

LEASE CONFERENCES



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VARIATION OF RESIDENTIAL LEASES

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What is a lease?



- A contract
- A deed under seal
- Interest in land
- Capable of being sold/mortgaged
- Obligations imposed on parties
- Duration

Why change a lease?



Why change the lease?



- Freeholder
- Facilitate management
 - no longer fit for purpose
 - Lack of advance service charges or sinking fund
 - Inability to recover improvement costs
 - Inability to recover professional fees including legal costs
 - Cannot recover interest on late payment



Why change the lease?

Leaseholder/purchaser

- Improve marketability
 - CML Lenders' Handbook requirements
- Poorly drawn
 - eg who owns windows/balconies?
- Lack of mutual enforceability
- Bars on subletting, alterations, satellite dishes, pets



Tackling problems without varying the lease





Tackling problems without varying the lease

Indemnity insurance

- CML Lenders' Handbook - Leasehold Property (Condition 5.14)
- If the terms of the lease are unsatisfactory, you must obtain a suitable deed of variation to remedy the defect. We may accept indemnity insurance (Condition 5.14.11)
- Policies available for lack of adequate repairing and maintenance obligations, no landlord obligation to undertake management company's obligations when it goes into liquidation

Tackling problems without varying the lease



- Altering articles of association
 - *Morshhead Mansions Limited v Di Marco* [2008] EWCA Civ 1371
- Does lease give power to add to or amend regulations/rules?

Tackling problems without varying the lease



- Alternative dispute resolution
- Seeking appointment of manager by the appropriate Tribunal - Part II of the Landlord and Tenant Act 1987
 - First-tier Tribunal (Property Chamber) - England
 - Leasehold Valuation Tribunal - Wales

Varying the lease - ways forward



- Rectification
- Unfair Terms in Consumer Contracts Regulations 1999
- By deed
- By statute
 - Landlord and Tenant Act 1987 Part IV
 - Schedule 11 Commonhold and Leasehold Reform Act 2002
 - Leasehold Reform Housing and Urban Development Act 1993
 - Housing Act 1985

Rectification



- Equitable remedy
- Intention of the parties not carried through into final document
- Consider if error can be solved by interpretation
- Importance of evidence
- Litigation commercially worthwhile?

Unfair terms in Consumer Contracts Regulations 1999



- Regulations apply to leases
 - London Borough of Newham v Khatun [2004] EWCA Civ 55
- Applies to leases granted on or after 1 July 1995
- Does not apply to leases individually negotiated

Unfair terms in Consumer Contracts Regulations 1999



- Is the term unfair?
 - "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" (reg 5(1))
- Does not apply to premium, rent or description of the demise

Potentially unfair terms



- Office of Fair Trading Guidance on Unfair Terms in Tenancy Agreements
- Challenging restrictions on alterations, subletting, pets
- Service charge items
 - Jurisdiction of the appropriate Tribunal
 - Canary Riverside v Schilling (LRX/65/2005)

Variation of the lease - by deed



- Consensual
- Proper drafting and execution
 - recitals - parties/supplemental to lease/intent to vary lease, clearly state additions/deletions
- "Save as hereby varied the lease shall continue in full force and effect"

Variation of the lease - by deed



- Register at HM Land Registry (freehold/leasehold title)
- Careful!
 - implied surrender and re-grant?
 - extending term of the lease
 - adding to the premises

The Landlord and Tenant Act 1987



- **Section 35** An application to vary because the lease fails to make satisfactory provision for repair, maintenance, provision of services, recovery of monies expended for the benefit of tenants and the computation of service charges
- **Section 36** A counter application for variation of leases of other flats with the same landlord on ground that the other leases fails to make satisfactory provision as above

The Landlord and Tenant Act 1987



- **Section 37** An application to vary 2 or more leases on the ground that variation cannot be satisfactorily achieved unless all the leases are varied to the same effect
- **Section 40** An application to vary lease of a dwelling as lease fails to make satisfactory provision in relation to insurance

Section 35



- Flats only
- Prerequisite - failure to make **satisfactory provision** in respect of certain matters

Satisfactory provision



- Question of fact for the Tribunal to judge in all the appropriate circumstances
 - Eg nature of landlord
- Lease does not fail to make satisfactory provision simply because it could have been better or more explicitly drafted
- Need to imply a term not necessarily an indication that lease fails to make satisfactory provision for the problem in question
- *Gianfresco v Houghton LRX/10/2007*

Satisfactory provision



- Not clear whether meaning of "fails to make satisfactory provision" is objective or subjective
- *Stapel v Bellshore Property Investments Limited [2001] 3 EGLR 7*

Section 35(2) list of matters



- Repair or maintenance of flat/building
- Insurance
- Repair or maintenance of installations necessary for a reasonable standard of accommodation
- Provision or maintenance of services reasonably necessary to ensure a reasonable standard of accommodation
- Recovery by one party to the lease from another of expenditure incurred or to be incurred
- Computation of service charge
- Such other matters prescribed by regulations



s35(2)(a) – repair or maintenance

- Failure to make satisfactory provision in relation to the repair or maintenance of
 - The flat in question
 - The building containing the flat, or
 - 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
 - rights of way
 - paths
 - gardens
 - external garages
 - recreation areas
 - fire escape



s35(2)(b) - insurance

- Failure to make satisfactory provision for the insurance of
 - The building containing the flat, or
 - Any land or building which is let to the tenant or in respect of which rights are conferred on him under it



s35(2)(b) - insurance

- s38(7) [A tribunal] shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease
 - a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes
 - b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes, or
 - c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer

s35(2)(c)-(d) – installations



- Failure to make satisfactory provision in relation to repair or maintenance of any installations which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation
- Installations do not need to be in the same building
- Can cover installations supplying water, gas, electricity

s35(2)(c)-(d) – services



- 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 the 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
- Examples: water, electricity, gas, cleaning of common parts

Reasonable standard of accommodation - section 35(3)



- Includes 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
- other factors relating to the condition of any such common parts

s35(2)(e) - expenditure



- Failure to make satisfactory provision in relation to the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by it on behalf of or for the benefit of that other party or of a number of persons who include that other party

Interest and charges - s35(3A)



- Relevant factors for determining 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
 - Interest
 - Administration charges

s35(2)(e) - expenditure



- Case law
 - (1) *Cleary* (2) *Robertson* and (3) *Feather v Lakeside Developments Limited* [2011] UKUT 264 (LC) (LRX/38/2010)

s35(2)(f) – computation of a service charge



- Failure to make satisfactory provision relating to computation of a service charge payable under the lease
- s35(4) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if its recovery is more or less than 100% of the expenditure incurred or to be incurred

Computation of a service charge



- Case law
 - Morgan v Fletcher and ors [2009] UKUT 186 (LC) (LRX/81/2008)
 - (1) Cleary (2) Robertson and (3) Feather v Lakeside Developments Limited [2011] UKUT 264 (LC) (LRX/38/2010)

s35(2)(g) – other matters



- Introduced by CLRA 2002 on 26 July 2002
- No other matters as yet

s36 – counter applications



- Once application made to the Tribunal under Section 35 by any party to a lease
- Any other party may apply to Tribunal requesting it to vary other leases if an order is made varying the lease following the Section 35 application
- Corresponding variation
- Need not be a lease of a flat which in same building, nor a lease drafted in identical terms
- Must share the same landlord

s36 – grounds



- Each of the leases specified in the application fails to make satisfactory provision with respect to the matter/matters specified in the Section 35 application
- and....

s36 – grounds



- If any variation is made consequent on the Section 35 application it would be in the interests of the person making the counter-application (or other parties to the leases specified in the application) to have all the leases in question varied to the same effect

s37 –majority application



- Application in respect of two or more leases of flats
- Landlord must be the same person
- Need not be leases of flats in same building
- Leases need not be drafted in identical terms
- May be made by landlord or any of the tenants

s37 – majority applications - grounds



- The object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect
- No need for a "failure to make satisfactory provision"

Majority application - the numbers



- s37(5) Any such application shall only be made:
 - where the application is in respect of less than nine leases, all, or all but one, of the **parties concerned** consent to it, or
 - where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10% of the total number of the parties concerned and at least 75% of that number consent

Parties concerned



- Tenant under the lease
- Landlord
- Right to Manage company

Majority application



- Decide percentage supporting/opposing application as at the date of application submitted to the tribunal not the date of the hearing
- Whether a person is deemed to be opposed is a matter to be decided objectively by the tribunal
- It is for the applicant to satisfy the tribunal that percentage requirements have been met
- *Dixon and others v Wellington Close Management Limited [2012] UKUT 95 (LC)*

s40 - dwellings other than flats



- Application by a party to a long lease of a dwelling other than a flat
- Houses and other dwellings which do not fall within the definition of a flat
- The lease fails to make satisfactory provision with respect to any matter relating to the insurance of the dwelling, including the recovery of the costs of such insurance

Long lease - s40(4)



A long lease shall not be regarded as a long lease of a dwelling if

- a) the demised premises consist of three or more dwellings; or
- b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies

Owner of more than three dwellings



- An application under subsection (1) may not be made by a person who is a tenant under a long lease of a dwelling if, by virtue of that lease and one or more other long leases of dwellings, he is also a tenant from the same landlord of at least two other dwellings
- For these purposes of subsection any tenant of a dwelling who is a body corporate shall be treated as a tenant of any other dwelling held from the same landlord which is let under a long lease to an associated company, as defined in section 20(1)

Associated company



- "Associated company", in relation to a body corporate, means another body corporate which is (within the meaning of section 736 of the Companies Act 1985) that body's holding company, a subsidiary of that body or another subsidiary of that body's holding company



Making of the order





Landlord and Tenant Act 1987 s38 - orders

- 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,
 - iii. 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
- Baystone Investments Limited v Mr Perkins and Others [2010]UKUT 70 (LC) (LRX/115/2008)



Making of the order

- The variation ordered may be either the variation specified in the relevant Section 35/36 application or such other variation as the tribunal thinks fit



Making of the order

- The tribunal may
 - Make an order varying a lease in such manner as is specified in the order
 - Make an order directing the parties to the lease to vary it in such manner as is so specified



Making of the order

- The tribunal may direct that a memorandum of any variation of a lease effected by an order shall be endorsed on such documents as are specified in the order
 - eg copy leases



Order can take effect retrospectively

- *Brickfield Properties Limited v Botten [2013] UKUT 133(LC)*
- Variation of the lease backdated to the date when the defect in the lease arose

s38(10) - Compensation



- Where the court makes an order under this section varying a lease the court 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 court considers he is likely to suffer as a result of the variation**

Compensation



- Rarely awarded
- Variation as benefiting the parties
- How to assess compensation
 - Increase in service charge percentage

Landlord and Tenant Act 1987



- s39 – effect of an order binds not only binds the parties to the lease for the time being but can bind third parties
 - Including any predecessors in title
- Binds sureties
- Protection to persons finding themselves bound where notice of the proceedings was not served on them
 - Damages for breach of a statutory duty
 - Application to the Tribunal for cancellation/ modification of the variation

Tribunal procedure



- The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
- The Leasehold Valuation Tribunals (Procedure) (Wales) Regulations 2004

Tribunal procedure



- Documentation required:
 - Leasehold 04 application form
 - in England
 - Copies of the relevant lease(s)
 - List of name and address of every person likely to be affected by the claim and a statement that each person has been served with notice of the application
 - Section 37 application - details of the number of persons consenting to or opposing the proposed variation together with evidence establishing these numbers

Leasehold 04 application form



- Details of applicants and respondents
- Lease variation details
 - Grounds of the claim
 - Date and term of the lease(s)
 - The relevant term of the lease(s)
 - A draft of the variation sought

Leasehold 04 application form



- Section 20C limitation of costs
- Deal with application without a hearing?
- Track preferences
- Availability
- Venue requirements

Leasehold 04 application form



- Application fee based on number of dwellings
 - £100 fixed fee plus £200 hearing fee
- Fee remission
- Send form and fee to correct regional office

Commonhold and Leasehold Reform Act 2002



- Schedule 11 - administration charges only
- For administration charges which are not variable
- Grounds for variation contained in paragraph 3
 - Unreasonable
 - Formula for calculation is unreasonable

Leasehold Reform, Housing and Urban Development Act 1993



- s57(1) (a) to (c) new lease to be on more or less same terms as original lease with scope to modify to take into account
 - of the omission of property
 - of alterations made to the property demised since the grant of the lease, or
 - of the combined effect of differences in the terms of any other leases from which the existing lease derives

Leasehold Reform, Housing and Urban Development Act 1993



- s57(6) (a) and (b) exclude or modify terms where
 - it is necessary to remedy a defect in the existing lease, or
 - it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes since the date of the existing lease and which affect the suitability of those provisions
- Gordon v Church Commissioners for England (LRA/110/2006)

Right to Buy leases - Housing Act 1985



- Implied covenants in Schedule 6 (14) (2)
- Can be varied by consent order made by the county court

Implied covenants



- To keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure

Implied covenants



- To keep in repair any other property over or in respect of which the tenant has rights by virtue of this Schedule
- To ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services

Varying implied terms



- The county court may, by order made with the consent of the parties, authorise the inclusion in the lease ... of provisions excluding or modifying the obligations of the landlord under the covenants implied by this paragraph, if it appears to the court that it is reasonable to do so

Next webinar: 1 December 2016



- Leasehold enquiry information forms – a guide for property professionals
- At the end of the webinar you should be able to:
 - Explain the key information a buyer of a lease should know
 - Describe at a high level the key documents the buyer should receive
 - Explain the main risks to the buyer's enjoyment of their property
 - Identify the main financial obligations the buyer is taking on

Questions?



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