

The background features a blue-tinted image of several business professionals in a meeting. Two men in the center are shaking hands, while others are visible in the foreground and background. A complex digital overlay of white lines and nodes is superimposed on the scene, suggesting a network or data flow.

「Landmark
Chambers」

Property Law Conference

www.propertylawconference.co.uk

VARIATION OF LEASES

Tom Jefferies

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The options

- Agreed variations
- Implied variations
- Section 35 Landlord and Tenant Act 1987
- Section 37 Landlord and Tenant Act 1987
- Section 57 Leasehold Reform Housing and Urban Development Act 1993
- Management orders

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Limits to consensual variations

Duval v 11-13 Randolph Crescent Ltd [2019] Ch 357, CA

- Absolute covenant against alterations
- Covenant by LL (3.19) to enforce covenants in other leases
- LL proposing to vary lease to allow work
- Objection from Claimant

Held

- the landlord would be in breach of cl.3.19 if he granted a licence to do an act that would otherwise be in breach of the lease
- Appeal to Supreme Court outstanding

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Implied variation of service charges

- Pole Properties v Feinberg (1982) 43 P&CR 121
 - Lease covenant provided for payment of 2/7th of increase in cost of coke
 - Varied to 12% of cost of heating combined blocks
- Waites v Hambleton Court FH Ltd [2014] EWHC 651
 - Each of 12 flats liable to pay 1/12th of costs
 - Letting scheme
 - If more flats, imply variation to a fair proportion

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Variation under Landlord and Tenant Act 1987 ss35 to 40

- Nugee Report 1985 para 7.6.9
- variation of leases of flats in the same building is justified without majority approval where the scheme set out in the leases is seriously defective, and the defects have a direct bearing on the upkeep and fitness for habitation of the flats in the block.

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Section 35 Applications

(1) Any party to a long lease of a flat may make an application to [the FTT] for an order varying the lease in such manner as is specified in the application.

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

- (a) the demised premises consist of or include three or more flats contained in the same building; or
- (b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

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S35 Applications

the lease fails to make satisfactory provision with respect to one or more of the following matters,

- (a) the repair or maintenance
- (b) the insurance
- (c) the repair or maintenance of any installations
- (d) the provision or maintenance of any services ..
- (e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him... for the benefit of that other party or ... persons who include that other party;
- (f) the computation of a service charge payable under the lease

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Section 36 – application in response to s35

- (1) any other party to the lease may make an application to effect a corresponding variation of other leases.
- (3) grounds —
 - (a) each of the leases fails to make satisfactory provision with respect to the matter or matters specified in the original application; and
 - (b) in the interests of the parties that all of the leases in question varied to the same effect.

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Section 57 LRHUDA 1993

- New lease on same terms as existing save
- S57(6) either of them may require that for the purposes of the new lease any term of the existing lease shall be excluded or modified in so far as—
- (a) it is necessary to do so in order to remedy a defect in the existing lease; or
- (b) it would be unreasonable in the circumstances to include, or include without modification, the term in question in view of changes occurring since the date of commencement of the existing lease which affect the suitability on the relevant date of the provisions of that lease.

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Prejudice

- (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.

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Compensation

- s38(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.

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Gianfrancesco v Haughton LRX/10/2007

- House divided into 2 flats
- Applicant liable to repair top half and roof
- Application on grounds (a) and (e) to impose repairing obligations on LL and create service charge regime

Held

- Not unsatisfactory just because
 - need to implied term
 - drafting poor
- No justification for wholesale re-writing

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Ground (e): Recovery of expenditure incurred for the benefit of other party

Cleary v Lakeside [2011] UKUT 264

- 3 out of 7 flats required to contribute to management costs
- Application to vary other 4 leases

Held

- Not in itself unsatisfactory
- No evidence of lack of management
- Evidence would be needed of particular need eg RTM Company
- Application dismissed

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Tripleroose v Stride [2019] UKUT 0099

- LL owned by 3 out of 4 flats
- T only obliged to contribute to 25% of costs of decoration
- Shortfall in recovery for repairs, management, decoration met by LL company
- s35 application to vary T lease alone

Held - Application dismissed

- Difference in contributions not of itself unsatisfactory
- No evidence of practical problems
- If wrong, £9,500 compensation payable. Diminution in value less one third discount for compensating benefits

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London Borough of Camden v Morath [2019] UKUT 193

- Camden liable under headlease to pay 25% of costs incurred in repair of Brunswick Centre
- Type A underleases do not enable C to recover % of costs payable under headlease
- Application to vary under s35(e)
- Application dismissed.
- Leases not unsatisfactory

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London Borough of Camden v Morath “unsatisfactory”

- “the Tribunal will consider whether the wording of the lease as it stands is clear, and whether the term sought to be varied is workable. If it is clear and workable then it is not unsatisfactory. Obviously the question whether the bargain as it stands works in practice has to be considered on the basis of the evidence in each case. But section 35 does not enable the Tribunal to vary a lease on the basis that it imposes unequal burdens, or is expensive or inconvenient. It would be very strange if it did, in view of the law’s general resistance to the temptation to interfere in or improve contractual arrangements freely made.”

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Contrast s57 LRHUDA 1993

57(2) Where during the continuance of the new lease the landlord will be under any obligation for the provision of services, or for repairs, maintenance or insurance—

- (a) the new lease may require payments to be made by the tenant (whether as rent or otherwise) in consideration of those matters or in respect of the cost thereof to the landlord; and
- (b) (if the terms of the existing lease do not include any provision for the making of any such payments by the tenant or include provision only for the payment of a fixed amount) the terms of the new lease shall make, as from the term date of the existing lease, such provision as may be just—
- (i) for the making by the tenant of payments related to the cost from time to time to the landlord, and....

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Ground (f)

Computation of service charge

- S35(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 .. 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 ..would either exceed or be less than the whole of any such expenditure.

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Morgan v Fletcher [2009] UKUT 186

- S35 application by six out of 8 lessees
- Service charges added up to 116%
- Voluntary variation of 2 leases to 1/96th and 3/96th
- Result service charges added up to 100%
- Jurisdiction to vary?

Held

- S35(4) ambiguous
- Limited to cases where total other than 100%

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Brickfield v Botten [2013] UKUT 0133

- 100% recovery across 7 Blocks
- Collective enfranchisement of one Block
- Resulted in 85% recovery from 2006
- Application to vary leases
- Could order be backdated to 2006?

Held

- Jurisdiction to backdate
- Appropriate in 100% case
- Loss of windfall not relevant prejudice
- Loss of windfall not compensatable

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Rossman v Crown Estate [2015] UKUT 0288

- Mixed use Victorian Blocks
- Service charge recovery 130%
- Voluntary abatement scheme
- Rossman lease 0.08%
- S35 and s36 application to vary to fair proportion by area
- FTT refused application
- Subsequent s42 claim
- UT held lease should be varied under s57 to correct defect
- Remitted to FTT

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Majority applications under s37

- 2 or more long leases under same landlord
- Landlord or tenant can apply
- (5) Any such application shall only be made if—
- (a) in a case where the application is in respect of less than nine leases, all, or all but one, of the parties concerned consent to it; or
- (b) in a case where the application is in respect of more than eight leases, it is not opposed for any reason by more than 10 per cent. of the total number of the parties concerned and at least 75 per cent. of that number consent to it.
- Landlord is one of “the parties concerned”

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Proving the numbers

- Only date of application is relevant
 - Dixon v Wellington Close [2012] UKUT 95
- Applicant should make available evidence of support and opposition

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Section 37 grounds

- (3) The grounds on which an application may be made under this section are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect.

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Shellpoint v Barnett [2012] UKUT 375

- Object identified as replacement of hot water communal heating with individual units
- Non-consequential variations to allow full recovery of costs of enforcement of covenants through service charges
- S37 application refused, appeal dismissed
 - Not necessary to achieve object
 - No evidence of problems
 - Prejudice to objectors
 - Majority support not sufficient.
- If it ain't broke don't fix it

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Problem areas

- Drafting of 1987 Act
- Unrepresented parties
- Over-ambitious re-writes
- Was Morgan v Fletcher correctly decided?
- Are personal circumstances of particular LL relevant?
- Why should proof of past problems be necessary?
- Compensation

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