**Neutral Citation Number: [2025] UKUT 88 (LC)**

**Case No: LC-2024-437**

**IN THE UPPER TRIBUNAL (LANDS CHAMBER)**
**APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER**
**FTT Ref: LON/OOBK/LVL/2023/0006**

**Royal Courts of Justice,**
**Strand, London WC2A 2LL**

**17 March 2025**

**TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007**

***LANDLORD AND TENANT – VARIATION OF LEASES – power to introduce a new administration charge to enable RTM company to recover costs of service charge proceedings from defaulting leaseholder – power to vary leases to allow costs of proceedings to be recovered through service charge – prejudice – material considerations – ss. 35, 38, Landlord and Tenant Act 1987 – appeal allowed***

**BETWEEN:**

**56 WESTBOURNE TERRACE RTM COMPANY LIMITED**

**Appellant**

**-and-**

**JEREMY POLTURAK**
**ROBERT DAVIES**
**AND OTHER LEASEHOLDERS AT 56 WESTBOURNE TERRACE**

**Respondents**

**56 Westbourne Terrace,**
**London W2 3UJ**

**Martin Rodger KC,**
**Deputy Chamber President**

**18 February 2025**

*Carl Fain* and *Ceri Edmonds*, instructed by Dean Wilson LLP, for the appellant
*Jamal Demachkie*, instructed by LAS Solicitors, for Mr Polturak
Mr Davies attended but did not address the Tribunal
The remaining respondents did not attend the hearing

The following cases are referred to in this decision:

*Barrett v Robinson* [2014] UKUT 322 (LC), [2015] L.& T.R. 1

*Baystone Investments Ltd v Perkins* [2010] UKUT 70 (LC)

*Brickfield Properties Ltd v Botten* [2013] UKUT 133 (LC)

*Camden LBC v Morath* [2019] UKUT 193 (LC)

*Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC)

*FirstPort Services Ltd v Settlers Court RTM Co Ltd* [2022] UKSC 1, [2022] 1 WLR 519

*Gianfrancesco v Haughton* LRX/10/2007 (2008, Lands Tribunal) (unreported)

*Mawhood v Sinclair Gardens Investments (Kensington) Ltd* LRX/59/2007 (2008, Lands Tribunal) (unreported)

*Mayor and Burgesses of the London Borough of Tower Hamlets v Khan* [2022] EWCA Civ 831, [2022] L.& T.R. 30

*Morgan v Fletcher* [2009] UKUT 186 (LC), [2010] 1 P.& C.R. 17

*O (a minor), R (on the application of) v SoS for the Home Department* [2022] UKSC 3, [2022] AC 255

*Shellpoint Trustees Ltd v Barnett* [2012] UKUT 375 (LC), [2012] 3 EGLR 115

*Triplerose Ltd v Stride* [2019] UKUT 99 (LC)

*Weycroft, Weybridge Ltd v Wilson* [2025] UKUT 64 (LC)

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## Introduction

1. Part IV of the Landlord and Tenant Act 1987 (the 1987 Act) provides for applications to the First-tier Tribunal (FTT) by any party to a long lease of a flat for an order varying the lease. The FTT is given jurisdiction to make such an order only if it is satisfied that the lease "fails to make satisfactory provision with respect to" one of the matters listed in section 35(2), 1987 Act. Those matters include repair, insurance, the provision of services, the recovery of expenditure by one party for the benefit of others, and the computation of service charges.

2. In what circumstances can it be said that a lease "fails to make satisfactory provision with respect to" one of the matters listed in section 35(2)? Must the lease contain a defect, or be unworkable or incapable of being understood, or will some lesser infelicity suffice to give the FTT jurisdiction to order a variation? And if the FTT decides that a lease is unsatisfactory in a relevant respect, what factors should it take into account when deciding whether to make an order?

3. These questions arise in this appeal against a decision of the FTT, Property Chamber dated 20 March 2024 refusing an application by the appellant, 56 Westbourne Terrace RTM Co Ltd, to vary the leases of each of the eleven flats in the building from which it derives its name. The application was supported by the leaseholders of eight of the flats but opposed by the leaseholders of three. The leaseholders have all been joined as respondents to this appeal. Mr Jeremy Polturak, who owns one flat, and Mr Robert Davies, who owns two,

oppose the appeal; the remaining respondents continue to support the position of the RTM Company. The respondents' names are included in an appendix to this decision.

4. The only variations which are now sought are to include provisions in each lease which would allow the landlord, and the RTM Company, to recover their costs of proceedings to enforce any of the covenants in the lease either as an administration charge payable only by the leaseholder concerned, or as part of the service charge payable by all leaseholders.

5. At the hearing of the appeal the RTM Company was represented by Carl Fain and Ceri Edmonds, and Mr Polturak was represented by Jamal Demachkie. I am grateful to them for their assistance. Mr Davies attended the hearing but chose not to speak; he made it known that he agreed with the submissions of Mr Demachkie.

**The background facts**

6. 56 Westbourne Terrace in Paddington is a four storey, mid-nineteenth century terraced house divided into 11 self-contained flats, each held under a long lease. In each lease the leaseholder covenants to pay a service charge for services described in the Third Schedule.

7. The freehold of the Building is owned by a company, 56 Westbourne Terrace Freeholders Association Ltd ("the Freeholder"), in which the owners of each flat hold one share. The only leaseholder who owns more than one flat, and who therefore holds more than one share, is Mr Davies, who owns Nos. 9 and 11. Mr Polturak owns No. 3.

8. Although, between them, Mr Davies and Mr Polturak own only 3 of the 11 shares in the Freeholder, they are its sole directors. The other leaseholders have tried but have so far been unable to replace them in those positions.

9. The application is part of a wider dispute between Mr Polturak and Mr Davies and the RTM Company, which has its roots in earlier disagreements between the Freeholder and individual leaseholders going back at least to 2010. Although there is reference in the evidence to the existence of these disputes, the FTT was given no proper account of them and was not asked to form any view on their merits. It is sufficient to say that in 2018, after several years of discord between the Freeholder and individual leaseholders, a sufficiently large group of leaseholders joined together to form the RTM Company and took over management of the building.

10. The FTT found that Mr Davies and Mr Polturak had refused to pay any service charges although exactly when this began is disputed. Some payments may have been made recently but Mr Demachkie was at pains to stress that Mr Polturak considers that he has legitimate grounds to withhold payment. Whether he is right about that or not, the RTM Company has been unable to manage the building as it would have liked to because of the substantial arrears attributable to the three flats belonging to the directors of the Freeholder.

11. Leases of the flats in the building were originally granted in 1983 and 1984. In 1991 they were extended on substantially the same terms other than as to their duration. The form of the covenants in the leases therefore dates back more than 40 years and predates the significant leasehold reform introduced by Part 2 of the Commonhold and Leasehold

Reform Act 2002 (the 2002 Act). That reform included the introduction of the right to manage and the creation of a new type of company, the RTM company; it also included restrictions on forfeiture introduced by section 168 which prohibit the service of notice under section 146 of the Law of Property Act 1925 as a prelude to forfeiture for breach of covenant without the tenant first having admitted the breach or the landlord having obtained a determination from the FTT that it has occurred.

12. In this case, the only provision of the leases which allows the landlord to recover the costs of enforcing its right to receive the service charges is clause 3(13), by which each leaseholder covenants:

> "To pay all expenses including solicitors' costs and surveyors' fees incurred by The Lessor of and incidental to the preparation and service of notice under Sections 146 and 147 of the Law of Property Act 1925 (or any other notice hereunder) notwithstanding that forfeiture be avoided otherwise than by relief granted by the Court."

In the event of non-payment of a service charge, or any other breach of covenant by a leaseholder, the Freeholder has the right, now subject to section 168, 2002 Act, to serve a section 146 notice before proceeding to forfeit the lease. Clause 3(13) gives the Freeholder a contractual right to recover any costs it incurs "of and incidental" to that notice directly from the defaulting leaseholder.

13. Since it acquired the right to manage in December 2018, the RTM Company has been responsible for the management and upkeep of the building and has been entitled to collect the service charges payable by the leaseholders. But it is not entitled to serve notice under section 146. Sections 96(6)(b) and 100(3) of the 2002 Act specifically exclude functions relating to re-entry or forfeiture from the management functions conferred on an RTM company. It follows that legal expenses which the RTM Company incurs in collecting service charges are not recoverable by it under clause 3(13) of the leases.

14. The members of the RTM Company are unable, or unwilling, personally to fund proceedings against Mr Davies and Mr Polturak to recover unpaid service charges. They are unable, or unwilling, personally to fund the contributions towards necessary repairs which Mr Davies and Mr Polturak consider themselves entitled to withhold. The parties have therefore reached a stalemate. They agreed that the FTT need not make findings of fact or allocate blame for the position they find themselves in. Nevertheless, the FTT rightly saw the existence of the dispute as highly relevant to the application it had to determine.

**The application**

15. The RTM Company initially proposed four variations to the 11 leases of flats in the building. The FTT refused all four, and only two are now the subject of this appeal. Both concern the costs of proceedings.

16. The RTM Company proposes the addition to each lease of a new covenant by the leaseholder, to be numbered clause 3(13A), in these terms:

> "To pay to the Landlord on demand the reasonable costs and expenses (including any solicitors', surveyors' or other professionals' fees, costs and expenses and any VAT on them) incurred by the Lessor in connection with or in contemplation of the enforcement of any of the Lessee's covenants."

17. The second addition is to the list in paragraph 1(1) of the Third Schedule of expenses to which the leaseholders are required to contribute through the service charge. There would be added any expenditure incurred by the Lessor:

> "(iv) in paying the fees of any Solicitors or other professional in connection with or in contemplation of the enforcement of any of the Lessee covenants in the lease where such fees are unable to be recovered from the defaulting leaseholder as an administration charge in accordance with clause 3(13A)."

**The statutory provisions**

18. The application with which this appeal is concerned was made under section 35, 1987 Act which, so far as relevant, provides as follows:

> "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 paragraph (a) and (b) would either exceed or be less than the whole of any such expenditure.

(5)- (9) ….”

19. By section 38(1), if the grounds of an application under section 35 are established the tribunal may make an order varying the lease; the variation may either be the variation specified in the application or such other variation as the tribunal thinks fit (section 38(4)). That power is subject to subsections (6) and (7) of section 38; subsection (6) is relevant to the current application, and provides as follows:

“38(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.

By section 38(10), where a tribunal makes an order varying a lease it may, if it thinks fit, order payment of compensation to any person, including a party to the lease, whom it considers is likely to suffer loss or disadvantage as a result of the variation.

20. Under section 37(1), 1987 Act an application may be made to the tribunal in respect of two or more leases for an order varying the terms of those leases. Section 37(5) provides that such an application shall only be made if, 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 consent to it. Under section 37(3) the grounds on which an application may be made are that the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect. It is not a requirement that the terms of the leases be unsatisfactory in any particular respect.

21. Provision is made by section 102(1) and paragraph 10 of Schedule 7 to the 2002 Act for the procedure for obtaining a variation of a lease to be available to an RTM company. With one immaterial exception, sections 35, 36, 38 and 39 of the 1987 Act have effect as if references to a party to a long lease included the RTM Company. Thus, although it is not a party to a lease, an RTM company may apply to the FTT for a variation of the lease.

22. As originally enacted, section 35 provided for applications for an order varying a lease under Part IV of the 1987 Act to be made to the court. In England, the jurisdiction was transferred to tribunals with effect from 30 September 2003 (initially to leasehold valuation tribunals but since 2013 to the First-tier Tribunal). In Wales, the reallocation of jurisdiction took place in 2013. Subsection (3A) was introduced as one of a number of amendments made by section 162, 2002 Act, with effect from 26 July 2002.

**An overview of sections 35 and 38**

23. When the FTT granted permission to appeal it commented that "there is remarkably little appellate authority on these difficult provisions in this difficult Act". With that observation in mind, it is convenient at this stage to comment on the structure of sections 35 and 38 and the logical sequence of steps which a tribunal asked to apply them might choose to adopt.

24. Section 35(1) is introductory and explains who may make an application for an order under it, namely, any party to a long lease of a flat. A tribunal determining an application under section 35 should satisfy itself first that the applicant is entitled to make the application. A "long lease" is defined by section 59(3) and includes any lease for a term certain exceeding 21 years. Section 35(6) excludes leases which demise three or more flats.

25. Section 35(2) then identifies the grounds on which an application may be made. No order varying a lease may be made unless one of them is made out.

26. Each ground requires that the lease "fails to make satisfactory provision with respect to" one of the matters listed in subsections (2)(a) to 2(f) (the power in sub-section 2(g) to prescribe other matters has not been utilised). Whether the lease fails to make satisfactory provision with respect to one of those matters is therefore the gateway or threshold question which the tribunal should address next.

27. The six matters are, in broad terms: (a) repair, (b) insurance, (c) installations, (d) services, (e) recovery of expenditure, and (f) computation of service charges. They are not entirely self-contained and there may be potential for (a), (c) and (d), or (b), (e) and (f) to overlap.

28. Subsections (3), (3A) and (4) supplement four of the six matters in subsection (2). Subsection (2)(c) and (d) should be read together with subsection (3); subsection 2(e) with subsection (3A); and subsection (2)(f) with subsection (4). It is important to appreciate however that subsections (3), (3A) and (4) are not additional, free standing grounds for making an order. They are illustrations or examples of ways in which a lease may fail to make satisfactory provision for the particular matter with which they are associated.

29. This appeal is concerned with subsection (2)(e) and I will restrict these initial observations to that provision and subsection (3A) which supports it.

30. The ground in subsection (2)(e) will only be satisfied if the lease fails to make satisfactory provision with respect to the recovery by one party to the lease, whom I will call A, from another party to it, whom I will call B, of expenditure incurred or to be incurred by A, or on A's behalf, for the benefit of B or for the benefit of a number of persons who include B. Subsection (3A) provides an example of one relevant "factor", in relation to a service charge, which may be relied on when determining whether a lease makes satisfactory provision with respect to that matter. That factor is whether the lease "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".

31. Unpacking subsection (2)(e) a little, it can be seen that it is concerned with the provisions of a lease which allow A to recover from B expenditure incurred by A for B's benefit. It is necessary that A's original expenditure must have been for the benefit of B (or B and others). It is not necessary that the recovery of that expenditure by A should be for B's benefit. Nor will it be, since at least in purely financial terms, B would obviously be better off without being required to reimburse A's expenditure.

32. The example furnished by subsection (3A) assists in understanding subsection (2)(e) in at least two ways. First, it makes it clear that the reference in subsection (2)(e) to the recovery of expenditure includes the recovery of expenditure through a service charge; that might have been inferred from the reference to expenditure for the benefit of a number of persons who include B, but it is put beyond doubt by the reference to a failure to pay a service charge. Secondly, subsection (3A) demonstrates that a lease may fail to make satisfactory provision for the recovery of expenditure incurred by A for the benefit of B not only in the way it deals with the recovery of that expenditure, but also in the way it deals with ancillary or consequential matters, such as interest. That suggests that that the

scope of subsection (2)(e) is broader than might have been thought had subsection (3A) not supplied a practical illustration.

33. Once a tribunal has satisfied itself that the applicant is party to a long lease of a flat, and that one of the grounds in subsection (2) is made out, it is next necessary for it to consider section 38(6) and (7). By section 38(1) the discretion to make an order varying a lease is expressly made subject to those provisions. Subsection (7) is engaged only where the application relates to insurance, but subsection (6) is of general application. It requires the FTT to consider two additional questions.

34. The first question is in two parts, arising from subsections (6)(a) and (10), namely: first, whether the variation which the tribunal is considering would be likely substantially to prejudice any respondent to the application or any other person who is not a party to the application, both of whom I will call C; and, secondly, if so, whether C would be afforded "adequate compensation" by an order providing for any party to the lease to pay compensation to C in respect of any loss or disadvantage that the tribunal considers C is likely to suffer as a result of the variation. It follows that substantial prejudice alone is not a bar to the making of a variation order; the FTT is prevented from making an order only if substantial prejudice could not be compensated adequately by a payment of money.

35. The final question arises from subsection (6)(b), and is whether, for any other reason, it would not be reasonable in the circumstances for the variation to be effected.

36. If the answer to either of these questions is affirmative the tribunal must not make an order under section 35.

37. If the qualifying conditions in subsection (1) are satisfied, and one or more of the threshold grounds in subsection (2) have been found to exist, the decision whether to order a variation is a discretionary one. The discretion is removed if substantial prejudice would be caused by the variation and it could not adequately be compensated by money, or if there is any other reason why making the variation would not be reasonable. If the application survives those hurdles the discretion is available to be exercised, but it is hard to see what would remain to be considered by a tribunal in those circumstances. If no other reason is found why it would not be reasonable for the variation to be effected, the obvious conclusion is that the variation should be effected.

38. I would add three footnotes to this overview.

39. First, although the lease or leases which may be varied and the grounds of the variation are both defined by the application, the FTT is not otherwise restricted by the terms of the application and may order a different variation from the one proposed by the applicant (subject, of course, to the parties having the opportunity to make submissions on any which the FTT have in mind). That is apparent from section 38(4) which permits the making of the variation proposed in the application "or such other variation as the tribunal thinks fit".

40. Secondly, prejudice to C will only be a bar to the making of a variation order if it would be caused by the making of the order and would be both substantial and incapable of being adequately compensated in money. Prejudice caused by a variation which is not

substantial and so is not a bar to the making of a variation order, may still justify an award of compensation for loss or disadvantage under subsection (10).

41. Thirdly, in a case under subsection (2)(e), party B for whose benefit expenditure has been incurred, and party C who may suffer prejudice and be entitled to compensation, are likely to be the same person.

**The FTT's decision**

42. The FTT refused the first of the proposed variations. It considered that it did not have power to vary a lease to introduce a new administration charge because such a variation would not be to the benefit of the respondent to the application.

43. As an alternative basis of decision the FTT said that, if it did have jurisdiction to vary the lease to introduce a new administration charge, it would not exercise that power in favour of the proposed clause 3(13A). Its reason was connected to the form of the leaseholders' covenants at clause 3(13) by which they agreed only to pay expenses incurred by the Lessor "of and incidental to" the preparation and service of a section 146 notice. The variation sought by the RTM Company would have allowed it to recover from a defaulting leaseholder expenses incurred "in connection with or in contemplation of the enforcement of any of the Lessee's covenants." The FTT refused to vary the lease to allow the RTM Company to recover expenses which the landlord could not have recovered under the original terms.

44. The FTT also rejected the second variation proposed by the RTM Company, which would have enabled it to recover the cost of proceedings as a service charge expense payable by all of the leaseholders collectively. It decided that it did not have jurisdiction to introduce the proposed alteration under section 35(2)(e), but that it did under section 35(3A). It nevertheless refused to exercise its discretion to make the proposed alteration. It applied what it considered to be the approach of this Tribunal (HHJ Gerald and Mr AJ Trott FRICS) in *Shellpoint Trustees Ltd v Barnett* [2012] UKUT 375 (LC), at [107], which it described as "the most detailed and authoritative decision under section 35". I will come back to that decision when I consider the appeal against this part of the FTT's decision.

**The grounds of appeal**

45. The three grounds of appeal for which the FTT granted permission were:

    1. That it had been wrong to find that it did not have jurisdiction to vary the leases to provide for the recovery of legal costs as an administration charge.

    2. That it had failed to take account of relevant considerations and had misapplied the law when it decided that, if it had had jurisdiction, it would not have varied the leases to provide for the recovery of legal expenses as an administration charge.

    3. That it had failed to take account of relevant considerations and had misapplied the law when it refused to vary the leases to provide for the recovery of legal costs as a service charge.

**Issue 1 – Did the FTT have jurisdiction to vary the leases to provide for the recovery of legal costs as an administration charge?**

46. The FTT decided that it had no power under section 35 to vary a lease to include an administration charge. The new clause 3(13A) proposed by the RTM Company is an administration charge. It would require an individual leaseholder to pay the reasonable costs and expenses (including professional fees) incurred by the Landlord in connection with or in contemplation of the enforcement of any of the Leaseholder's covenants.

47. The expression "administration charge" is not used in the 1987 Act. It is defined in paragraph 1(1) of Schedule 11 to the 2002 Act as an amount payable by a tenant of a dwelling as part of or in addition to the rent and which is payable, directly or indirectly, in respect of certain matters which include a failure by the tenant to make a payment by the due date, or in connection with a breach (or alleged breach) of a covenant or condition in the tenant's lease. The important difference between an administration charge and a service charge is that an administration charge is payable only by the particular leaseholder who has failed to make a payment or breached their lease; a service charge, by contrast, is a contribution payable by all leaseholders, whether or not they were responsible for, or benefitted from, the relevant expenditure.

48. Two submissions by Mr Demachkie persuaded the FTT that it lacked jurisdiction under section 35 to introduce a new administration charge. Those were, first, "that section 35(2)(e) cannot apply because the Lessees can only vary a lease to recover expenditure incurred on their behalf for the benefit of another party". The FTT considered that any expenditure under the proposed new clause "would not be for the benefit of another party, but in fact to his detriment" (the FTT was presumably referring to Mr Davies or Mr Polturak). Secondly, the FTT accepted Mr Demachkie's alternative submissions that section 35(3A) "clearly applies to service charges but not to administration charges."

49. The FTT's first reason was based on a misreading of section 35(2)(e). It was persuaded to read ground (e) as if it was concerned with the recovery, for the benefit of B, of expenditure incurred by A. Mr Demachkie repeated that reading in his skeleton argument for the appeal, suggesting that a variation "is permissible only if it is for the benefit of the other party (or for a number of persons who include that party)".

50. As I have explained, at [31] above, the correct reading of ground (e) is that it is A's original expenditure, which it wishes to recover, which must have been for the benefit of B. That was Mr Fain's submission and after hearing it Mr Demachkie did not advance any contrary argument of his own on this aspect of the appeal.

51. The second proposition of which the FTT was persuaded by Mr Demachkie, but which was not pursued at the hearing of the appeal, was that section 35(3A) "clearly applies to service charges but not to administration charges." That is a second misreading of the section. The purpose of subsection (3A) is to provide an example of one way in which a lease may fail to make satisfactory provision "in relation to a service charge". Those words do not purport to limit the scope of ground (e), or to define it; they simply identify one particular context in which a provision for the recovery of expenditure by one party for the benefit of another may not be satisfactory. Moreover, subsection (2) does no more than to identify the grounds which may be relied on to justify a variation; it does not identify the variation which may be made if one of those grounds is made out.

52. It is for the FTT to determine the variation required to deal with the absence of satisfactory provision for any one of the matters in subsection (2). If, in relation to the recovery of service charges, the FTT is satisfied that the lease makes less than satisfactory provision for the costs of enforcement, there is nothing in subsections (2)(e) or (3A) which limits the order it may make to one varying the service charge provisions alone. Adding the cost of enforcement to the expenditure which may be recouped through the service charge would be one way of addressing the absence of satisfactory provision concerning that matter, but it need not be the only one. I can see no reason why, in principle, a lease could not be varied to make a defaulting leaseholder responsible for the costs incurred by the landlord or the RTM Company in enforcement proceedings against the leaseholder, in addition to, or instead of, a variation to add the costs of enforcement to the service charge payable by all leaseholders.

53. The FTT considered that the proposal to vary the leases to introduce an administration charge raised an issue of jurisdiction. In that respect it was mistaken. The scope of the FTT's jurisdiction is defined by subsection (2). If one of the grounds in subsection (2) is made out, there is no jurisdictional barrier to the sort of variation which may be ordered. Except in an insurance case when subsection (7) will apply, the only controls over the variations which may then be made are those provided by section 38(6) i.e. whether the variation would cause substantial prejudice incapable of adequate compensation by a payment of money, and whether for any other reason it would not be reasonable.

54. In my judgment, therefore, the FTT was wrong to dismiss the application to introduce clause 3(13A) simply on the basis that it would add an administration charge. The FTT had jurisdiction to vary the leases to make each leaseholder responsible for the costs of enforcement of their own covenants against them. But, of course, the suggested absence of jurisdiction was not the only basis for the FTT's refusal to vary the leases.

**Issue 2 – Was the FTT entitled, for the reasons it gave, to refuse to vary the leases to provide for the recovery of legal expenses from the leaseholder in default?**

55. The FTT approached the RTM Company's request to introduce clause 3(13A) by comparing the proposed new right for the landlord (and by extension, the RTM Company) to recover costs of enforcement with the right originally agreed when the leases were granted, which was clause 3(13). The original clause allowed the landlord to recover costs incurred "of and incidental to the preparation and service" of a section 146 notice, whereas the proposed variation would have allowed the recovery of expenses incurred "in connection with or in contemplation of the enforcement of any of the Lessee's covenants."

56. The FTT considered this a difference of significance. The original leaseholders had not agreed to pay expenses incurred by the landlord "for the purpose of" the preparation and service of a section 146 notice. The Court of Appeal had decided in *Mayor and Burgesses of the London Borough of Tower Hamlets v Khan* [2022] EWCA Civ 831, at [50], that a covenant to pay expenses "of and incidental to" the preparation and service of a section 146 notice was not wide enough to oblige the leaseholder to pay the costs of proceedings to recover unpaid service charges in the County Court or in the FTT where no section 146 notice had ever been served. The proposed variation would have widened the scope of the existing provision to include such expenses, because they would be "in connection with or in contemplation of the enforcement of" the leaseholder's service charge covenant. That led the FTT to ask itself two rhetorical questions, namely:

> "55. So why should the Applicant recover litigation costs when the Freeholder could not recover litigation costs? Why should the lease be varied in this way when the existing clause is clear and workable: see *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) and *Camden LBC v Morath* [2019] UKUT 193 (LC).
>
> 56. So, even if we felt we had jurisdiction [we] would not make the variation suggested."

57. The FTT's second question ("Why should the lease be varied in this way when the existing clause is clear and workable") was obviously intended to invoke a negative response, but it did so without explanation. The two decisions of this Tribunal to which the FTT referred, *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) and *Camden LBC v Morath* [2019] UKUT 193 (LC), were concerned with the circumstances in which a lease will fail to make satisfactory provision for any of the matters in section 35(2)(e). In *Camden v Morath* the Tribunal (Judge Cooke) considered *Triplerose v Stride* and another of its previous decisions, *Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC), before continuing, at [16]:

> "What I take from those decisions is that 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."

58. In this case, the FTT's reference to the lease being "clear and workable" is clearly derived from this passage in *Camden v Morath* and was used by it as a shorthand test for whether the leases failed to make satisfactory provision for the recovery of expenditure incurred by one party for the benefit of another. The second question was concerned with whether the ground under section 35(2)(e) had been made out, and I will refer to it as the ground (e) question. The first question was relevant to the exercise of discretion, and I will call it the discretionary question. I will reverse the order in which the two questions were dealt with by the FTT.

*The ground (e) question*

59. As the FTT pointed out in granting permission to appeal, there is remarkably little authority on the application of section 35. In a featureless landscape the aphorism that "if it is clear and workable then it is not unsatisfactory" has been welcomed as a guide (for a very recent example, see *Weycroft, Weybridge Ltd v Wilson* [2025] UKUT 64 (LC), at [35(4)]). This appeal provides an opportunity to review such earlier authority as there is under section 35(2) and to consider the reliability of the aphorism or whether too much might have been read into it.

60. The textbook writers and websites do not mention any relevant reported decision under Part IV between the commencement of the 1987 Act and the transfer of jurisdiction to tribunals in 2003. Thereafter, the earliest appellate consideration of section 35 of which I

am aware was by the Lands Tribunal (George Bartlett QC, President) in *Gianfrancesco v Haughton* (2008) LRX/10/2007 (unreported). The unconventional lease of a flat on the two upper floors of a converted house required the leaseholder to maintain the exterior of the flat including the roof and to contribute half of the cost of repairs to the lower flat undertaken by the landlord, but it contained no mechanism to enable the leaseholder to collect a contribution towards the repairs she was obliged to carry out. She applied for a variation to make the landlord responsible for all works subject to the leaseholder paying half the cost; other variations she proposed would have incorporated into the lease express rights of access which the Tribunal considered were already to be implied. The FTT described the existing arrangements as "satisfactory and workable" and refused the proposed variations. The Lands Tribunal dismissed the leaseholder's appeal. The President made the following observation at [21]:

> "Whether the lease fails to make satisfactory provision is one for the tribunal to judge in all the circumstances of the case. A lease does not fail to make satisfactory provision, in my judgment, simply because it could have been better or more explicitly drafted. For instance the need to imply a term is not necessarily, or even probably, an indication that the lease fails to make satisfactory provision for the matter in question."

61. The only other statement of potentially wider application in *Gianfrancesco* was that it would normally be wrong to base a refusal of an application under section 35 on an expression of willingness by a party to do more than they were contractually obliged to do; if the relevant provision of the lease was not satisfactory, such willingness would not make it so, as the willing individual might change their mind or be replaced by another person differently disposed.

62. The decision of the Lands Tribunal (HHJ Huskinson) in *Mawhood v Sinclair Gardens Investments (Kensington) Ltd* (2008) LRX/59/2007 (unreported) also concerned an application to vary the long leases of flats in a converted house. The leases were agreed to be unsatisfactory, so the decision has nothing to say about the section 35(2) gateway conditions. The Tribunal directed itself that it should consider the rival variations put forward by the parties in the circumstances existing at the date of the hearing. It made only modest adjustments to the leases, asking itself, based on section 38(6)(b), whether the proposed variations appeared reasonable in view of an impending enfranchisement. The approved variations included a new obligation to pay interest on unpaid service charges.

63. In *Morgan v Fletcher* [2009] UKUT 186 (LC) this Tribunal (HHJ Jarman QC) considered the interpretation of subsections 35(2)(f) and (4). The issue was whether subsection (4) provides an exhaustive list of the ways in which a lease might fail to make satisfactory provision for the computation of a service charge, or whether they are simply illustrations. After noting the contrasting language of subsections (3) and (3A), and after consulting the report of the Nugee Committee on which the 1987 Act was based and ministerial statements made in the course of the passage of the legislation through Parliament, the Tribunal decided that section 35(4) was intended to be exhaustive and that service charges which added up to exactly 100% of expenditure did not "fail to make satisfactory provision". The Judge explained his reasons at [19], as follows:

> "As was recognised by the authors of the report, their recommendations represented an intervention without majority approval in the contractual

> freedom of the parties and accordingly required justification. The justification given was that such intervention is needed where the scheme is seriously defective, and the defects have a direct bearing on the upkeep and fitness for habitation of the flats in the block. It seems to me that an intervention in the proportions in which the service charge is made also requires justification but cannot be said to have a bearing on the upkeep and fitness for habitation of the flats in the block. It may well be that such intervention can be justified, but it was not a justification which was made or articulated in the report or in the passage of the Bill through Parliament. The reason, I am satisfied, is that that was not the mischief which the provisions were intended to remedy."

64. *Baystone Investments Ltd v Perkins* [2010] UKUT 70 (LC) was another case in which the parties agreed that leases were unsatisfactory and that a variation was required to impose a specific obligation on leaseholders to contribute towards the cost of maintaining the common parts. The only appeal was against the LVT's decision to vary the leases to make the landlord pay all the costs of implementing the variation, which the Tribunal (HHJ Jarman QC) reversed. The Tribunal was prepared to assume that the LVT's "wide discretion" under section 38(1) to make an order varying the lease "in such manner as is specified in the order" extended to ordering a variation which required one party to pay the costs of the variation. The Tribunal also placed weight on the LVT's assessment that long term benefits to the leaseholders in terms of quality of life and possibly enhancement of the value of their leaseholds as a result of the improved condition of the property, justified a decision not to award them compensation under section 38(10).

65. In *Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC), the LVT had varied the leases of four flats in a block of six to introduce a right for the landlord to recover a contribution towards its costs of employing a managing agent, in circumstances where the more recently granted leases of the two remaining flats included such a clause. On appeal, the issue of principle considered by the Tribunal (George Bartlett QC, President) was whether the condition in section 35(2)(e) was satisfied by reason of the landlord's inability to recover all its expenditure on management. In the course of its decision that the gateway condition was not satisfied the Tribunal made the following points, which may be regarded as statements of principle. First, at [26], as regards clarity, a lease might be unsatisfactory if it leaves some matter of significance to be implied rather than being expressly stated, as there could be disagreement about it. Secondly, at [27], as regards uniformity: "there is … nothing arguably 'unsatisfactory' in the fact that two lessees pay a contribution to the lessor's costs of management and four do not"; that simply reflected "different contractual provisions that do not appear to have caused any difficulty in interpretation or application". Thirdly, at [30], as regards the risk of future neglect:

> "… 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."

Finally, as regards compensation (which did not have to be considered in detail), a loss or disadvantage need not be measured only by a diminution in value of a lease; it was hard to see how the leaseholders being required in future to pay for management for which they

currently paid nothing would not be a loss or disadvantage requiring the payment of compensation.

66. The decision of the Tribunal (HHJ Huskinson) in *Brickfield Properties Ltd v Botten* [2013] UKUT 133 (LC) concerned the date from which a variation could take effect. The Tribunal noted that the purpose of an order under section 35 was "to cure a defect" and said there was nothing in the statute to suggest an intention to cure a defect prospectively rather than from the time that it arose. The nature of the variation which could be applied for was expressed "in wide words" in sections 38(1) and (4) and, in that case, it was reasonable to backdate the variation to the date on which the defect had begun to cause the total service charge contributions to fall below 100% of the landlord's expenditure.

67. On similar facts to those in *Cleary v Lakeside Developments*. the Tribunal (Judge Behrens and Mr AJ Trott FRICS) in *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) followed the same approach, holding once again that the fact that the leases of flats in the same building provided that different tenants had to make different contributions towards service charge costs did not of itself make a lease unsatisfactory. The FTT had varied the lease of one flat to make the leaseholder contribute, for the first time, to the cost of maintaining the structure of the building, a provision described as "absolutely standard". On appeal the Tribunal accepted the leaseholder's submissions that the lease was "satisfactory" and that the fact the proposed variation was "standard" or "common" was irrelevant. It also accepted that, because the landlord was a company owned by the leaseholders, there might be circumstances where the lack of adequate contributions from the appellant could render the lease unsatisfactory. However, that could only be established by evidence (for example that major structural repairs were beyond the means of the members of the company). But the only evidence was that the building was in reasonable condition and any shortfall in the service charge was being funded by the members of the company. The appeal was therefore allowed, and the variation refused. In case it was wrong, the Tribunal considered how compensation might have been assessed if the variation had been permitted and it described the method proposed by the appellants' expert (which produced a compensation figure of £9,500) as "a reasonable approach".

68. That brings me finally to *Camden v Morath*, the Tribunal's decision in which it was said that the established meaning of "satisfactory" was that "if it is clear and workable then it is not unsatisfactory". That was another application based on section 35(2)(e), and on the landlord's inability to recover all of its expenditure on services. Leaseholders who occupied flats on a large estate under a particular form of lease were obliged to contribute towards the cost of services provided to their own building but not towards the landlord's expenditure on the common parts of the estate as a whole from which they also benefitted. The Tribunal's commentary on the two authorities to which it referred, *Cleary* and *Triplerose*, has already been quoted, at [57] above, and need not be repeated. The Tribunal found no reason to adopt a different approach, as it explained, at [33]:

> "It has not been argued that those two decisions were made in error, and I see nothing in the facts of this case that might persuade me to depart from the construction of "satisfactory" adopted in them. Exactly as in those cases there is here a perceived inequity in the bargain made between the parties. Why it was so made is not known, but it was clearly made and the provisions are workable. There has been no evidence to show that they are not. There is no suggestion that the appellant cannot meet its contributions."

69. *Cleary*, *Triplerose* and *Camden* were all appeals in applications relying on section 35(2)(e). Additionally, and significantly, they were appeals in which an existing allocation of responsibility for the cost of services was being challenged on the grounds either that it did not allow the landlord full recovery or that the contributions of different leaseholders were unequal. It is therefore understandable that great weight was placed on the fact that the existing provisions of the lease were clear, so that there was no uncertainty over what they meant, and that they were workable, in the sense that there was no evidence that they had given rise to practical problems or led to the building or the estate in question not being properly maintained. Those are clearly relevant considerations in determining whether agreed contractual terms are satisfactory.

70. But I respectfully suggest that clarity and workability cannot provide a comprehensive test for whether the provisions of a lease are satisfactory. First, because the question asked by the statute is whether the provisions are "satisfactory", and there is no reason to substitute different and significantly narrower language, nor would it be permissible as a matter of interpretation. Secondly, because there are six distinct grounds in section 35(2), four of which are elaborated on in subsections (3), (3A) and (4), and a test of clarity and workability would not adequately address the variety of circumstances and relevant factors which Parliament has identified as capable of being less than satisfactory. Thirdly, and illustrating the previous point by reference to section 35(2)(e), the circumstances in which a lease will fail to make satisfactory provision for the recovery by A of expenditure incurred for the benefit of B include, by subsection (3A), whether the lease makes provision for an amount to be payable, by way of interest or otherwise, in respect of a failure to pay the service charge. It could not be said that the absence of a provision for the payment of interest would make a service charge obligation unclear or unworkable, yet Parliament obviously considered that such a lease may fail to make satisfactory provision and intended the FTT to have power to reverse the omission.

71. It should also be noted that, in *Camden*, although the Tribunal referred, at [26], to "the well-established meaning of the term 'satisfactory' in s.35(2)", its focus subsequently narrowed. At [33], it said that speculation about the intention of the parties was of no value in assessing whether the relevant provision of the leases was satisfactory "within the meaning of section 35(2)(e)".

72. My own reading of *Cleary* and of *Triplerose* is that they support the proposition that a service charge provision which is clear and which has not produced practical problems is not unsatisfactory merely because it does not allow A to recover all of its expenditure from a group of leaseholders including B. Unequal contributions are not enough, but other factors, including an absence of alternative sources of funds to enable A to meet its responsibilities, may combine to undermine the workability of a provision and to render unsatisfactory that which was previously satisfactory. In my judgment neither decision supports the broader reading suggested in *Camden*, nor do any of the trilogy consider the meaning of "satisfactory" in the context of the other available grounds in section 35(2). The clarity of existing provisions and the results which they have produced or are expected to produce in future are likely to be relevant considerations in many cases, but they are not exhaustive.

73. The FTT was therefore in error in substituting consideration of whether the lease was "clear and workable" for the statutory question of whether it made "satisfactory provision" with respect to the recovery by A of expenditure incurred on B's behalf.

*The discretionary question*

74. The FTT's first question invited a comparison between the position of the RTM Company and the position of the Freeholder in relation to the recovery of costs: "why should the Applicant recover litigation costs when the Freeholder could not?". Expressing the comparison in that concise way makes it a little difficult to identify the point the FTT was making. It might have been comparing the position of the Freeholder and the RTM Company after the making of the proposed variation; or it might have been comparing the position of the Freeholder before the variation with the position of the RTM Company after the variation.

75. It seems unlikely that the FTT had the first comparison in mind. The RTM Company's proposal was for the lease to be varied so that *the Lessor* would be entitled to recover its costs incurred in connection with or in contemplation of the enforcement of any of the leaseholder's covenants. The variation did not refer to the RTM Company at all and it would not give the RTM Company any different rights from those which the Freeholder, as Lessor under the leases, would enjoy once the variation took effect. The RTM Company would benefit from the variation indirectly, through the effect of section 102 and paragraph 10 of Schedule 7 to the 2002 Act.

76. The comparison the FTT is more likely to have considered significant was between the rights of the Freeholder, as Lessor, before the proposed variation, and the rights of the RTM Company once it had taken effect. Why, it may have thought, should the RTM Company have greater rights than the parties originally agreed the Lessor should have? That is a relevant question, but unfortunately the FTT did not attempt to answer it.

77. Mr Fain criticised the FTT for basing this part of its decision on whether the leases, as currently drafted, would have permitted the Freeholder to recover the costs of enforcement. It failed to consider the extent to which the Freeholder could recover its costs or the reasons why the RTM Company could not. It therefore failed to have regard to relevant considerations when exercising its discretion.

78. I agree with Mr Fain's submission on the adequacy of the FTT's assessment of the relevant circumstances. For one thing, as Lessor, the Freeholder was entitled to the benefit of clause 3(13) and could recover the costs of and incidental to the preparation and service of a section 146 notice. Additionally, once a section 146 notice was served and forfeiture proceedings were commenced, the Freeholder would expect to recover all of its costs as a condition of relief against forfeiture. In principle, those would include costs incurred in contemplation of service of the notice, and in any previous proceedings before the FTT under section 168, 2002 Act for a determination of breach, or under section 27A, Landlord and Tenant Act 1985 for quantification of the leaseholder's service charge liability.

79. In *Barrett v Robinson* [2014] UKUT 322 (LC), at [48], I sought to explain the purpose of a clause like clause 3(13) (the equivalent in that case was clause 4(14)), as follows:

> "The real purpose of a clause in the form of clause 4(14) can be seen from its concluding words: "notwithstanding forfeiture is avoided otherwise than by relief granted by the Court." Where a forfeiture is avoided by relief granted by the court, the terms of relief reflect the principle that the landlord should be put in the position it would have been in but for the forfeiture (i.e. if the tenant

had not committed the breach of covenant on which the forfeiture was based)(see Woodfall: Landlord and Tenant, para 17.169; *Egerton v Jones* [1939] 2 KB 702). That principle will normally require that the tenant reimburse any costs incurred by the landlord in serving the required section 146 notice and in bringing the proceedings. However, the purpose of a notice under section 146(1) is to allow a tenant who is in breach of covenant the opportunity to remedy the breach. Where a breach has been remedied within a reasonable time, the notice will have been complied with and the landlord will have no continuing cause of action, nor any reason to commence proceedings to forfeit the lease. The same landlord may nonetheless have incurred significant costs in the preparation of the notice itself. The object of a clause such as clause 4(14) is to give the landlord the contractual right to recoup the costs incurred in taking those preparatory steps, even where no proceedings eventuate in which the payment of the landlord's costs could be made a condition of relief against forfeiture."

80. The RTM Company has no right to serve a section 146 notice, and therefore no right to recover the incidental costs of doing so. Nor has the RTM Company any opportunity to seek the forfeiture of a lease. Accordingly, with the leases in their current form, it will never be in a position to recover the costs it might incur in taking steps to enforce the leaseholder's covenants whether under clause 3(13) or as a condition of relief against forfeiture. Those are relevant differences between the rights of the Freeholder and the rights of the RTM Company which the FTT overlooked.

81. Another relevant consideration overlooked by the FTT is that in 1983 and 1984, when the leases were granted, the distinction on which it placed such importance, between costs "of and incidental to" the preparation and service of a section 146 notice, and costs "in connection with or in contemplation of" the enforcement of leaseholder's covenants, would have been of very little, if any, importance. Before the commencement of sections 81 of the Housing Act 1996 there was no need for a landlord to obtain a final determination of a court or tribunal concerning the amount of a service charge or administration charge payable by a leaseholder before proceedings could be commenced for the forfeiture of a lease for non-payment of the charge. Before the passing of section 168 of the Commonhold and Leasehold Reform Act 2002, there was no need for a landlord to seek a preliminary determination from a tribunal that a breach of covenant had occurred, before serving a section 146 notice. All of the Lessor's costs of enforcement through the threat of forfeiture up to and including the service of a section 146 notice (which at that time was almost invariably a landlord's preferred method of enforcement) would have been covered by both formulations. The costs of any preliminary investigation or advice which preceded the drafting of a section 146 notice would be costs "of and incidental to" the preparation of the notice.

82. It is true that the extensive statutory interventions since the original leases were granted limit the circumstances in which a lease can be forfeited, and it might be said that since forfeiture is a remedy which is not available to an RTM Company the changes are not relevant to the proposed variations. But it remains the case that the RTM company is a creation of statute which did not exist when these leases were first granted. The idea that responsibility for the maintenance of the building might become detached from the conventional remedy of forfeiture would not have occurred to the parties.

83. Additionally, the leases were first granted in a context in which a leaseholder who failed to pay service or administration charges which were properly due would have been liable to pay the landlord's costs of enforcement either as a result of a court order or by the contractual route provided by clause 3(13). The current position is that proceedings to quantify a defaulting leaseholder's liability will almost always take place in a tribunal where costs-shifting powers are available only by exception, leaving the landlord or the RTM Company unable to recover their costs of enforcement. Although the Freeholder and the RTM Company would, in that respect, be in the same position, that does not mean that changes since the commencement of the original leases are irrelevant to the question whether it would be reasonable to effect a variation.

84. One response to the FTT's question (why should the RTM Company recover litigation costs when the Freeholder could not recover litigation costs?) might therefore be that because of statutory interventions since the leases were granted, they now fail to make satisfactory provision for the costs of enforcement, whether by the Lessor or by an RTM Company. The FTT did not consider that possibility. By limiting its consideration of the relevant circumstances to a simple comparison between the rights of the Freeholder and the rights of the RTM Company, the FTT failed to consider whether the position which both found themselves in was unsatisfactory. At the very least, the consideration it did give to the application failed to take account of the different rights of the Freeholder and the RTM Company, and the changes brought about by statute since the leases were granted.

85. Those were all relevant circumstances which ought to have been taken into account. Had the FTT addressed the relevant questions in their logical sequence having regard to the relevant considerations its conclusion might have been different. Because it did not, its decision on the introduction of the proposed clause 3(13A) must be set aside.

86. Nor did the FTT address the remaining questions raised by section 35 and 38, namely, whether the leaseholders would be substantially prejudiced by the variation in a way which could not adequately be compensated by an award of money, and if not, whether there was any other reason why it would not be reasonable in the circumstances to order the variation. It is understandable that, having decided that it did not have jurisdiction to make the proposed variation, and that none of the grounds in section 35(2) had been made out, the FTT felt it sufficient to provide only one reason why it would not have exercised the power if it had enjoyed it. But the result is that those matters remain to be considered for the first time either by this Tribunal if I remake the decision, or by the FTT If I remit the proceedings for further consideration.

87. For these reasons I allow the appeal on ground 2 and set aside the FTT's decision so far as it concerned the variation of the leases to allow the Lessor to recover the costs of enforcement directly from the defaulting leaseholder.

**Issue 3 – Was the FTT entitled, for the reasons it gave, to refuse to vary the leases to provide for the recovery of legal expenses from all leaseholders as a service charge?**

88. The FTT rejected the second variation proposed by the RTM Company, which would have enabled it to recover the cost of enforcement of any leaseholder's covenants as a service charge expense payable by all of the leaseholders collectively. It decided that it did not have jurisdiction to introduce the proposed alteration under section 35(2)(e) for the same

reasons it had refused jurisdiction to introduce an administration charge. Nevertheless, it said that it was able to give section 35(3A) "a wide and purposive construction to fill a significant lacuna in the Act as originally drafted". On that basis the FTT held that it had jurisdiction to make the second of the proposed variations.

89. As I have previously explained when considering issue 1 above, the FTT was mistaken in its understanding of section 35. The submissions of Mr Demachkie which had persuaded it that it had no jurisdiction to vary the leases to introduce an administration charge were equally mistaken when applied to the proposed variation in the service charge provisions of the lease. The "significant lacuna" which the FTT detected was illusory and, in any event, subsection (3A) does not provide an alternative free standing ground of application.

90. The only jurisdiction question which the FTT needed to consider was whether each of the leases made satisfactory provision for the recovery by the Lessor or the RTM Company of expenditure incurred or to be incurred by them for the benefit of the individual leaseholder or for the benefit of a number of leaseholders. It did not consider that question.

91. In refusing to exercise its discretion to give effect to the proposed alteration making the costs of enforcement recoverable through the service charge, the FTT said that it would apply the approach of this Tribunal in *Shellpoint Trustees v Barnett*, which it described as "the most detailed and authoritative decision under section 35". In *Shellpoint* the Tribunal refused to vary leases in a development to allow the landlord to recover its costs of bringing proceedings against one leaseholder at the request of another. In their original form the leases required an individual leaseholder to indemnify the landlord against the costs of proceedings brought at their request against a fellow leaseholder. The Tribunal said of the proposed change, which would have dispensed with the need for an indemnity and added the landlord's costs to the service charge:

> "It is in our judgment a quite exceptional, and substantially prejudicial, thing to enable the landlords to recover its costs not only of recovering the service charge but also of enforcement of all of its covenants from all tenants through the service charge, particularly where the landlords are not owned or controlled by the tenants and there is no evidence that the landlords cannot afford to do so or that the absence of such covenants has caused any difficulties in the past or will or is likely to in the future. It would enable the landlords to decide how, when, by whom and at what cost they should enforce covenants. That would shift all the financial risk and liability from the landlords to the tenants whose only control would be proceedings via the LVT and all the time, trouble, cost and uncertainty that that involves. The appellants have put forward no justification for such a major risk and liability transfer and all that that entails."

92. The FTT acknowledged that the circumstances of this application were not the same as those considered by the Tribunal in *Shellpoint* (in particular, the RTM Company is controlled by the leaseholders, there is evidence that it cannot afford to litigate, and its case is that without the variation it will continue to experience difficulty in enforcing its right to collect service charges). Nevertheless, it considered that the decision was not confined to its own facts and that "[t]here is no reason why this approach should not apply to RTM Companies as well."

93. The FTT appears not to have appreciated that *Shellpoint* was not an appeal under section 35 at all. It was an appeal from the decision of an LVT on an application under section 37 brought by the landlord of a development of 365 leasehold flats with the support of the majority of the leaseholders. The applications sought variations to each of the leases to enable the communal heating and hot water systems to be replaced with individual boilers in each flat with consequential provisions for recovery of those costs through the service charge together with other unrelated variations to enable the landlord to recover its costs of enforcing covenants contained in the Leases through the service charge. No evidence at all was tendered as to why the variations unrelated to the replacement of the heating system were required, or what their object was; in particular, there was no evidence or suggestion that the landlord had been unable to properly manage the blocks or enforce any of the covenants due to being unable to recover such costs *via* the service charge. The LVT allowed the variations so far as they concerned the communal systems but refused those concerning the service charge and the recoupment of the costs of enforcement.

94. The Tribunal held, at [64], that the applications failed because the sole object of the package of variations could be achieved without making amendments unconnected to the replacement of the communal systems. That was a reflection of the single available ground of application in section 37(3), which is not a relevant consideration in an application under section 35.

95. One unusual feature of the appeal was the acknowledgement by the appellant landlord's counsel that neither he nor his clients had appreciated the far reaching scope of the proposed variation to permit the addition to the service charge of the costs of enforcement of *all* leaseholder covenants, not just service charge covenants (see [90]). They now considered that to order such a variation would be wrong. Despite this acknowledgement, the Tribunal, at [98], considered that "[t]he proposed variations may well be appropriate where the landlord is a single asset company owned and controlled by the tenants with no source of revenue other than the service charge and rent." But there was no evidence or suggestion that the landlord met that description.

96. The passage from *Shellpoint* quoted by the FTT (see [92], above) was in part of the Tribunal's decision considering the issue of prejudice and section 38(6) (which applies equally to applications under section 35 and 37). Reading the decision as a whole, it is apparent that it was the breadth of the proposed variations, going far beyond what the landlord had understood it was proposing, which the Tribunal considered to be "substantially prejudicial". The Tribunal took exception to the proposal for the landlord "to recover its costs not only of recovering the service charge but also of enforcement of all of its covenants from all tenants through the service charge". The decision was emphatically not that allowing the recovery through the service charge of the costs of collecting unpaid service charges (to the extent that they were not recouped from the defaulting leaseholder) was prejudicial or unreasonable. Nor, importantly, was it a decision that the proposed variations would not have been justifiable if the landlord had been owned by the tenants.

97. The FTT drew attention to the factual differences between *Shellpoint* and the current case but it made no assessment of their significance. On proper analysis, *Shellpoint* contains very little of relevance to the current application and by simply adopting the approach taken in that case as if it reflected a rule of general application, the FTT failed to give proper consideration to the matter before it.

98. It follows that neither the FTT's assessment of the gateway condition, nor its approach to the exercise of its discretion, can be allowed to stand. For these reasons I allow the appeal on issue 3.

**Consequences**

99. I have decided so far that the reasons given by the FTT did not justify its refusal to vary the leases to oblige the leaseholder to reimburse the lessor's costs of enforcement action, nor did they justify its refusal to vary the leases to permit the recovery of those costs through the service charge.

100. On an appeal, if this Tribunal finds that the making of the FTT's decision involved the making of an error on a point of law, it may (but need not) set aside the decision. If the decision is set aside the Tribunal must then either remit the case to the FTT for reconsideration or re-make the decision.

101. On behalf of Mr Polturak, Mr Demachkie submitted that the FTT's decision should not be set aside, because it was supportable on an additional ground, which it had not considered. That was that the proposed variation would drastically alter what Mr Demachkie referred to as "the balance under the lease" by favouring the RTM Company at the expense of any tenant with a legitimate dispute. He asserted that the variations would substantially prejudice the leaseholders, and that such prejudice could not sensibly be quantified or compensated in money.

102. As Mr Demachkie acknowledged, the FTT did not consider the issue of prejudice. Although the Tribunal in *Shellpoint* had dealt with prejudice, the passage which the FTT quoted from that decision was not concerned with the quantification of prejudice or whether such prejudice as might be caused by a variation could be adequately compensated. Neither party has suggested that I should remit the case to the FTT to enable it to consider that issue for itself, and it would put the parties to further avoidable expense and delay which can and should be avoided. As it will therefore be necessary for me to consider the issue of prejudice in any event, and as it involves balancing a number of factors, the better course is for me to consider it while re-making the decision on the application as a whole.

103. For these reasons I set aside the FTT's decision, and I will now re-make it.

**Remaking the decision**

104. The leases with which these proceedings are concerned are all long leases of flats. By section 102(1) and paragraph 10 of Schedule 7 to the Commonhold and Leasehold Reform Act 2002 the RTM Company is entitled to make an application under section 35 as if it was a party to the leases it seeks to vary. The contentious questions to be determined in relation to each proposed variation (or any alternative formulation of the variation) are therefore (1) whether there are grounds under section 35(2) for making the variation, (2) whether the variation would substantially prejudice any person, (3) if so, whether money would be adequate compensation for that prejudice, (4) whether for any other reason it would not be reasonable in the circumstances for the variation to be effected, (5) whether any variation should take effect retrospectively, or only from the date of the application or

this decision, and (6) whether compensation should be paid to any person in respect of any loss or disadvantage they are likely to suffer as a result of the variation.

*The variations*

105. The sole ground of the application submitted to the FTT on 23 October 2023 was under section 35(2)(e). It was said that the leases fail to make satisfactory provision for the recovery by the Lessor (and therefore by the RTM Company) of expenditure incurred or to be incurred by them for the benefit of the leaseholders. The particular expenditure highlighted was expenditure incurred by the RTM Company in recovering unpaid service charges.

106. The proposed variations are somewhat wider than the grounds require. In particular, the proposed clause 3(13A) (see [16] above) refers to the recovery of professional fees incurred in connection with or in contemplation of the enforcement of *any* of the Lessee's covenants. That is the formulation which the Tribunal found objectionable in *Shellpoint.* There is no need for so wide an obligation if the objective of the variation is to deal with the non-payment of service charges. A covenant by every leaseholder in these terms would suffice (clause 4(1) being the leaseholder's covenant to pay service charges):

> "To pay to the Lessor on demand the reasonable costs and expenses (including any solicitors', surveyors' or other professionals' fees, costs and expenses and any VAT on them) incurred by the Lessor in or in connection with the determination or recovery of sums payable under clause 4(1)."

107. The second variation, to add to the categories of service charge expenditure listed in paragraph 1(1) of the Third Schedule a new category covering professional fees incurred in connection with the enforcement of any leaseholders' covenants, would not be objectionable in principle and would go no further than necessary to enable the RTM Company to fund enforcement action in the event of a breach of covenant.

108. As I have explained, the Tribunal has power under section 38(4) to make different variations from those proposed in the application. I will therefore consider the sequence of questions identified above by reference to the narrower terms of clause 3(13A), but the original formulation of the proposed new paragraph 1(1)(iv) of the Third Schedule.

*(1) Satisfactory provision*

109. Do the leases make satisfactory provision for the recovery by the RTM Company of expenditure incurred or to be incurred by it for the benefit of the leaseholders? It is common ground that the leases do not provide for the RTM Company to recover its costs incurred in connection with the determination or recovery of service charges. One way of considering ground (e) would be to focus narrowly on those costs and to ask whether the leases fail to make satisfactory provision for the recovery of costs incurred in connection with the determination or recovery of service charges. An alternative approach would be to consider whether, by failing to make provision for the recovery of those costs, the leases fail to make satisfactory provision for the recovery by the RTM Company of the costs of services it provides to the leaseholders. In practice there may not be much difference

between the two questions, but it seems to me that the second, wider question is more consistent with subsection (2)(e) itself, particularly in the light of subsection (3A).

110. Does the absence of provision for the recovery of costs incurred in connection with the determination or recovery of service charges mean that the leases fail to make satisfactory provision for the recovery by the RTM Company of costs expenditure incurred by it for the benefit of the leaseholders? That raises the question of what the Act means when it refers to a lease which "fails to make satisfactory provision".

111. The starting point to any exercise in statutory interpretation is the language of the Act itself. In *Morgan v Fletcher* the Tribunal referred to the report of the Nugee Committee to identify the vice or mischief which Part IV of the 1987 Act was intended to address, but care is required when resorting to such external sources. In *O (a minor), R (on the application of) v Secretary of State for the Home Department* [2022] UKSC 3, at [29], Lord Hodge DPSC emphasised that the words which Parliament has chosen to enact as an expression of the purpose of a piece of legislation are the primary source by which the meaning of the legislation is to be ascertained. The role of external aids is secondary, as he explained, at [30]:

> "External aids to interpretation therefore must play a secondary role. Explanatory notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty: *Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."

112. In this case, the relevant words of the statute are "the lease fails to make satisfactory provision". The key word is "satisfactory", which the Oxford English Dictionary defines as meaning "adequate, fair, tolerable; sufficient for the needs of a given situation or circumstance". It is a word of approval with middling connotations, and its antonym, unsatisfactory, is also a comparatively moderate rebuke. To say that there has been a failure to make satisfactory provision for something suggests that there is a problem of some sort without giving the impression that the problem is acute. Nor does it give any indication of the nature of the problem. It may be something for which provision has been made, which turns out not to be adequate, or it may be the omission to make any provision at all for a particular contingency which is unsatisfactory.

113. "Satisfactory" is an ordinary English word with a well understood meaning. It is not necessary or appropriate to substitute some different word, such as "defect" when addressing the ground (e) question. The better course is to identify the provision which has been made in the lease, or which is missing from it, and to consider whether in the

circumstances which now exist that amounts to satisfactory provision, in the ordinary understanding of those words.

114. The leases do not contain a covenant by the leaseholder to reimburse expenditure by the landlord in recovering unpaid service charges. Nor does they provide for the landlord to recoup such costs through the service charge. When the leases were first granted, those features would not have been regarded as problematic or as less than satisfactory. For reasons which I have already considered, the landlord would have been confident that a leaseholder who failed to pay services charges which were due would be liable to pay the landlord's costs of securing payment contractually under clause 3(13). If it was necessary to resort to proceedings, payment of the landlord's costs would have been a standard condition of relief against forfeiture. Thus, reimbursement of the landlord's costs of enforcement was what the original parties bargained for.

115. Statute has subsequently intervened to place obstacles in the way of the landlord. The parties could not have foreseen or made provision for that intervention when they first entered into the leases. Provision which was satisfactory has become unsatisfactory, in the sense that it no longer achieves what the parties originally intended.

116. Nor could the parties have foreseen or made provision for the right to collect service charges becoming vested in an entity, an RTM company, which would have no assets of its own and which would not have the opportunity to enforce payment by forfeiture.

117. In *Cleary, Triplerose* and *Shellpoint* this Tribunal has identified the position of an RTM company as one which introduces different considerations. In *FirstPort Services Ltd v Settlers Court RTM Co Ltd* [2022] UKSC1, at [56] Lord Briggs explained that:

> "An RTM company is, because of the statutory provisions which regulate it, not a creature of substance. It is a company limited by guarantee with no share capital and no assets other than the right to enforce the tenant covenants in the leases of the flats in its building, otherwise than by forfeiture."

Such an entity will not be in a position to fund litigation without some external source of funds. That source must necessarily be either the members of the company, or the whole body of leaseholders, or the individual leaseholder whose default gave rise to the need for enforcement. In deciding where such expense would most satisfactorily fall it is relevant to bear in mind that an RTM Company has no interest in the premises themselves; it exists to provide services for the benefit of all leaseholders, not for its own benefit, or that of its members as such. Unlike the landlord, an RTM company has no possibility of achieving a forfeiture windfall. It is relevant also to remember that the consequences of the inability of an RTM Company or a leaseholder-owned landlord to pursue a defaulting leaseholder through litigation, or a lack of alternative funds to make up the shortfall will be felt by all leaseholders collectively. The building may not be maintained as they would like it to be, works may be delayed or cancelled, or they may be asked to make additional contributions beyond their contractual liability.

118. In all of those circumstances it is not difficult to describe a structure under which the expense of enforcement falls on the members of the company or the whole body of leaseholders as one which fails to make satisfactory provision for the recovery of the costs of services. Viewing their leases objectively, rather than from the perspective of an

individual who was already in dispute with the RTM Company, all leaseholders would be likely to regard the current arrangements as unsatisfactory both insofar as they protect a defaulting leaseholder from the risk of paying the RTM Company's costs of court or tribunal proceedings, and in depriving the RTM Company of recourse to the service charge account to meet anticipated expenditure.

119. For these reasons I am satisfied that there are grounds under section 35(2)(e) for making the variations because the leases fail to make satisfactory provision for the recovery of service charges by the RTM Company and by the current, leaseholder-owned landlord.

*(2) Would the variations be likely substantially to prejudice any person?*

120. When considering whether substantial prejudice would be caused to any person by a variation order, it is necessary to remember that there is a live issue over the date from which the proposed variations would take effect. But, as far as I am aware, there have as yet been no proceedings against any leaseholder to which the proposed variations would apply. The current proceedings are not directly concerned with enforcement and, if it was considered appropriate for the avoidance of doubt, they could be excluded. I believe the issue of timing can be put to one side for the moment. I will first consider whether, in principle, the variations are likely substantially to prejudice an individual leaseholder before considering whether a specific leaseholder is likely to be prejudiced.

121. I do not consider that variations which make individuals liable for the consequences of their own default, or which enable the costs of enforcement to be met initially from the service charge, are likely substantially to prejudice the general body of leaseholders. It is to the benefit of the leaseholders as a whole that their leases facilitate the performance by the RTM Company of the functions which it was set up to discharge. Only in that way will the building be maintained in accordance with their expectations, to a high standard and without a disproportionate share of the cost falling on any particular group. Those benefits will be reflected in the condition of the building and may also be seen in the maintenance or improvement of the value of individual flats, and in the willingness of individuals to take on the responsibility of running the RTM Company. The leaseholders will obtain sufficient value for the additional expenditure to which they will be exposed to eliminate any prejudice.

122. As for Mr Polturak and Mr Davies, they too will benefit from the RTM Company being in a position to collect the service charges on which it depends to be able to maintain the building. Any disadvantage they experience will be offset to some extent by the benefit they derive from the RTM Company being able more effectively to proceed against other leaseholders. But, as leaseholders currently in dispute with the RTM Company, they face a much more immediate and substantial risk that they may personally be liable to meet the cost of enforcement action against themselves. They also share the risk of being required to contribute through the service charge to the costs of proceedings against themselves, but will additionally be burdened by their own costs of defending those proceedings (which might be avoided altogether if the RTM Company's access to funds remained restricted). The risk of prejudice is therefore greater for Mr Polturak and Mr Davies than for other leaseholders.

123. But, importantly, the risk that individual leaseholders may be the first who are liable to reimburse the RTM Company's costs of proceedings under the proposed clause 3(13A), or through the service charge, is not a risk against which they lack protection.

124. A charge under proposed clause 3(13A) would be an administration charge. Paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 allows the tenant of a dwelling to apply to the court or tribunal before which proceedings are, or have been, taking place for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs. By paragraph 5A(2), the relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

125. A service charge to cover the costs of enforcement proceedings in a court or tribunal would be a charge to which section 20C, Landlord and Tenant Act 1985 would apply; the reasonableness limitation imposed on all service charges by section 19 of the 1985 Act would also apply to it. Mr Davies and Mr Polturak, or any other leaseholder, would be entitled to apply for an order that the costs of the proceedings were not to be regarded as relevant costs when calculating any service charge payable by them. The court or tribunal would make such order on the application as it considered just and equitable. They could also apply for a determination of their liability under section 27A of the 1985 Act, to which the section 19 cap would apply.

126. These statutory protections will be significantly enhanced from the commencement (on a date not yet appointed) of section 62 and 63 of the Leasehold and Freehold Reform Act 2024. The former section will place the onus on landlords of making an application to the FTT for a determination that the costs they have incurred in litigation should be recovered from one or more leaseholders. On such an application the relevant court or tribunal may make such order on the application as it considers just and equitable in the circumstances. The latter provision will make it an implied term of a lease that the landlord shall pay any amount ordered by a court or tribunal in respect of the tenant's litigation costs in connection with proceedings concerning the lease. Once again, the relevant court or tribunal will be able to make such order on an application under section 63 as it considers just and equitable in the circumstances. When it comes into force, this provision will go a long way to eliminate arguments based on an inequality of arms which Mr Demachkie particularly relied on in this part of the appeal. He suggested that it would be prejudicial and unjust for the RTM Company to be armed by the Tribunal with contractual rights which it could rely on to recover its costs of proceedings in the FTT or the small claims court, where a leaseholder would be unable to recover their own costs if they were the successful party.

127. The question is therefore whether, taking account of (1) the collective benefits of the RTM Company having access to funds to enable it to pursue defaulting leaseholders, (2) the disadvantage for Mr Davies and Mr Polturak of the RTM Company being in a stronger position to pursue them (ultimately at their own expense) for sums which they are currently withholding, and (3) the protections currently and prospectively available to leaseholders, the proposed variations would be likely substantially to prejudice Mr Davies and Mr Polturak. In view of the statutory protections I have identified I will assume, when answering that question, that each leaseholder will be able to ensure that no liability will fall on them unless the relevant court or tribunal considers it just and equitable that it should, and that, in due course, but on a date not yet known, a successful leaseholder will

be entitled to recover their costs of relevant tribunal proceedings to the extent that the relevant tribunal considers it just and equitable.

128. On that assumption, I do not consider that Mr Davies and Mr Polturak would be likely to be substantially prejudiced by the proposed variations to the service charge schedule. They would be required to contribute their proportionate share of the RTM Company's costs of proceedings, if it was just and equitable that they should do so. That would put them in a less advantageous position than they currently enjoy, because at present the RTM Company has very limited access to funds. But the financial burden involved would be shared proportionately amongst all leaseholders, would be controlled by their mutual self-interest, would be further limited, if necessary, by the reasonableness limitation imposed on all service charges by section 19, Landlord and Tenant Act 1985, and finally would be restricted to what was just and equitable by section 20C of the same Act. Any prejudice which any leaseholder might experience would be counterbalanced by the ability of the RTM Company properly to manage the building and I am satisfied that the result would be a net benefit, rather than a cause of prejudice. In the absence of a likelihood of substantial prejudice the prohibition in section 38(6) does not apply and the Tribunal has a discretion to make an order varying all of the leases to introduce a new paragraph 1(1)(iv) into the Third Schedule allowing recovery through the service charge of expenditure on professional fees in connection with the enforcement of any leaseholders' covenants.

129. The proposed clause 3(13A) would expose Mr Davies and Mr Polturak to the risk of a much larger bill, equal to the whole of the costs of enforcement proceedings, including proceedings in the FTT to quantify their liability for the service charges which they have been withholding. That liability might be measured in tens of thousands of pounds and the prejudice which would be likely to result would be significant, even when the counter balancing factors already mentioned are taken into account. On that basis the Tribunal has power to introduce the new clause 3(13A) only if it appears to me that an award of compensation under section 38(10) would not afford Mr Davies and Mr Polturak "adequate compensation".

*(3) Could money adequately compensate Mr Davies and Mr Polturak for prejudice they would be likely to experience by the introduction of clause 3(13A)?*

130. No evidence was presented to the FTT on the issue of compensation. Mr Demachkie submitted that it was impossible to provide such evidence, as the consequences of making the variations proposed were not capable of being quantified in money. In particular, he suggested, the balance of the relationship between the leaseholders and the RTM Company would be altered in a way which could not be measured. That submission might be said to apply with greater force to the introduction of clause 3(13A) and Mr Demachkie himself acknowledged that the case for varying the service charge provisions in the Third Schedule was stronger.

131. The main prejudice which any leaseholder is likely to experience as a result of the variation of their lease to introduce a new clause 3(13A) would be their exposure for the first time to a risk of a liability to pay money. I can see no reason why a risk of liability to pay money could not, in principle, be adequately compensated by a payment of money. Perfection is not required, and there is nothing in the nature of the prejudice which would affect a leaseholder's enjoyment of their flat or their personal well-being such that a payment would not be capable of compensating them "adequately". Nor do I consider

that the "balance of the relationship" between the parties creates a difficulty. The parties' relationship is transactional: the RTM Company is liable to provide services and the leaseholders are liable to pay for them. It is also heavily regulated by the statutory provisions I have mentioned. The consequences of a change are capable of assessment. Some types of variation may not be capable of being adequately compensated in money, but this is not one of them.

132. The prejudice in question is the immediate risk to Mr Davies and Mr Polturak in particular (it has not been suggested that other leaseholders are in dispute with the RTM Company) that they will be exposed to an obligation to pay costs in proceedings brought to resolve the current disagreement over their service charge liability. Once the current dispute is determined, there is no reason why Mr Davies and Mr Polturak should not be in the same position as other leaseholders who, for the reasons I have explained, will benefit from the proposed variations, rather than be prejudiced by them.

133. In order to determine adequate compensation it would be necessary to assess the likelihood of either leaseholder being required to pay the RTM Company's costs of proceedings and to quantify the amount which would be likely to be payable. An experienced litigator would be able to provide a reliable estimate of the costs of tribunal proceedings. But in circumstances where the parties are already in dispute, assessing the likelihood of a particular leaseholder being required to pay the RTM Company's costs is a much more difficult exercise. It would require detailed knowledge of the circumstances of the current dispute and of the appetite of all parties for litigation and for compromise. It would also require an assessment of the likelihood, at the conclusion of proceedings, of an order being made protecting the leaseholders from their new liability to pay an administration charge to meet the RTM Company's costs. These may be the sort of assessments which those who provide after the event insurance against the costs of litigation undertake, but it difficult to see how, practically, a tribunal could embark on the same exercise. It would be required to immerse itself deep into the detail of the dispute to enable it to determine the probability of a particular outcome and then to determine the amount which would adequately compensate the two leaseholders for that risk. I do not think the power to award compensation under section 36(10) was intended for that purpose.

134. In summary, my conclusions on the adequacy of compensation are, first, that there is no need for any person to be compensated for the variation to the Third Schedule because it will not cause prejudice; secondly, that there is no need for any person other than Mr Davies and Mr Polturak to be compensated for the introduction of clause 3(13A); thirdly, that there is no need for Mr Davies and Mr Polturak to be compensated for prejudice arising out of future service charge disputes, as in that respect they will be in the same position as all other leaseholders and will be beneficiaries of the new clause 3(13A); fourthly, that Mr Davies and Mr Polturak are likely to be substantially prejudiced in respect of the existing service charge disputes and could not be adequately compensated for that prejudice by an award of money under section 38(10).

*(4) Reasonableness*

135. It follows from the fourth of my conclusions on the adequacy of compensation that the Tribunal has no power to order that the leases of Mr Davies and Mr Polturak be varied by the introduction of clause 3(13A) if it is applicable to the existing service charge dispute.

The same considerations as led me to that conclusion would also have caused me to refuse the variation to that extent on the grounds of reasonableness. It would not be reasonable to expect the parties to embark on a complicated and uncertain assessment of compensation when the variation to the Third Schedule will be sufficient to meet the RTM Company's immediate needs.

136. It is therefore necessary for me to consider whether there is any other reason, not already taken into account, why it would not be reasonable for the remaining variations to be effected.

137. I take into account the fact that the proposed variations are opposed by the leaseholders of three of eleven flats in the building and that the other leaseholders support them. It was submitted by Mr Demachkie that for an application made under section 35 rather than section 37, the degree of support for a variation was irrelevant. I do not agree. In circumstances where the obligations of each leaseholder are the same and are capable of having a significant impact on other leaseholders' enjoyment of their own property, the degree of support which a particular variation commands does seem to me to be relevant to whether it is reasonable that it should be imposed against the will of some. Under section 35 it is not a decisive consideration, but it is relevant, and the greater the support a proposal attracts, the less likely it is to be unreasonable to impose it.

138. The FTT recorded in its decision that all parties had agreed before it that it would not be appropriate for it to be asked to make findings of fact or to apportion blame for the impasse which had been reached in the management of the building. It was not suggested that I should take a different course. But it is relevant to refer to the parties' statements of case before the FTT to identify matters on which they relied as making it unreasonable for the proposed variations to be made.

139. In his statement of case, Mr Davies argued that it would not be reasonable to change the terms originally agreed. That is a serious consideration, engaging what the Tribunal in *Camden v Morath* referred to as "the law's general resistance to the temptation to interfere in or improve contractual arrangements freely made." This is the appropriate point in the analysis to take it into account. The parties' freedom to contract in whatever terms they choose to accept weighs against the making of any change to the original scheme.

140. In *Morgan v Fletcher* the Tribunal referred, at [19], to the mischief which Part IV of the 1987 Act was intended to address (and which justified intervention to vary a contract freely entered into). That mischief was the problem of schemes for the maintenance of residential blocks which are seriously defective in circumstances where the defects "have a direct bearing on the upkeep and fitness for habitation of the flats in the block". That cannot be taken to be a complete statement of the purpose of Part IV, but it is an indication of the balance which has to be struck in these cases. On the one hand, the principles of contractual autonomy and the freedom of parties to agree whatever terms they wish are very important; on the other hand, the terms which parties agreed often many years ago may contain drafting errors or incomplete or poorly thought out contractual arrangements, or they may have failed to anticipate social or legislative changes which give rise many years later to serious problems for the original parties or their the successors. Those are relevant considerations in this case for reasons which have already been considered. In particular, it is relevant that the proper maintenance of the building is being delayed by disputes over service charges which cannot be resolved (or at least, are not being resolved)

because of the inability of the RTM Company (an entity which did not exist when the leases were first granted) to fund tribunal proceedings (which were not required when the leases were first granted).

141. Mr Davies also suggested that he had been given insufficient notice of the proposals on which he was not consulted in advance. The issue of notice can no longer be relevant, but it is material that Mr Davies (like Mr Polturak) is entitled to membership of the RTM Company and by that route will be able to influence its decisions. He also suggested that the RTM Company could rely on the threat of forfeiture, in the same way as the Freeholder, but section 100(3), 2002 Act confirms that an RTM company may not exercise any function of re-entry or forfeiture. He pointed to the RTM Company's ability to raise funds from its members, but that depends on the willingness of members to contribute over and above their contractual liabilities under their leases. He also pointed out that, due to previous disputes between leaseholders and the Freeholder which resulted in proceedings in 2012 and 2016, the members of the RTM Company were aware that the leases did not provide for the recovery of legal expenses as a service charge or administration charge when they voluntarily assumed responsibility for the management of the building. Assuming that is correct, it does not seem to me to make it unreasonable for the leases to be varied in the manner proposed. The remaining matters which Mr Davies focussed on in his statement of case concerned the state of repair of the building, and responsibility for it. I have read his concerns, which confirm that there is significant work to be done in the building, and I take that into account along with the other matters he raised.

142. In his statement of case Mr Polturak also referred to the ability of the RTM Company to look to its members to fund its activities. He pointed to the absence of a complete consensus and to the fact that his lease had not been varied in 1991, when the term was extended, and said that the bargain struck then should not be rewritten. He suggested that the RTM Company could act in tribunal proceedings without legal representation. I take these matters into account.

143. None of the points made by Mr Davies and Mr Polturak seem to me to make it unreasonable for all of the leases in the building to be varied to enable the RTM Company to raise funds through the service charge to enable it to participate in proceedings to enforce leaseholders' covenants. Nor do they make it unreasonable for individual leaseholders to be liable for costs incurred by the RTM Company in enforcing their obligation to contribute to the cost of services provided to them. The leases have been overtaken by substantial statutory changes since they were first granted and are no longer satisfactory. They make it difficult or impossible for the RTM Company to carry out its functions in the face of resistance from particular leaseholders. Those leaseholders will have significant statutory protection from unreasonable charges. In all the circumstances it does not appear to me that there is any reason why it would not be reasonable for the remaining variations to be made.

144. I have previously said that, after concluding for the purpose of section 38(6)(b) that there is no other reason why a variation order should not be made, it is not obvious that a genuine discretionary question remains to be considered. But, strictly speaking, the conclusions I have reached do no more than engage the power in section 38(1) to make an order. Formally, therefore, I record that having considered all of the circumstances relied on by the parties I can see no reason not to exercise my discretion to make the variation.

*(5) From what date should the variations take effect?*

145. It was suggested by Mr Demachkie that no variation should have retrospective effect. Mr Fain argued that they should be backdated to the date in 2018 on which the RTM Company acquired the right to manage.

146. I do not think it would be reasonable to rewrite history, as Mr Demachkie put it, by vesting the RTM Company with the right to recover costs of enforcement as far back as 2018. The application was made on 23 October 2023 and from that date all parties were on notice that their contractual rights might change. That seems to me to be an appropriate date, in this case, for the variations to take effect. That is subject to two points.

147. The variations proposed by the RTM Company were to enable it to recover professional fees incurred in connection with enforcement of leaseholders' covenants. In their original form and, in the case of clause 3(13A), in its modified form, the variations do not expressly refer to costs incurred in the current variation proceedings, and it would be regrettable if further costs were incurred in an argument about what the new clauses mean. Whether or not the RTM Company hoped to be able to recoup its costs of these proceedings, I do not think it should be entitled to. This can be achieved by an order under section 20C, Landlord and Tenant Act 1985, made for the avoidance of doubt, and need not be reflected in the new clause itself.

148. Nor, for the reasons I have already given, do I consider that it would be reasonable for the new clause 3(13A) to apply to costs incurred by the RTM Company in connection with any current arrears. The same limitation is not required for the introduction of the new paragraph 1(1)(iv) into the Third Schedule.

149. These limitations require a further modification of the variations. The new clause 3(13A) will be in the following terms:

> "To pay to the Lessor on demand the reasonable costs and expenses (including any solicitors', surveyors' or other professionals' fees, costs and expenses and any VAT on them) incurred by the Lessor in or in connection with the determination or recovery of sums which first became payable under clause 4(1) after 18 March 2025."

The new sub-paragraph (iv) of paragraph 1(1) of the Third Schedule will be as follows:

> "(iv) in paying the fees of any Solicitors or other professional incurred after 23 October 2023 in connection with or in contemplation of the enforcement of any of the Lessee covenants in the lease where such fees are unable to be recovered from the defaulting leaseholder as an administration charge in accordance with clause 3(13A)."

*(6) Compensation*

150. In view of my conclusions on the issues of prejudice and the adequacy of compensation, summarised at [134] above, I do not think it necessary to provide for the payment of compensation.

**Disposal**

151. For these reasons the appeal is allowed and I will make an order varying the leases of all leaseholders in the manner specified at [148] above. I will also make an order under section 20C, as indicated at [146] above. I invite the parties to agree and submit an appropriate form of order.

Martin Rodger KC,

Deputy Chamber President

17 March 2025

**Right of appeal**

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.

Respondents supportive of the appeal

CARL, WENDY AND RYAN PERRY
ALAN BARTON
MAJID ALIMADADIAN
MERLADONA LIMITED
PAUL GRAHAM AND WENDY PATRICIA ARCHIBALD
FRANCO COSTARIOL AND BRUNA PICCIN
KA KA TAN
QINGHUI HUA

Respondents opposed to the appeal

JEREMY POLTURAK
ROBERT DAVIES