the flat. As a result it was impossible to agree anything. Indeed, it was impossible to get a quorum at a meeting.

38. Ms Stride sought to uphold the decision of the F-tT for the reasons it gave. She did, however make a number of additional submissions. She submitted that Triplerose was obliged to pay 1/3 of the external painting under the terms of its lease so that the variation was in some respects beneficial to Triplerose. She submitted that there was a grey area between painting and repair and that of itself made the lease "unsatisfactory".

Discussion and Conclusion

39. In the course of his submissions Mr Bates commented that a special place in hell should be reserved for the person(s) who proof read and checked these four leases. We have no hesitation in agreeing that they demonstrate an astonishing lack of care and illustrate the dangers of cutting and pasting parts of a lease to another lease without checking the details. As the table in paragraph 22 above shows the result is a mess. We also agree that a layman unversed in the jurisprudence surrounding section 35 of the 1987 Act might describe it as "unsatisfactory".

40. However, in our view, Mr Bates's submissions on whether Triplerose's lease is unsatisfactory for the purposes of section 35 of the 1987 Act are correct. The fact that the proposed variations are common or standard does not make the original terms unsatisfactory. Equally the fact that different tenants make different contributions does not make the lease unsatisfactory. There is a repairing covenant so this is not a case where there is no obligation to repair. Because House of Hector is a lessee owned company and in the light of *Cleary* and *Shellpoint* we accept that there might be circumstances where the lack of adequate contributions from Triplerose could render the lease unsatisfactory. However, that can only be established by evidence. If, for example, the building required a major roof or other structural repair beyond the means of the members of House of Hector, that might constitute the necessary evidence. But there is no such evidence at present. Indeed, the current position is that the building is in reasonable condition and any shortfall in the service charge is being funded by the members of House of Hector.

41. We do not accept Ms Stride's additional submissions. In our view the true construction of this badly worded lease is that Triplerose are only liable for one quarter of the external painting costs. In our view the wording in clause 3(iii) takes precedence over the first paragraph of the Fourth Schedule. We are assisted in this construction by knowing that there are four flats that need outside painting and that in the earlier lease of the ground floor flat the proportion was one quarter.

42. Whilst we accept that there may be difficult decisions as to whether a particular item falls within the repair clause or the external painting clause we do not think this factor affects the question of whether the lease is unsatisfactory. Difficult items will have to be dealt with on a case by case basis. There are many leases with separate clauses for repair and painting and we do not think they can all be regarded as unsatisfactory.

43. It follows that the appeal must be allowed on the basis that Triplerose's lease is not unsatisfactory within the meaning of section 35 of the 1987 Act. It follows that the F-tT's order will be set aside.

44. In those circumstances it is not strictly necessary to deal with Triplerose's second ground of appeal and the question of prejudice and compensation. However, as they were fully argued, and we heard expert evidence de bene esse on prejudice and compensation we shall discuss the main points arising.

Prejudice and compensation

45. In our view there is considerable force in the submission that the F-tT treated Triplerose unfairly on the question of prejudice and compensation. The 22 March 2017 was the first hearing of the application to vary. There had been no oral case management conference and Judge Powell's directions made no provision for expert evidence. The application for an adjournment was refused in part because there was an expert surveyor on the panel. Yet the decision on prejudice was based – at least in part – on the lack of expert evidence.

46. Whilst we accept that having an orderly lease may add some value to it (see paragraphs 57 to 58 below) the fact remains that the effect of the variations is to impose an additional and immediate liability on Triplerose. As the President said in paragraph 31 of *Cleary*:

> "it is on the face of it hard to see how a requirement that the lessees should have to pay £200 a year for something for which they at present pay nothing would not be a loss or disadvantage requiring the payment of compensation."

47. In our view the decision on compensation and prejudice cannot stand. As noted above in granting permission to appeal the Deputy President directed that if the appeal is allowed there should be a rehearing and gave permission for expert evidence. We accordingly heard expert evidence from Mr Mellor.

48. Mr Mellor said that historic data suggested the typical service charge cost of the subject flat would be between £1,100 and £1,200 p.a. before any allowance for future major works. Allowing for the possibility of such works he assumed the saving to the lessee in the long term average service charge under the current lease was at least £1,250 p.a.

49. Mr Mellor acknowledged that his analysis included an allowance for insurance. He agreed this was inappropriate in the light of Mr Bates' concession that the wording of clause 3(iv) of the lease in its reference to clause 4(g) was mistaken and that properly construed that clause imposed an obligation on the lessee to pay a one-quarter share of the insurance premium. Mr Mellor said that the figure of savings should therefore be discounted by 40%, i.e. from £1,250 to £750.

50. Mr Mellor could not find any direct evidence of the sale of flats where the lessee had the benefit of paying a reduced service charge. Instead he approached the assessment of compensation by reference to:

(i) a lease extension claim under the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act") where he had acted for the tenant. The service charge was capped compared with the typical service charge. The parties agreed to capitalise the difference over the unexpired term of the lease at 5%, making a 25% deduction to reflect the risk that the lessor could make

a successful application to the F-tT for a variation to the service charge clause without payment of compensation;

(ii) a decision of the F-tT under the 1993 Act in which it allowed a discount of 1.48% from the value of three flats to be leased back to the freeholder to reflect an increase in the service charge payable from 8.15% of the total to 33.7%;

(iii) a decision of the Leasehold Valuation Tribunal in 2009 regarding lease extensions under the 1993 Act in which the LVT added 3% to the existing lease values to reflect the difference in the terms of the existing leases, which provided for service charges to be paid in arrears and with no contribution to a reserve/sinking fund, and those of the extended leases, which provided for service charges to be paid in advance and for a contribution to a reserve/sinking fund. They added a further 1% for the uncertainty about the future amount of such charges and contribution; and

(iv) capitalisation of the difference between the service charge proposed by the respondent and the service charge payable by the lessee under the existing lease. Mr Mellor did this in two ways. Firstly, he treated the difference as though it was ground rent receivable. He adopted two alternative capitalisation rates:

(a) 6%, described as the equated yield[4] on "vanilla" type ground rents; and

(b) 3.35% which was the yield adopted in a recent F-tT decision in the valuation "of a dynamic ground rent".

Secondly, Mr Mellor treated the difference as though it was a negative ground rent receivable by an intermediate lessee, i.e. where the rent receivable is less than the rent payable. He said he had adopted the valuation approach set out in *Nailrile Limited v Earl Cadogan* [2009] RVR 95 and used a yield of 2% which was the National Loan Fund Rate. He took 50% of the resultant figure as representing "part of a hypothetical marriage value calculation."

51. Applying each of these methods in turn, and discounting by 40% to exclude the insurance contributions, Mr Mellor calculated the value of the benefit to the lessee of having advantageous service charge terms:

[4] The equated yield is the internal rate of return of a property investment making explicit assumptions about future rental growth. Mr Mellor said it would have been more appropriate to adopt an initial (equivalent) yield, without making any such assumptions. He said the initial yield was 4.5%.

(i) £11,100: capitalising savings of £1,250 at 5% and deducting 25%.

(ii) £7,560: based on 1.48% of Mr Mellor's estimate of £850,000 as the capital value of the lower ground floor flat.

(iii) £20,400: based on 4% of £850,000.

(iv) Capitalising the difference between the proposed and existing service charges:

(a) £12,420: capitalised at 6%;

(b) £21,300: capitalised at 3.35%

(c) £15,660: capitalised at 2% and "apportioning 50% to the tenant".

52. In the light of these results Mr Mellor said that the compensation payable to the applicant should be £12,000.

53. Two of Mr Mellor's methods ((ii) and (iii)) depend upon his estimate of the capital value of the flat at £850,000. His expert report gave no explanation of this figure but at the hearing, and without any prior notification, Mr Mellor referred to the sale in September 2016 of a comparable lower ground floor flat at 13A Crossfield Road for £1m. He said this was a superior flat to the subject property because it was an end of terrace flat with a side entrance, and side windows, a wider plot and a good size garden. It had three bedrooms and measured 853sq ft. Mr Mellor discounted the purchase price by 15% to give an equivalent value for the subject flat of £850,000. Ms Stride said this figure was too high and referred to the unsuccessful marketing of the upper ground floor flat in the subject building over the last 12 months. She said this had been placed on the market at £800,000. Mr Mellor said, having spoken to the agent, that the flat was under offer at or around £725,000 but was withdrawn from the market in February 2019 when the sale fell through. Ms Stride also noted that Mr Mellor was basing his valuation on the layout of the subject flat before its modernisation in 2014. Mr Mellor acknowledged he had not inspected the interior of the flat.

54. Mr Mellor noted that at 629 sq ft the upper ground floor flat was smaller than the subject flat, which he assumed was approximately the same size as 13A Crossfield Road, i.e. some 850 sq ft. The value of the upper ground floor flat, assuming the sale had proceeded at £725,000 was approximately £1,150 per sq ft. Mr Mellor said the upper ground floor flat was better and discounted its value by 10% to £1,050 (rounded) per sq ft and discounted again to £1,000 per sq ft to allow for a "quantum effect". This gave a capital value of £850,000 which supported the valuation derived from the sale of 13A Crossfield Road.

55. We consider Mr Mellor's valuation to be too high. He acknowledged that the market had softened by 5% since the sale of 13A Crossfield in 2016. By comparison with the subject property that flat had an extra bedroom, an extra bathroom, a larger garden, an entrance hall and a better end of terrace location. Our opinion, based on that comparable, the subject flat is worth £800,000.

56. Substituting this figure into Mr Mellor's methods (ii) and (iii) above gives a revised compensation figure of £7,100 and £19,200 respectively.

57. Mr Mellor determined the compensation by using a range of methods in the absence of direct comparables. Mr Mellor fairly conceded that there were limitations upon the use of these methods given that they were concerned with different statutory regimes. Subject to these limitations we think this is a reasonable approach. The average of Mr Mellor's calculations, as adjusted, is £14,463. Mr Mellor said in his expert report that a number of purchasers might be put off by the current service charge arrangement due to (i) the fear of litigation; and (ii) the risk that the freeholder will not properly maintain the building in future due to a service charge shortfall. This echoes the view of the F-tT at paragraph 15 of this decision where it said if the:

> "Respondent's lease did not provide for it to contribute to these expenses the integrity of the building and its upkeep generally would be at risk, and far from being prejudiced by the proposed variation, it would be prejudiced if the variation were not made."

Mr Mellor concluded that "the value of the flat is likely to be enhanced at least [to] some degree from the reduced service charge obligations."

58. We agree that there are benefits in having a lease structure which provides fully and fairly for the recovery of service charges and that the inadequate arrangements in the present lease would discourage prudent and well-informed purchasers. The proposed variation of the lease would remove this detrimental effect (at least insofar as the subject flat is concerned) and, in our opinion, would increase the value of the lease to a degree. Such an increase would partially offset the loss or disadvantage of the proposed variation to the appellant and we consider the average figure of £14,463 should be reduced by one-third to reflect this. This gives a figure of compensation of £9,642 which we round to £9,500.

Disposal

59. Mr Bates readily accepted that no prejudice was caused by the variations relating to insurance and striking out the reference to the non-existent Fifth Schedule. As he accepted there is no difficulty in construing the lease as imposing an obligation to pay a one-quarter share of the insurance premium. Thus, no variation is necessary on either of these issues.

60. We allow the appeal on the basis that Triplerose's lease is not unsatisfactory within the meaning of section 35 of the 1987 Act.

Dated 11 April 2019

Judge John Behrens

A J Trott FRICS

Member, Upper Tribunal (Lands Chamber)

ADDENDUM

61. Triplerose has applied under Rule 10(14) of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 (as amended) that Ms Stride reimburse the fees of £1,045 paid to the Upper Tribunal, being an application fee of £220, an appeal lodging fee of £275 and a hearing fee of £550. Ms Stride has objected to the application.

62. Rule 10 of the 2010 Rules is concerned with orders for costs and without going into detail it is plain that this is not a case where an order for costs could be made in favour of Triplerose. However, this is not an application for costs. Rather it is an application under rule 10(14) which provides:

> "The Tribunal may order a party to pay to another party costs of an amount equal to the whole or part of any fee paid (which has not been remitted by the Lord Chancellor under the Upper Tribunal (Lands Chamber) Fees Order 2009) in the proceedings by that other party that is not otherwise included in an award of costs."

63. It is plain from the wording of the rule that the power is discretionary. So far as we are aware there is no appellate authority on when the power should not be exercised. Certainly we were not referred to any such authority by the parties. A number of factors seem to us relevant to the exercise of our discretion:

(i) Triplerose was the successful party in the appeal. We reversed the order of the F-tT.

(ii) Ms Stride is not the landlord. The order appealed against was obtained by the landlord in the F-tT. Thus the necessity to appeal was not caused by Ms Stride and the fees which Triplerose seek to recover would have been incurred even without Ms Stride's intervention.

(iii) There is an inequality of resources between Triplerose and Ms Stride, and/or the landlord.

(iv) We were unimpressed with the fact that Triplerose had still not paid its share of the insurance premium.

64. In all the circumstances we have decided not to order Ms Stride to reimburse the fees to Triplerose. The application is dismissed.

Dated 12 August 2019

Judge John Behrens

A J Trott FRICS
Member, Upper Tribunal (Lands Chamber