Varying Long Residential Leases: When, Why and Reform

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Introduction

In 2011, the freeholder of two buildings containing 44 flats, Astell Court and Astell Lodge, sought to vary all of the leases so that sub-letting would no longer be allowed. The leases had been granted in 2007 and had more than 150 years left to run. Most flat owners supported this request, but four objected, and one abstained. No reason was given for the application, and the Tribunal assumed that the intention was to prevent flats being let on short term tenancies by investor landlords, and thus to ensure that the blocks would be wholly owner-occupied. The variations were approved notwithstanding the objections.[1]

This article explores how Tribunals exercise the jurisdiction to order variation of leases. The Landlord and Tenant Act 1987 Pt IV permits a party to a long lease of a flat (one for more than 21 years)[2] to apply to the First Tier Tribunal (Property Chamber) (the Tribunal) for a variation of the lease.[3] If approved, the variation will bind all parties to the lease in accordance with the terms of the variation sought,[4] and parties to other leases within the development can also be joined and may similarly be bound, even without their consent.

The power to order non-consensual contractual modifications is unusual, and sits uncomfortably alongside the idea of contracts as voluntary undertakings. The next section of the article considers the goals of the variation jurisdiction and is followed by the discussion of the nuts and bolts of how the Act works. As little has been written about how the variation jurisdiction is used, we studied all reported decisions[5] and report on trends. Tribunal decisions do not have any precedent value and there have been relatively few appeals to the Upper Tribunal (and none to the Court of Appeal) but our study shows the type of variations being sought, who applies, and outcomes. This provides the basis for our reflections on how Tribunals appear to balance individualist rights-based concerns against more utilitarian and collectivist goals. Finally, we turn to possible reform, suggesting that the jurisdiction should be expanded in pursuit of broader agreed policy objectives.

[1] *Re Astell Court* CAM/22UN/LVL/2011/0003.
[2] Landlord and Tenant Act 1987 s.59(3).
[3] Landlord and Tenant Act 1987 ss.33–40.
[4] Landlord and Tenant Act 1987 s.38(1).
[5] That is, all we could find for the period of study to February 2018 (268 in total).

Leases as property and contracts

It may be helpful to start by describing typical ownership and management arrangements within a simple block of flats in England and Wales. The building is owned by a freeholder; this could be the original developer, or an investor who has bought it from them as a financial asset,[6] or a company owned by (some, or all, of) the flat owners collectively. Each flat is sold on a long lease, maybe 99, or even 999 years. The freeholder/landlord covenants to maintain the exterior and common (shared) parts of the building. Each flat owner, a leaseholder/tenant,[7] covenants to pay a service charge towards the maintenance costs. Some leases are tripartite, with a management company also joined as the party undertaking the obligation to maintain the building (and the right to recover service charges).[8] The leases contain a host of other promises as to what the leaseholder can, and cannot, do—such as a requirement to decorate the flat every five years, being unable to hang washing on balconies, being allowed to sublet (as in *Re Astell Court* before the variation), and so on. Ownership of flats therefore involves both property rights and contractual rights; as Lord Browne-Wilkinson observed in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*, a "lease is a hybrid, part contract, part property".[9] Many leases will also be mortgaged, meaning that the mortgagee also has a stake over the lease.

Given the duration of leases, and the notoriously poor quality of much leasehold drafting,[10] it is inevitable that variations may be required to lease wording or the management arrangements. But to achieve the desired outcome it may be necessary to make changes to all leases, not just one. And even if it is sought to change only one lease, and both parties consent, this may not be possible if the change breaches a landlord covenant to grant all leases on materially similar terms.[11]

In the normal run of events contracting parties may wish to modify contracts for many reasons, perhaps as a response to changing circumstances, unforeseen impacts, or to improve poor drafting; and, as highlighted by Macneil and other relational contract theorists, the opportunity to be flexible and adapt to change may be especially appropriate for long-term contracts.[12] Barring duress, and possibly concerns about whether there is consideration "in the eyes of the law",[13] these consensual variations are respected and enforced. But the idea that a contract can be modified against the will of one of the parties sits uncomfortably alongside the infusion within contract law of what Radin describes as a deep embeddedness of the "notion of voluntariness".[14] There are, of course, some well-known instances

[6] Income being generated from ground rents, but worth less than 1% of the asset value of the site. See *https://www.leaseholdknowledge.com/government-thinking-freeholders-are-paternalistic-long-term-custodians-of-a-building-is-where-it-has-gone-wrong-over-grenfell-cladding* [Accessed 14 November 2019].

[7] The language of leaseholder tends to be used for these long leases, but means the same as tenant.

[8] As in *Citiscape* LON/OOAH/LSC/2017/0435.

[9] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85 HL at 108; [1993] 3 W.L.R. 408.

[10] S. Bright and D. Weatherill, "Framing and Mapping the Governance Barriers to Energy Upgrades in Flats" (2017) 29 *Journal of Environmental Law* 203, 216.

[11] e.g. in *Duval v 11–13 Randolph Crescent Ltd* [2018] EWCA Civ 2298; [2019] Ch. 357, the landlord promised "that every lease of a residential unit in the Building hereafter granted by the Landlord at a premium shall contain … covenants of a similar nature to those contained in Clauses 2 and 3 of this Lease …".

[12] For example, I.R. Macneil, "Relational Contract Theory: Unanswered Questions" (2000) 94 NWULR 877

[13] Finding consideration might be problematic if one party simply receives under the varied contract what they were already contractually entitled to.

[14] M. J. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Oxford: Princeton University Press, 2014), 56.

within general contract law where concerns over the fairness of terms means that they may not be enforceable against one of the parties,[15] and occasionally the concern over unfairness extends to an ability to vary, or alter, the agreement itself.[16] As a general rule, however, a concluded contract must be respected and only if the parties voluntarily agree can it be modified. The ability to order alteration of the terms of residential lease contracts is, therefore, a highly unusual jurisdiction.

Long residential leases are, however, exactly the types of contracts where we might expect there to be a need for adaptation and flexibility as they are "enduring property relations" set within a complex network of legal and interpersonal relations. As argued by Blandy, Bright, and Nield there is a need to acknowledge that some types of property relationships "are not rigid but [need to] evolve responsively to the spatial, temporal and lived dimensions of property in land".[17] Sometimes sites change over time, perhaps as roofspace or basements are converted into new accommodation[18]; old installations may wear out and need to be replaced by newer forms of technology; changing use of accommodation and urban environments may create a desire for flats designed for owner-occupation to be available for short rent (or vice versa), and so on. The variations to the Astell Court leases involved alteration of both property and contract rights. The owners had bought flats that they were free to rent out but this right was taken away from them, and for four of them it was against their wishes.[19] As well as interfering with their contractual rights it also removes one of the "sticks" from the "bundle of rights" that these property owners previously possessed.[20] Nonetheless, if residential leases are to be adaptable to change, there needs to be a mechanism for non-consensual modification.

Goals: building maintenance, defective drafting, dinosaurs and modernisation

The jurisdiction to vary leases is not at large but is focussed around particular objectives. Concern with maintenance of the fabric of the building stock is a key driver. Two years before the 1987 Act, the Nugee Committee was established to collect evidence on the scale of problems "arising from the management of privately-owned blocks of flats".[21] In amending leases to enable buildings to be properly maintained features strongly in how the Act is drafted and in the way that Tribunals have responded to the jurisdiction.

[15] Consumer Rights Act 2015.

[16] Consumer Credit Act 1974 s.140A, B.

[17] S. Blandy, S. Bright and S. Nield, "The Dynamics of Enduring Property Relationships in Land" (2018) 81(1) M.L.R. 85, 85–86.

[18] As was planned for the roofspace in *Gold Harp Properties Ltd v Macleod* [2014] EWCA Civ 1084; [2015] 1 W.L.R. 1249 (a case on alteration of the Land Register), and as occurred in *Re Ground Floor and Basement 158–164 Royal College Street* LON/00AG/LVL/2013/0018.

[19] They could have made an application for an award of compensation, but none did: *Re Astell Court* CAM/22UN/LVL/2011/0003 at [20].

[20] This is a common way of explaining the nature of property, the bundle representing the "collection of the individual rights people have as against one another with respect to owned resources": G. S. Alexander and E. M. Peñalver, *An Introduction to Property Theory* (New York: Cambridge University Press, 2012), 2. In an Australian case in the state of Victoria a similar alteration to the flat owner's powers was described as a substantial interference with the owners' proprietary rights: *Owners Corp PS 501391P v Balcombe* [2016] V.S.C. 384.

[21] Committee of Inquiry, *Report on the Management of Privately Owned Blocks of Flats* (1985) (The Nugee Report). The Nugee Report estimated over half a million households in privately owned flats at [3.5].

Many of the reported problems stem from unsatisfactory leases, a recurrent theme in the evidence provided to the Nugee Committee. There were widespread problems with drafting, including uncertainty about the extent of obligations; lack of clarity in leases; gaps, deficiencies and ambiguities in leases making it difficult or impossible to ensure proper maintenance or repair of the block; and different types of lease being used for different units within the same block. In the House of Lords debate on the draft Bill, Lord Coleraine, noting that he was the tenant of "what would be called a defective lease", agreed that incompetent drafting was a serious problem. More recently, in *Triplerose Ltd v Stride*,[22] counsel commented that "a special place in hell should be reserved for the person(s) who proof read and checked" the leases in that case.

There was also a desire that the jurisdiction should facilitate the modernisation of leases. Referring to this in the House of Lords debate on the Bill Lord Coleraine colourfully illustrated that it would assist:

> "… where what are largely social conditions have changed over the years and left old leases stranded like dinosaurs on a beach. Such leases were relevant in the days of the daily delivery of groceries by errand boys on bicycles into the hands of porters … Now we may want to install entry phones but the lease does not provide for that."[23]

The "dinosaur" jurisdiction could also be used to tackle other modernisation needs in the housing stock, such as inefficient and dated communal heating systems ("the old guzzler in the basement") that fail to promote energy saving or satisfy the modern preferences for individual central heating.[24] The flip side of the dinosaur problem is to enable futureproofing of leases, a way of thinking about lease wording that will enable adaptability over time in response to wider societal change, for example, allowing new technologies to be installed into the building. Most leases do not facilitate this, and as we will see below, neither is the 1987 Act well suited to this.

An outline of the Landlord and Tenant Act 1987 Pt IV

The two routes to variation are contained in the Landlord and Tenant Act 1987 (LTA 1987) s.35 and s.37. Both apply only to leases of flats.[25] The House of Lords debate on the draft Bill suggested that whereas s.35 would particularly enable better building maintenance by dealing with poor drafting, s.37 would be better at getting rid of "dinosaurs" and supporting modernisation where circumstances have changed. Under s.35, there is a need to show that the lease "fails to make satisfactory provision" in relation to one of six specified things, whereas s.37 is more broadly expressed to support objects that cannot be satisfactorily achieved unless all leases are varied. An application under s.37 must have support from the majority of those affected, and the example used in debate was where leaseholders wished to create a sinking fund (setting aside money each year to build reserves

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

[23] The debate is at *https://hansard.parliament.uk/Lords/1987-05-13/debates/7cbbc17d-3ddf-4147-8f18-308f03642ade/LandlordAndTenant(No2)Bill* [Accessed 14 November 2019].

[24] HL Deb 13 May 1987 vol.487 cc.636-51 at 640.

[25] This requirement is why the leasehold variation provisions did not apply in *Arnold v Britton* [2015] UKSC 36; [2015] A.C. 1619.

for unanticipated items or major works). We examine our data showing how these sections have been used below, but first we explain the jurisdiction in more detail.

Applications for variation are made to the Tribunal. Appeal lies to the Upper Tribunal, and then to the Court of Appeal. Under LTA 1987 s.35, any party to the lease may request an order varying a long lease of a flat if the lease "fails to make satisfactory provision" with respect to:

- the repair or maintenance of the flat, the building containing the flat, or any land or building let to the tenant;
- the insurance of the building containing the flat;
- the repair and maintenance of any installations;
- the provision or maintenance of any services which are reasonably necessary to ensure that occupiers enjoy a reasonable standard of accommodation;
- the recovery by one party to the lease from another party of expenditure incurred or to be incurred by him or on his behalf for that other party's benefit; and
- the computation of a service charge payable under the lease. This ground is only engaged where there is either under or over-recovery under the lease (i.e. the Tribunal cannot order variation where precisely 100% of expenditure is already recoverable (even if the current split between leaseholders may appear unjust)).[26]

Although specific, s.35 can be amended: additional grounds can be added by regulation,[27] and this feeds into our reform ideas below. As any variation made under s.35 may impact on other leases, s.36 permits any other party to the lease to apply to the Tribunal for corresponding variations to other leases.

Under s.37 the variation sought is not limited to specific grounds. Rather, the only ground is that "the object to be achieved by the variation cannot be satisfactorily achieved unless all the leases are varied to the same effect", with no provision limiting what that "object" is. This application can be brought by the landlord or any of the tenants,[28] and although the landlord to all the leases involved must be the same person, there is no requirement that the leases to be varied are in the same building, nor in identical terms.[29] Certain jurisdictional majorities are needed for a s.37 application. For an application in respect of eight or fewer leases, all parties, or all but one of the parties, must consent; whereas for nine or more leases at least 75% of the total number of parties involved must consent, and not more than 10% oppose it.[30] The Tribunal must be satisfied that these consent requirements are made out before they can consider whether to exercise their discretion.[31]

The Tribunal has a discretion whether to order variation, and, if so, in the case of s.35 and s.36 it can be either in the specific terms sought or any variation it

[26] Landlord and Tenant Act 1987 s.35(4). See also *Morgan v Fletcher* [2009] UKUT 186 (LC); [2010] 1 P. & C.R. 17.
[27] Landlord and Tenant Act 1987 s.35(2)(g).
[28] Landlord and Tenant Act 1987 s.37(4).
[29] Landlord and Tenant Act 1987 s.37(2).
[30] Landlord and Tenant Act 1987 s.37(5).
[31] Landlord and Tenant Act 1987 s.38(3).

thinks fit.[32] The Tribunal "shall not make an order" where "it would not be reasonable in the circumstances for the variation to be effected".[33] In particular, it "shall not" do so if it appears the variation "would be likely to substantially prejudice" a party to the lease, where that prejudice cannot be remedied by compensation.[34] Where variation is ordered, the Tribunal has a discretion to order any lease party to pay compensation to any person for loss or disadvantage that the Tribunal considers that party "is likely to suffer as a result of the variation".[35]

The s.35 jurisdiction is specific and exhaustive. It is not available to ensure "satisfactory provision" or "fairness" more generally, as illustrated in *Morgan v Fletcher*.[36] Here the service charge contributions initially payable under eight leases added up to 116% of the lessor's expenditure (this would trigger the s.35(2)(f) jurisdiction) and six leaseholders sought to reduce the proportions they paid to bring the total amount payable down to 100%. Before the Tribunal hearing, however, the landlord reduced the proportions payable in the other two leases (one of which they owned). The impact of this change was that the charge under some of the six leases was 16 times more than the largest flat which the landlord also owned as leaseholder. The further impact was that in aggregate the sums recoverable now "hit" the 100% target, without any need to adjust the leases of the six disgruntled applicants, and if the variations requested were made the total recoverable would be 79.1666% of expenditure. The Upper Tribunal confirmed that, in the presence of 100% recovery, there is no jurisdiction under to interfere with the distributions of charges, irrespective of their fairness. The Upper Tribunal in *Morgan v Fletcher* were unequivocal in insisting that the fairness of the lease cannot influence the approach of the courts, an approach followed by the Tribunal.[37] Where there is a:

> "workable mechanism that ensures that the fabric of Building is satisfactorily repaired and maintained, the Tribunal has no power to interfere with the contractual arrangements the parties made when they entered into the lease in question, even if the provisions as to repair … are demonstrably unfair to one of the parties."[38]

Taking the provisions in the round, the s.35 jurisdiction appears mainly to address the problem of "defects" narrowly (and objectively)[39] understood, intending to make things "workable".[40] By contrast, the jurisdiction under s.37 can enable better management, an aspiration closer to dealing with dinosaurs and facilitating "futureproofing". While it appears that s.37 could simply be used to give effect to

[32] Landlord and Tenant Act 1987 s.38(1) and (4).
[33] Landlord and Tenant Act 1987 s.38(6)(b).
[34] Landlord and Tenant Act 1987 s.38(6)(a).
[35] Landlord and Tenant Act 1987 s.38(10).
[36] *Morgan v Fletcher* [2009] UKUT 186 (LC).
[37] *Morgan v Fletcher* [2009] UKUT 186 (LC) esp. at [9]. See, e.g. in *Re Flat 1 Granville Crest* CHI/21UC/LVL/2013/0009 at [25]. See also the recent decision of the Upper Tribunal in *London Borough of Camden v Morath* [2019] UKUT 193 (LC) at [16].
[38] *Re Flat 21 Wickets Tower* BIR/00CN/LVL/2013/0002 at [21]. Note that for variable service charges there is also the jurisdiction in section 19 LTA 1985 to challenge service charges on the grounds of reasonableness (that is, "reasonably incurred" and works and services to a "reasonable standard").
[39] In *Re Windsor Court* CHI/OOMS/LVT/2017/0010 at [18] the Tribunal said: "the words "fails to make satisfactory provision" imply an objective test of defectiveness in relation to the lease, rather than a subjective test of preference for a change in, or an addition to, or an omission from, the lease".
[40] *Re Flat 21 Wickets Tower* BIR/00CN/LVL/2013/0002.

the "will of the majority", the requirement that the object to be achieved by the variation "cannot be satisfactorily achieved unless all the leases are varied to the same effect" and the discretion conferred to the Tribunal under s.38 both place important constraints on the exercise of majority power.[41]

How the variation jurisdiction is being used in practice

In order to discover how this jurisdiction is being used, we examined all reported English Tribunal and Upper Tribunal cases[42] from May 2004 to February 2018, 268 in total. Given that there are estimated to be almost 3 million leasehold flats[43] this shows that only a tiny proportion of leasehold parties seek to vary leases using the statutory jurisdiction, although variations also occur consensually, without the involvement of the Tribunal.

Method

Our sample was compiled from two sources: the LEASE website[44] and the government database of Tribunal decisions.[45] We read all decisions, extracted relevant information into a spreadsheet, and then analysed the spreadsheet results, with frequent referencing back to the full judgments.

The task of collation and categorisation of the decisions was not straightforward. Neither database is easy to use, and neither appears to be comprehensive. The LEASE database often miscategorised decisions, and there is the risk we missed some relevant decisions. The government database appears comprehensive for the period post-2011, but there were problems during 2018 when new cases were not appearing. Case references were not always accurate; for example, two entirely different cases were assigned the same case reference number.[46] Given the non-robust reporting of Tribunal cases we realise that our sample will not be comprehensive, but we are confident that our sample of 268 cases between 5 May 2004 to 12 February 2018 is representative.

It was also difficult to categorise decisions. Some judgments were extremely concise, to the point of revealing almost nothing about the variation sought. Many applications were made by leaseholder litigants in person, who often failed to particularise the specific variation sought, and in many instances failed to refer to the statutory grounds relied upon. In these cases, the authors had to exercise some

[41] For an example of a s.37 application being turned down as a matter of the Tribunal's discretion see *Re 110 Evesham Road* CHI/23UB/LVT/2013/0009.

[42] Welsh cases were excluded because the Welsh Residential Property Tribunal Office confirmed that there were only two variation cases in the Tribunal records (correspondence with the authors, 12 July 2017), and one copy was only available for inspection in hard copy at the office.

[43] MHCLG, estimating the number of leasehold dwellings in England, 2016–17. Housing Statistical Release 25 October 2018. The Leasehold Knowledge Partnership considers the government figures to be underestimating the number of flats: *https://www.leaseholdknowledge.com/lies-damned-lies-and-statistics* [Accessed 14 November 2019].

[44] See *https://www.lease-advice.org/* [Accessed 14 November 2019]. This search was conducted as at 5 July 2017.

[45] We searched on a website that is no longer available. The website used stated that one can search for decisions from 1 January 2006, but these did not appear on the website, and the site stated that decisions for the period 1 January 2006–31 December 2010 could be inspected at Tribunal offices. Our search was from 1 January 2011 to the end of September 2017, and was later updated to include cases to February 2018. The government website now in use, for decisions from December 2018, is *https://www.gov.uk/residential-property-tribunal-decisions* [Accessed 22 November 2019].

[46] See *Re Flats A, B, C, and D 43 Herbert Road* LON/00BF/LVL/2012/0004 and *Re The Benhill Estate* LON/00BF/LVL/2012/0004.

degree of judgment, informed by the Tribunal decision, as to the particular "type" of variation being applied for (where discernible).

Findings

We set out to explore the data against some of the issues raised by Lord Coleraine in the House of Lords debate but have also identified further issues of interest. The primary results of our analysis are set out in the summary tables in the Appendix.

Landlords are responsible for most of the applications, either alone or supported by leaseholders, and only 15% of applications are from leaseholders (Table 1). These figures support Lord Coleraine's prediction that the majority of variations would be brought by landlords, even if they cannot confirm that Lord Coleraine's reasons for this are correct (namely, deeper pockets and having more at stake).[47] But the observation is tempered by the fact that around one-third of the landlord applications were brought either by resident controlled companies or in conjunction with leaseholders.

As flats are more common in heavily urbanised areas it is unsurprising, as Table 2 shows, that more than two-thirds of applications are in London and the South.[48]

As one of our key goals was to see what the object to be achieved by variation was, we sorted the cases into different "types" of application. Our results often reflect our best interpretation of the type of variation being sought because applications did not always neatly mirror the s.35 subsections, and s.37 is, of course, open. Table 3 shows that almost half of applications are to do with service charge computation, and that the other key categories we found are applications to do with insurance, repair and maintenance, sinking funds, replacing management, and altering definitions. A significant number of cases fell outside the main categories we identified, as shown in Table 4, including applications to remove live-in wardens, replace communal heating, to permit improvements, and to introduce management fees.

Almost three-quarters of applications were successful, with the most frequent cause of failure being a lack of Tribunal jurisdiction (Table 5). Only in a small number of cases did the Tribunal have jurisdiction and yet exercise its discretion not to approve the variation in whole or in part.

Confusion over the legislation

Although the variation provisions do not appear unduly complex, and the application form is relatively straightforward,[49] our study shows that the sections are often difficult to use. A large number of cases are brought by litigants-in-person who routinely struggle to understand the jurisdiction. Some fail to understand what the legislation covers, which can result in wasted time and effort for parties and

[47] See HL Deb 13 May 1987 vol.487 cc.636-51 at 642.

[48] 58% of residential property transactions in London were leasehold flats in 2017, compared to 20% nationally: House of Commons Library briefing paper Leasehold reform (CBP 8047 at *http://researchbriefings.files.parliament.uk/documents/CBP-8047/CBP-8047.pdf* [Accessed 14 November 2019]) p.15. The data is based on properties sold for full market value and registered at the Land Registry, and excludes, for example, gifts and Right to Buy sales.

[49] See *https://www.gov.uk/government/publications/form-leasehold-4-application-for-the-variation-of-a-lease-or-leases* [Accessed 14 November 2019].

the Tribunal.[50] Parties often fail to understand when they should use s.35 and when they should use s.37.[51] Often applicants (particularly, but not exclusively, litigants-in-person) do not specify the precise ground of s.35(2) that they are relying on, even after the Tribunal directing this.[52] There can also be sloppiness in the draft variation proposed, leading to an inability to approve the variation.[53] In one case, the applicant sought to vary the lease for a flat which didn't exist![54]

The confusion even (but very rarely) extends to the Tribunals themselves. In *Re 188–192 Leigham Court Road*,[55] the Tribunal begins by mentioning an application under s.37, later it mentions s.35(2)(f), and it mixes the requirements of ss.35 and 37.[56] This erroneously blends the jurisdiction under s.35 and s.37 together, and misunderstands the relationship between the provisions, showing that even highly skilled lawyers may fall into technical confusion in approaching the variation legislation.

The nature of the contractual interferences

In this section we look at the way in which the jurisdiction has been exercised. We start by drawing on theoretical contract and property scholarship to show that allowing Tribunals to alter lease contracts in pursuit of wider social and collective goals, or to reflect the will of the majority, reflects choices about the preferencing of values that challenge many understandings of both contract and property.

A common way of thinking about contracts is to see them as rights-based. That is, contracts protect individualist interests ("say an interest in owning property or achieving personal autonomy") from which it follows that "contract law is concerned with duties that contracting parties owe to each other rather than any broader social goal".[57] This focus on the individual also underpins many theoretical explanations of property. Harris, for example, sets "the pivotal idea of 'self-seekingness' at the cornerstone of his notion of ownership, and this is 'inimical to any idea that owners must be "other-regarding".[58] Tribunals are mindful of the delicate nature of this jurisdiction, recognising that variation means departing from the contractual bargain.

Long residential leases are, however, special forms of contract and of property. They are conceptually hybrid: as the property right, the estate in the land, is created at the time of grant they are partly executed contracts, yet also, in the words of Lord Simon in *National Carriers Ltd v Panalpina (Northern) Ltd*, "partly executory:

[50] e.g. see *Re 26 Plas Newydd* CAM/00KF/LAM/2005/0001, although this was clearly part of protracted difficult relationships with the landlord.

[51] e.g. in *Re Regent Court* CAM/00MC/LSC/2014/0069 the proposed variation sought to change insurance arrangements, but s.35(b) didn't apply because the current provisions were workable (s.37 may have been a better route).

[52] *Re 8a Edgar Terrace* CHI/00HG/LVL/2013/0006. In the event, the Tribunal ultimately refused the variation due to a lack of jurisdiction.

[53] "Every one of the proposed amendments has a mistake in it". The Tribunal could not allow the variation with "so many mistakes": *Re Lucam Lodge* CAM/22UL/LVT/2013/0002.

[54] *Re Flats 1–5 and Land at the Rear of 19 St Peter Street* CHI/18UD/LVT/2012/0013.

[55] *Re Delphian Court* LON/00AY/LVT/2014/0003.

[56] *Re Delphian Court* LON/00AY/LVT/2014/0003.

[57] S. Smith, *Contract Theory* (Oxford: Clarendon Law Series, 2004), 141.

[58] D. Weatherall, F. McCarthy and S. Bright, "Property Law as a Barrier to Energy Upgrades in Multi-Owned Properties: Insights From A Study of England and Scotland" [2017] *Energy Efficiency* at *http://link.springer.com /article/10.1007/s12053-017-9540-5* [Accessed 14 November 2019].

rights and obligations remain outstanding on both sides throughout its currency".[59] They regulate the use of spaces that are shared in common with others, generating interdependency, and complex and inter-linking legal relationships. As (very) long term enduring relationships that relate to particular physical structures, the governing executory norms articulated at the outset (often poorly) may need to evolve and be adjusted over time to accommodate changes in the physical fabric and shifting expectations around use, creating a need for dynamic responsive to these external influences and changes to rights-holders' preferences.[60]

The 1987 Act jurisdiction provides for this dynamic response, enabling the Tribunal, in pursuit of social or collective goals, to substitute a different contractual entitlement for the one autonomously chosen by the contracting parties and to order compensation if appropriate. Thus the "exchange value" of the contractual entitlement is protected but not the contractual entitlement itself. If we look to property law scholarship, we find a rich and complex literature that explores how law protects the plurality of values reflected in property. [61] At one extreme, the law may treat property as "castle" or "thing" (using Singer's and Rudden's terminology respectively[62]), providing fortified protection for property interests so they can never be transferred or terminated without the owner's consent. At the other end of the spectrum, the idea of "investor" is used (both by Singer and Rudden) in which "every thing may be treated merely as the clothing (in-*vestment*) worn by a certain amount of wealth"[63] and which is more readily substitutable. Of course, the reality is that property models are unlikely to be at either end of this spectrum; there will be a middle way that balances rights and responsibilities, rigidity and flux. In their highly influential article, Calabresi and Melamed, focussing on the tort of nuisance, used the language of "property rules" and "liability rules" to explain the differential remedies available to protect property: property rules protecting the entitlement itself, and liability rules protecting the exchange value.[64]

Applying these ideas to contractual entitlements, we see that the norm is for courts to give contract terms the respect of castles and to protect contract with property rules. As Gross LJ remarked in *Goodlife Foods Ltd v Hall Fire*:

> "An important pillar of English common and commercial law is party autonomy. Parties are free to contract on terms they choose, to allocate risks as they see fit—and the Court will enforce their bargains."[65]

Likewise, any modifications to the original contract must be agreed between the parties voluntarily. But this is not the case for residential long leases. Under the 1987 Act, the Tribunal can alter the terms of the bargain reached and, if

[59] *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] A.C. 675 HL at 705; [1981] 2 W.L.R. 45.

[60] S. Blandy, S. Bright and S. Nield, "The Dynamics of Enduring Property Relationships in Land" (2018) 81(1) M.L.R. 85.

[61] An excellent overview of the North American literature can be found in D. C. Harris and N. Gilewicz, "Dissolving Condominium, Private Takings, and the Nature of Property" in B. Hoops (ed), *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (The Hague, NL: Eleven, 2015), 263, 283–286.

[62] J. W. Singer, "The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations" (2006) 30 *Harvard Environmental Law Review* 309–338; B. Rudden, "Things as Things and Things as Wealth" (1994) 14 O.J.L.S. 81.

[63] B. Rudden, "Things as Things and Things as Wealth" (1994) 14 O.J.L.S. 81, 83.

[64] G. Calabresi and A. d Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1971) 85 *Harvard Law Review* 1089, 1092.

[65] *Goodlife Foods Ltd v Hall Fire Protection Ltd* [2018] EWCA Civ 1371; [2018] B.L.R. 491 at [99].

appropriate, order compensation. This is to treat the residential lease terms as protected by a liability rule. The statutory justification for this is either that the lease fails to "make satisfactory provision" (s.35) or there is an "object" that cannot be achieved without the alteration and the "will of the majority" requires change (s.37). Unfairness is not a ground for variation.[66]

Putting to one side situations of unfairness[67] or unconscionability,[68] there are few other contexts in which courts have jurisdiction to interfere with contracts. One is where the Upper Tribunal has power to discharge or modify restrictive covenants under the Law of Property Act 1925 s.84. This can be done if the restriction is obsolete or impedes "some reasonable user" of the land or the modification will not injure the person with the benefit. As with the LTA 1987, compensation may also be ordered. Doctoral research shows that s.84 is often used to increase the density of development, and that compensation is awarded in 40% of cases.[69] Similar to LTA s.35 this then provides for non-consensual modification in order to achieve a "broader social goal". The "reasonable user" ground can be used, inter alia, if the Upper Tribunal is satisfied that the covenant is contrary to the public interest. Case law shows that significant weight is given to the vested contractual entitlement as it must be shown that the public interest is "so important and immediate as to justify the serious interference [which discharge or modification under s.84 would involve] with private rights and sanctity of contract".[70]

The section 35 jurisdiction

Cases under s.35 similarly show that Tribunals attach importance to the contractual bargain. Indeed, the Upper Tribunal in *Morgan v Fletcher* noted that s.35 involves "interference without majority approval in the contractual freedom of the parties".[71] Drawing on the Nugee report, they explained that intervention will, however, be 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".[72] The *Morgan v Fletcher* guidance is referred to in many Tribunal cases, some making explicit reference to the importance of upholding contractual bargains. In *Re 3 & 4 Whitehall Court*, the leases provided for the landlord to recover in excess of 100% (in the region of 130%) yet the Tribunal refused the proposed alterations as there was no evidence that the block was not being properly maintained and a voluntary abatement scheme was in place which, though not perfect, ensured that there was not over-recovery in practice.[73] Noting that the approach to intervention should be minimalist the Tribunal stated that, reflecting the approach of English courts to uphold sanctity of contract, "… if there is to be an intervention the tribunal

[66] *Flat 21 Wickets Tower* BIR/00CN/LVL/2013/002 [21], "The Tribunal has no power to interfere … even if the provisions … are demonstrably unfair to one of the parties".

[67] For jurisdictions based on unfairness see: Consumer Rights Act 2015; Consumer Credit Act 1974 ss.140A, B.

[68] As, e.g. with the "clogs and fetters" doctrine in mortgages.

[69] E. Walsh, "Obsolete restrictive covenants: a socio-legal analysis of the problem and solutions" (2016) University of Portsmouth p.193 at *https://researchportal.port.ac.uk/portal/en/theses/obsolete-restrictive-convenants(95d268d7-a6b4-4790-8548-3a00fdb32ad6).html* [Accessed 14 November 2019].

[70] *Re Collins' Application* (1975) 30 P. & C.R. 527 at 531 (recently cited with approval in *The Alexander Devine Children's Cancer Trust v Millgate Developments Ltd* [2018] EWCA Civ 2679 at [47]; [2019] 1 W.L.R. 2729).

[71] *Morgan v Fletcher* [2009] UKUT 186 (LC) at [19].

[72] *Morgan v Fletcher* [2009] UKUT 186 (LC) at [19].

[73] LON/00BK/LVL/2011/0013 + 0008 + 0010. Note that Baroness Hooper, presumably the same person who promoted the Bill, was one of the respondents in this case!

should strive to keep as close to the contractual scheme as is possible and [its]… nature", and "avoid intervening in contracts or re-writing bargains made by parties".[74] Likewise in *Re Ground Floor and Basement 158–164 Royal College Street*, the proposal was to move from an equal service charge being payable on each flat, irrespective of the flat's size, to one based on floor area.[75] This, as the Tribunal noted, "would be an equitable option upon the grant of new leases" but as it was not what the original bargain was for and "the current service charge apportionment would have been reflected in the value of those properties for the purpose of sale/resale", the variation approved was adjusted by the Tribunal to "reflect more closely the bargain between the original parties to the lease, upon which sale prices have been valued".[76]

In a few cases brought by landlords the Tribunal has been firm that s.35 cannot be used simply to escape from a "bad bargain", and the Tribunal has emphasised that the test as to whether a lease makes "satisfactory provision" is an objective test of "defectiveness in relation to the lease, rather than a subjective test of preference for a change in, or an addition to, or an omission from, the lease".[77] In *Cleary v Lakeside Developments Ltd*,[78] the Upper Tribunal declined to vary leases to allow the recovery of management fees, stating that there was nothing unsatisfactory with the inability to recover them, and noting that it was the result of freely entered into contractual arrangements. In *Re 2 Boscobel Road*,[79] a 17% shortfall in service charge recovery came about because although the original intention had been for a basement to be converted into a flat that would also contribute to the service charge permission for this work had been refused on health and safety grounds. By the time the applicant bought the block, it was abundantly clear that the conversion would not be allowed. In refusing the lease variations, the Tribunal remarked that the applicant could have decided not to purchase the property, or he could have purchased for a different price.[80] In *Re 24 Grover Court*,[81] the applicant had bought the reversion to leases with no service charge provisions. Refusing to alter the leases the Tribunal referred to the "Buyer Beware" principle, stating that "the intention of the 1987 Act was not to assist parties who had made a bad bargain, but to deal with prejudicial supervening events and circumstances which had not been foreseen".[82]

The position may be different where it is the leaseholders who seek change. For example, if (unusually) leaseholders are seeking to redress a shortfall, they are not trying to avoid a bad bargain but to ensure that the property is properly maintained.[83] The impact will be felt by any non-consenting leaseholders who will have to pay more than originally agreed, emphasising the importance of the social goal involved.

[74] *Re 3 & 4 Whitehall Court* LON/00BK/LVL/2011/0013 at [124]–[125].
[75] *Re Ground Floor and Basement 158–164 Royal College Street* LON/00AG/LVL/2013/0018.
[76] *Re Ground Floor and Basement 158–164 Royal College Street* LON/00AG/LVL/2013/0018 at [20]–[21].
[77] *Re Windsor Court* CHI/00MS/LVT/2017/0010 (this case is not included in our data analysed).
[78] *Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC).
[79] *Re 2 Boscobel Road* CHI/21UD/LVL/2013/0002.
[80] In the Parliamentary debate, Lord Coleraine expressed serious concern over the proposed jurisdiction to interfere with vested rights, particularly as there will frequently have been sales of landlords and tenants interests after the defect has become known and prices will have been adjusted to reflect that [641].
[81] *Re 24 Grover Court* LON/OOAZ/LVL/2014/0010.
[82] *Re 24 Grover Court* LON/OOAZ/LVL/2014/0010 at [20].
[83] *Re 2 & 4 Harding Road* CAM/11UC/LAM/2010/0003; *Re various flats in John F Kennedy Court* CAM/12UD/LVT/2016/0002 (residents' association); *Re Hampton Court Mews* CHI/43UB/LVT/2013/0013 (landlord with leaseholders).

Central to the jurisdiction is, however, the need to prove that the current wording fails "to make satisfactory provision". This is the starting point for the s.35 jurisdiction; only if it is proven that the lease fails to make satisfactory provision can the Tribunal then consider the exercise of its discretion to vary the lease. In the context of service charges, the focus is on the impact that defective service charge provisions have on "the incentive to keep the building in repair and properly maintained and fit for habitation".[84] Some applications are to correct simple arithmetical errors (defects).[85] Others stem from there being a change in circumstances that mean that the original payment proportions are no longer appropriate,[86] perhaps because of past enfranchisement of part of the site (dinosaurs)[87] or anticipated enfranchisement,[88] or additions being made.[89] In some cases, the parties seek to introduce a recovery mechanism when there is none in the existing leases, using s.35(2)(f).[90] Or there may be obvious oversights, as where the service charges are referenced to be contained in a schedule to a lease when in fact the schedule contains no such figures[91] or does not even exist,[92] or where the percentage payable was, in error, left blank in the service charge schedule.[93]

A recent Upper Tribunal case, *Triplerose Ltd v Stride*,[94] decided after our dataset was compiled, surprisingly held that it had not been proven that the lease failed to make satisfactory provision.[95] The four leases had no consistency in the service charge provisions. Crucially, the leaseholder of the basement flat, Triplerose Ltd, was the only leaseholder with no liability to pay towards the repair and maintenance of the building and the landlord, a company owned by the other three leaseholders, could only recover 75% of its expenditure on this. The landlord applied to vary Triplerose's lease so that it would be liable to pay one quarter of the repair and renewal costs for the main structure. The Tribunal found the lease not satisfactory and allowed the variation, noting that the landlord was a single asset entity and that if this lease did not require proportionate payment "there could be an impact on the structure of the building".[96]The Upper Tribunal overturned this decision: although the current wording was unsatisfactory, and the amendments sought are standard, "the fact that different tenants make different contributions does not

[84] *Re 25 Clarence Road, Croydon* LON-OOAH-LVL-2013-0002 at [10].
[85] e.g. *Re Flats 1–10, 39 Baddow Road* CAM/00UF/LVL/2014/0001.
[86] e.g. *Re Ripon House and Winchester House* CAM/11UB/LVT/2013/0001.
[87] *Re Flats 1, 5–12, 12A, 15 & 16 Golden Gates* CHI/00HP/ LVL/2013/0008.
[88] *Re Sandalwood house* LON/00AD/LVT/2011/006.
[89] *Re 158–164 Royal Collect Street* LON/00AG/LVL/2013/0018 at [13]. The Tribunal agreed that structural changes meant that the existing definition of the "building" and the service charge provisions were unsatisfactory, and the leases were varied. The variation also supported modernisation of the building as the applicant wanted to regularise the service charge provisions before embarking on a major works programme that would involve significant expenditure.
[90] *Re 7 St Aubyns* CHI/OOML/LVL/2010/0007.
[91] See the variations of the properties referenced in MAN/00CE/LVL/2015/0004–0009. This was their standard form lease. This had significant consequences and entailed the number of variation applications across a range of properties.
[92] *Triplerose Ltd v Stride* [2019] UKUT 99 (LC). This decision has since been applied by the *Upper Tribunal in London Borough of Camden v Morath* [2019] UKUT 193 (LC).
[93] *Re Flat 21 Wickets Tower* BIR/00CN/LVL/2013/0002, although the variation sought was not approved as it was a cross-application to the lessee's s.35 application, and should instead have been brought by the landlord with all leaseholders named as respondents.
[94] *Triplerose Ltd v Stride* [2019] UKUT 99 (LC).
[95] Triplerose Ltd is a real estate private limited company with, according to filed accounts for 2017, investments of £111,488,997 and was represented by two barristers before the Upper Tribunal. The landlord company did not participate in the appeal, and the respondent, Ms Stride, one of the leaseholders, was a litigant in person. Does the outcome, which we think is legally incorrect, reflect the inequality of arms?
[96] *Re Lower Ground Floor Flat, 11 Crossfield Road* LON/00AG/LVL/2017/0007 at [24].

make the lease unsatisfactory. There is a repairing obligation so this is not a case where there is no obligation to repair".[97] The Act, however, states in s.35(4), expanding on s.35(2)(f), that a lease fails to make satisfactory provision with respect to the computation of a service charge if the aggregate of leaseholder payments are less than the whole of the expenditure.[98] This allows no wriggle room, and yet the Upper Tribunal found there was no jurisdiction to order the variation. Further, the Upper Tribunal leaves open the worrying suggestion this lease might become unsatisfactory, for example if there were a major repair required.[99] This is a strange comment; the property's condition at the time of application might feed into the exercise of discretion but should not affect the central issue of whether the lease makes satisfactory provision.

Modernisation cases are more likely to be brought under s.37; attempts to use s.35 to insert "improvement clauses" permitting landlords to carry out and charge for improvement works have been unsuccessful as this does not come within the specific s.35 grounds.[100]

The section 37 jurisdiction

Applications under s.37 involve quite different issues as there is no explicit statutory reference to a "social goal" requirement, but rather a "seemingly unlimited" object[101] coupled with "the will of the majority". Majority decision-making raises two issues that we discuss below: the risk of minority oppression, and whether concerns about contractual autonomy are of lesser weight where the majority support alteration.

Before considering the approach taken in s.37 cases it is worth noting that there are some analogous jurisdictions outside of lease variation which provide for enforcement of the will of the majority onto a dissenting minority. One example comes from company law: a company's articles of association may ordinarily be altered by a special resolution (requiring 75% approval).[102] This can have major implications for minority shareholders, who can have their property and contractual rights modified by a majority, even where they do not consent.[103] For instance, an article could be inserted requiring members to sell their shares (for example to a director), thereby granting a route to expropriation. Thus, where a majority exercises this power the courts have found a duty to exercise their votes bona fide for the benefit of the company as a whole, with the resolution being challengeable in court.[104] Similar issues arises in company schemes of arrangement, where extensive

[97] *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) at [40].

[98] It is not stated in either the Tribunal or Upper Tribunal judgment which particular s.35 provision was relied on in the application.

[99] *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) at [40]. The point seemingly being that for a single asset company a major repair might be beyond its resources. It was remarked in *Fairbairn v Etal Court Maintenance Ltd* [2015] UKUT 639 (LC) (a case on contractual interpretation), that if a single asset entity cannot meet the costs, then its members would have to fund the liability voluntarily or face the risk of it becoming insolvent.

[100] *Re Dorwin Court* CHI/00HP/LVL/2017/0001: the Tribunal narrowed the variation sought to ensure it only covered improvements "which are reasonably necessary to ensure … a reasonable standard of accommodation", rather than improvements generally.

[101] *Re Astell Court* CAM/22UN/LVL/2011/0003.

[102] Companies Act 2006 s.21.

[103] The articles of association of a company take effect as a contract between all members: Companies Act 2006 s.33.

[104] *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch. 656 CA. See the guidance on the application of this test in *Re Charterhouse Capital Ltd* [2015] EWCA Civ 536; [2015] B.C.C. 574 at [91].

case law has built up around the court's discretion to sanction the proposed scheme, even where it has been approved by the requisite members and/or creditors.[105]

In the context of real property, similar issues have arisen in other countries in relation to the termination of schemes for ownership of apartment buildings.[106] Changing urban environments and building life cycles may provide the opportunity—or need—for extensive remodelling or rebuilding, to provide for higher density living or modernisation.[107] But the interconnection between the communal ownership of buildings and individual ownership of flats inhibits decision making and constrains urban renewal. Whilst the majority may wish to rebuild, there can be hold-outs who do not want to move or sell. A report on the Australian system of strata title notes the tension that arises between the individual rights associated with property, and the contingency of these rights on the cooperation of others.[108] Several jurisdictions have therefore introduced mechanisms for the communal ownership to be terminated by majority agreement, again recognising contractual/property entitlements as to some extent protected by liability rules rather than property rules.[109]

LTA 1987 s.37 is therefore not alone in allowing the majority to alter the rights of a dissenting minority, subject to court approval and oversight. However, the other contexts do not provide direct analogies. The requirement that an alteration to articles must be bona fide for the benefit of the company as a whole makes sense as the company has a legal entity with its own purposes and objectives, but does not obviously translate to the building context. The apartment scheme termination provisions are closer, but again there may be a more obvious "social goal" that the majority agreement pursues.

Examining the cases involving s.37 shows that most are to do with the same kind of things as s.35 cases, that is, building maintenance and the provision of services. There is a mix of removing dinosaurs and enabling modernisation. There are examples of alterations to enable additional or different services, such as a video entry system,[110] remove references to resident wardens,[111] or alter the payment mechanism or provide for a reserve fund where there was not one previously.[112] There is a cluster of cases involving the removal of communal heating systems that have come to the end of their useful life,[113] often where some flat owners have already installed individual heating systems,[114] and several where the landlord (mostly, but not always, a social landlord[115]) is seeking to enable advance payments

[105] CA 2006 s.895 and s.899. For guiding criteria in exercising the discretion to sanction the scheme of arrangement see, e.g. *Re Anglo American Insurance Co Ltd* [2001] 1 B.C.L.C. 755 at 762.

[106] See the discussion in L. Troy and B. Randolph, "Renewing the Compact City: Final Report" (November 2015).

[107] L. Troy and B Randolph, "Renewing the Compact City: Final Report" (November 2015), 16.

[108] L. Troy and B. Randolph, "Renewing the Compact City: Final Report" (November 2015), 23.

[109] D. C. Harris and N. Gilewicz, "Dissolving Condominium, Private Takings, and the Nature of Property" in B. Hoops (ed), *Rethinking Expropriation Law II: Context, Criteria, and Consequences of Expropriation* (The Hague, NL: Eleven, 2015), 263.

[110] *Re Buttermere Court* LON/00BK/LVL/2012/0013; *Re Dorwin Court* CHI/00HP/LVL/2017/0001.

[111] *Re 1 to 15 and 17 to 34 Scaleby Close* MAN/16UD/LVL/2012/0005. Often this is to reduce costs, and potentially enables the sale of the flats previously occupied by the warden.

[112] *Re Flats 1–8 Layer Court* CAM/22UG/LVL/2010/0008. The approved variations included the recovery of interest for late payment and creating a reserve fund.

[113] *Re Eton Hall, Eton Place* LON/OOAG/LVL/2010/002-3 where the existing communal system was referred to as "somewhat decrepit and potentially expensive" at [47].

[114] *Re Flats 6, 8, 10, 14, 15, 17, 19, 21 and 27 Tadworth House* LON/00BE/LVL/2011/0009.

[115] e.g. *Re Properties at Mayfield* BIR/00GF/LVL/2012/0001-0010 (unsuccessful), *Re Flats 1–32 Mercian Court* BIR/41UD/LVT/2016/0003 (unsuccessful), *Re Eggardon Court* LON/00AJ/2011/0001 (sic) (successful), *Re Barchester Close* LON/00AJ/LVL/2012/0016 (unsuccessful), *Re 31 to 42 Paget Road* LON/00AS/LVL/2012/0017 (successful),

prior to major works programmes being undertaken[116] or insert an improvement clause (allowing the landlord not only to recover the costs of repair and maintenance but also improvement works).[117] The *Astell Court* case, prohibiting subletting, is therefore outside the usual run of case, but is not an isolated case. *Re Flats 1–5, South Lodge*[118] also involved a variation to leases in order to control the types of sub-lets possible (not to prohibit them altogether). One of the flats, Flat 3, was repeatedly rented on short-term lets which gave rise to various nuisance and noise complaints and increased maintenance issues, affecting the quality of life of other residents and failing to "take into account the community around them".[119] The owners had emigrated to Australia and chose short-lets as it gave them the flexibility to use the flat on return visits. Although they argued there would be substantial prejudice to them, most of their claims were not found by the Tribunal to be supported by evidence and the variation was approved.

In most s.37 cases the decision appears to have been relatively straightforward; there is little sense of the Tribunal "worrying" over weighing competing interests. In part this may be because so many cases appear to be uncontentious requests for changes considered necessary in order to manage the building more effectively. There are relatively few cases that involved reasoned, and evidenced, objections to the proposals. The minority often includes leaseholders who did not respond at all,[120] and even those objecting often do not provide reasoned explanation,[121] or, perhaps reasons are unrelated to the current issue,[122] and occasionally they are "nuisance" objectors.[123] When there are reasoned objections (which sometimes are vigorous) the Tribunal weighs competing interests by considering the "object" to be achieved (building maintenance, peace and quiet, etc) and whether there is "substantial prejudice" to the objectors. If any prejudice can be met by compensation then the variation is likely to be approved[124]; if not it will be refused.[125] Whilst it may be acknowledged that variation involves altering a contract freely entered on the understanding that the terms normally remain effective for the duration of the contract, it is also noted that circumstances may alter and make those terms inappropriate.[126] Whereas s.35 requirements appear to require there to be a seriously defective scheme or a "pressing need",[127] and search for the minimum intervention needed for this, s.37 appears to adopt a lighter approach.

Re Flats 1–23 (Odd) Heathcote Way and 1–6 Peplow Close LON/00AS/LVL/2013/0001 (successful). The other two cases in our sample seeking to add improvement clauses were applications by residents' management companies: *Re Dorwin Court* CHI/00HP/LVL/2017/0001 (successful, after modification), *Re Lake View Court* MAN/00DA/LVT/2015/0006 (successful).

[116] *Re Motcombe Court* CHI/21UG/LVT/2016/0005.

[117] *Re Lake View Court* MAN/00DA/LVT/2015/0006, *Re Flats 1–23 (odd) Heathcote Way* LON/00AS/LVL/2013/0001, *Re 31 to 42 Paget Road* LON/00AS/LVL/2012/0017, and *Re Eggardon Court* LON/00AJ/2011/0001.

[118] *Re Flats 1–5 South Lodge* CAM/OOME/LVT/2013/0004.

[119] *Re Flats 1–5 South Lodge* CAM/OOME/LVT/2013/0004 at [14].

[120] *Re Masham Court* MAN/00DA/LVT/2016/0001: eight out of 36 leaseholders did not respond; one objected.

[121] *Re 1–30 Albany Court* BIR/00CQ/LVT/2012/0001, where the two objectors did not provide reasons even after "ample opportunity".

[122] *Re Northumberland Court* CHI/29UN/LVL/2013/0010.

[123] *Re Flats 1–8 Layer Court* CAM/22UG/LVL/2010/2008.

[124] *Re 1–46 Clive Lodge* LON/00AC/LVL/2011/0005. The leaseholder objecting to the variation was 89, and argued that she could not face the ordeal of having a new boiler and radiators installed. The variation was approved, with alternative accommodation provided by applicant, as well 50% of costs of installation being paid for the on behalf of the dissentient leaseholder.

[125] *Re Wellington Close* CHI/43UB/LVL/2015/0002.

[126] *Re 42 residential flats situated at King Street, Queen Street and Akenside Hill* MAN/00CJ/LVT/2011/0003.

[127] *Re Shanklin Village Estate* LON/OOBF/LVT/2015/0009.

In exercising the s.37 discretion, the Tribunal is awake to the possibility of oppression by the applicants.[128] Genuine objections are accorded respect. For example, one variation concerned an attempt to remove the landlord's obligation to repair a lift in a three-storey building that had not been working for 25 years.[129] One leaseholder opposed the application. He had previously sublet his flat but wished to return now he had retired. He suffered from osteoarthritis, which was aggravated by using the stairs, and had purchased the flat, in part, because of the lift. The Tribunal decided not to approve the variation, as to do so would substantially prejudice the leaseholder. Ultimately, the Tribunal carefully balanced the majority support for the change, the landlord's breach of covenant, and the importance of property rights. This careful analysis indicates the protective function of the Tribunal's discretion in the context of variation by a majority. Sometimes, however, the award of compensation will be sufficient to compensate any loss or disadvantage, and even real concerns about variation will sometimes result only in compensation.[130]

In practice, therefore, s.37 is not simply about "majority rule" but is also being used to support broader social goals, often to do with building maintenance and management, and sometimes for other goals that support the enjoyment of property by others within the development, as in *Re Flats 1–5 South Lodge*.[131]

Compensation, property and liability rules, and proportionality

The initial goals behind the 1987 Act (to support building maintenance, correct drafting defects, and remove dinosaurs) can be seen at play in the successful applications, and their importance explains why long-term residential lease contracts are protected by liability rules rather than property rules, with compensation for any prejudice suffered. The compensation is not a sum calculated in the same way as damages would be for breach of contract, nor is it an entitlement. The jurisdiction in s.38(10) provides that the:

> "tribunal may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the tribunal considers he is likely to suffer as a result of the variation."

The approach to compensation varies, as one Tribunal noted, to a "slightly disturbing degree".[132]

The Tribunal does not look solely at the financial impact of variation but will often evaluate in the round whether the "good" balances the "bad", resulting in no overall loss or disadvantage. This was made clear by Huskinson J in the Upper Tribunal decision, *Parkinson v Keeney Construction Ltd*: a variation to increase how much a leaseholder has to pay which is made because the existing lease does not make satisfactory provision with respect to the service charge "is not an amendment which necessarily brings loss or disadvantage to a lessee".[133] Thus, in

[128] *Re 74 Auckland Road* LON/00AH/LVT/2013/0003.
[129] *Re 1 First Avenue* CHI/00ML/LVT/2012/0007.
[130] *Re 1–46 Clive Lodge* LON/00AC/LVL/2011/0005 (the case involving the 89 year old leaseholder).
[131] *Re Flats 1–5 South Lodge* CAM/OOME/LVT/2013/0004.
[132] *Re The Benhill Estate* LON/00BF/LVL/2012/0004.
[133] *Parkinson v Keeney Construction Ltd* [2015] UKUT 607 (LC) at [19].

Re Flats 1–8 Baden House,[134] the Tribunal ordered a variation to enable the recovery of (capped) management fees but held that compensation was not appropriate because the variations benefited the leaseholders by ensuring future management, as well as making the leases more acceptable to potential mortgagees (thereby rendering it more marketable). It concluded "the additional cost to the [leaseholders] … is more or less balanced out by the advantages the variation will give". In *Re Manor Court*,[135] the Tribunal approved a variation to replace the communal heating system with an individual system and declined to order compensation "in spite of the upfront cost of the installation in each flat" as "over a reasonable period of time" the overall and running costs would be lower than maintaining the current system. In another case in which the Tribunal approved a variation to remove the obligation to maintain a communal heating system, *Re 1–46 Clive Lodge*, the Tribunal did, however, award compensation to an 89 year old as "due to her age and infirmity" she would not benefit from the individual installation to the same extent as other leaseholders.[136] The freeholder had offered to provide alternative housing during the installation as the leaseholder was worried about being disturbed by the proposed building work and the Tribunal additionally ordered that they should pay 50% of the cost of installation of her heating.[137]

The Upper Tribunal may be more willing to recognise that compensation should be payable based on the simple fact that leaseholders have to pay more by way of service charge due to the variation. In *Cleary v Lakeside Developments Ltd*,[138] it said (obiter), "it is hard to see how a requirement … to pay £200 a year for something for which they at present pay nothing would not be a loss or disadvantage requiring the payment of compensation".[139]

The potential to award compensation is likely to mean that challenges under the Human Rights Act 1988 would not be successful. It is unclear as to whether a Tribunal ordered variation would engage the right to "peaceful enjoyment of … possessions" in A1P1 of the European Convention on Human Rights. It may well be that for a Tribunal to alter the terms of the lease involves an interference with the right of possessions, probably under what is referred to as the third rule in *Sporrong and Lonnroth v Sweden*[140] as a "control" on the use of property, but whether the Human Rights Act applies to cases involving two private parties is doubtful.[141] Even if it applies, whether an interference violates A1P1 will depend on whether the interference was proportionate and there was a fair balance between the demands of the general interest and the interest of the individuals concerned. The issue has not received any detailed consideration in Tribunal cases. One decision considered that variation did not engage A1P1 at all,[142] whereas another

[134] *Re 1–8 Baden House* CHI/00AH/LVT/2006/0005.
[135] *Re Manor Court* LON/00AY/LVL/2011/0017.
[136] *Re 1–46 Clive Lodge* LON/00AC/LVL/2011/0005.
[137] *Re 1–46 Clive Lodge* LON/00AC/LVL/2011/0005.
[138] *Cleary v Lakeside Developments Ltd* [2011] UKUT 264 (LC) at [31].
[139] Also see *Triplerose Ltd v Stride* [2019] UKUT 99 (LC) (also obiter) where the Upper Tribunal concluded that if variation had been ordered, compensation of £9,500 would be appropriate based on expert evidence reflecting the increased value the flat would have had with the lower service charge (lost post variation), minus a reduction recognising the more adequate service charge arrangements may be more attractive to well-informed purchasers. If there is a single asset landlord (as in *Triplerose*) how can this compensation payment be raised?
[140] *Sporrong and Lonnroth v Sweden* (7151/75 and 7152/75) (1983) 5 E.H.R.R. 35 at [61].
[141] See *McDonald v McDonald* [2016] UKSC 28; [2017] A.C. 273, *FJM v UK* (76202/16) [2019] H.L.R. 8.
[142] *Re 1 First Avenue* CHI/00ML/LVT/2012/0007.

considered that allowing a "rewriting" of the lease would engage A1P1.[143] The ultimate issue would, however, turn on proportionality: could it be said that the variation goes no further than necessary in pursuing the outcome pursued? Given the wide discretion that is given to Tribunals in deciding whether to vary leases, and the ability to order compensation in the event of prejudice resulting, it is improbable, even if A1P1 is engaged, that a variation would be found to violate A1P1.

Many features of the dynamics approach to enduring relationships highlighted by Blandy, Bright and Nield[144] can be seen in the Tribunal cases. There is often explicit recognition of the impact of time on the need for flexibility and adaptation, the Tribunal commenting in *Re South Lodge* that the:

> "current occupants will come and go, and the type of user will ebb and flow over time as societal needs change. With that in mind, the Tribunal considers that the proposed new terms of the lease are too prescriptive and too limiting to be the subject of a variation for all time."[145]

The fact that these are contracts relating to land is important, both because the contractual terms can affect the quality of life in the home,[146] and also because of the central concern that buildings need to be maintained and adapted over time. In one application the variation was refused as the voluntary abatement scheme agreed between the parties was working well enough.[147] Drawing these observations together, it can be seen that at the heart of the jurisdiction is recognition that these contracts are not a series of discrete and isolated rights but instead they combine to create a network of rights in which there is a need for co-operation and community and flux over time.

In the next section we consider opportunities to reform the current jurisdiction.

Reforming the jurisdiction

Under the current provisions it is not possible to vary a lease in the absence of majority agreement unless the proposed changes come within the grounds in s.35. Should the jurisdiction be expanded to encompass issues not already covered?

In this concluding section we suggest there should be power to vary leases to facilitate adaptations that reflect contemporary social and policy concerns. We have three principal suggestions: (i) fire safety; (ii) improvements; and (iii) energy efficiency and "green" upgrades.

Following the Grenfell fire, a large number of deficiencies have been revealed in the housing stock. To take one example, a report by Carr has highlighted the gaps in the law relating to fire doors and fire safety.[148] With respect to fire doors, they indicate that "it is often not clear whether or not the door forms part of the

[143] *Re Shanklin Village Estate* LON/00BF/LVT/2015/0009.

[144] S. Blandy, S. Bright and S. Nield, "The Dynamics of Enduring Property Relationships in Land" (2018) 81(1) M.L.R. 85.

[145] *Re Flats 1–5 South Lodge* CAM/OOME/LVT/2013/0004.

[146] *Re Flats 1–5 South Lodge* CAM/OOME/LVT/2013/0004.

[147] *Re 3 & 4 Whitehall Court* LON/00BK/LVL/2011/0013 + 0008 + 0010.

[148] H. Carr, D. Cowan, E. Kirton-Darling and E. Burtonshaw-Gunn, "Closing the gaps: health and safety at home" (2017), 24 at *https://www.law.ox.ac.uk/housing-after-grenfell/useful-resources* [Accessed 14 November 2019].

demise to the lessee",[149] and that "it is not clear who is responsible for ensuring that the door is made compliant" with fire safety regulations.[150] The authors call for legislation to ensure freeholders are responsible for the compliance of fire doors.[151] If this is to happen there has to be clarity about the freeholder's legal power to access flats for inspection purposes and to carry out works. Leases involve the grant of exclusive possession to the leaseholder and this means that freeholders only have the right to enter if they have reserved these rights under the lease. In practice, rights of access are usually limited to particular purposes and this has become a major problem following the Grenfell Tower fire as landlords seek to make buildings safe, for example, to inspect, change fire doors, remove unsafe material from balconies, or install sprinklers. The uncertainty that can surround whether or not access is possible was demonstrated recently in two cases. The first, *Network Homes v Harlow*, required an appeal to the High Court to establish that the landlord did have a right of access to replace a fire door to a flat.[152] The second case, *Oxford CC v Piechnik*, concerned a Right to Buy lease and the County Court judge implied a term to permit entry to "remedy a state of affairs which is injurious to health".[153] The variation provisions could be used to address fire safety issues by an additional ground being added to s.35. Ensuring the lease has satisfactory provision for fire safety is entirely consonant with the policy objective of having a non-defective lease.

The variation provisions in s.35 could also be expanded to allow for variations aimed at enabling "improvements". As set out above, this currently needs to be undertaken by majority agreement under s.37, and leases without improvement clauses are seemingly regarded by some Tribunals as "satisfactory".[154] As building techniques change, as we move towards smarter cities, and as our housing expectations change, should it not be possible to enable improvements to be made in a more simplified way?

The final suggestion is that s.35 is expanded to allow for the installation and maintenance of energy efficiency upgrades.[155] "Future-proofing" and modernising leases is clearly an important purpose of the legislation as originally framed and is important in practice (as evidenced by the applications for improvement and removal of communal boilers). For example, it could allow electric car charging ports to be added to a property, when at present it may prove difficult to achieve the majorities needed under s.37. Alternatively, it may allow for photovolteic cells to be added to the building where the lease, as it stands, does not allow for this. Such variations are necessary to respond to changing social conditions.

[149] This appears remarkably common. It was noted by the Tribunal chair in a hearing in relation to a challenge to service charge bills by long leaseholders following refurbishment of Tower Blocks in Oxford (although not mentioned in the decision: *Re Evenlode Tower* CAM/38UC/LSC/2016/0064).

[150] H. Carr, D. Cowan, E. Kirton-Darling and E. Burtonshaw-Gunn, "Closing the gaps: health and safety at home" (2017), 21.

[151] H. Carr, D. Cowan, E. Kirton-Darling and E. Burtonshaw-Gunn, "Closing the gaps: health and safety at home" (2017), 21.

[152] [2018] EWHC 3120 (Ch)

[153] Bright, S. (2019). Do Landlords Have a Right to Enter Flats?. Available at: *https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/10/do-landlords-have-right-enter-flats* (Accessed 22 November 2019); an application has been made to appeal this case. See also Bright, S. (2019). Retrofitting Sprinklers in Mixed Tenure Blocks. Available at: *https://www.law.ox.ac.uk/housing-after-grenfell/blog/2019/07/retrofitting-sprinklers-mixed-tenure-blocks* (Accessed 22 November 2019).

[154] *Re Flats 1–32 Mercian Court* BIR/41UD/LVT/2016/0003.

[155] Under existing law leases usually inhibit energy renovations: S. Bright and D. Weatherall, "Framing and Mapping the Governance Barriers to Energy Upgrades in Flats" (2017) 29 *Journal of Environmental Law* 203–229.

Each of these suggestions may have the effect of increasing the liability of leaseholders, for example, to pay for replacement fire doors or car charging points. As we have seen there is a notable reluctance to interfere with the contractual bargains struck by the parties, and the approach taken in s.35 cases is to address problems of serious defects or pressing need. Whilst fire safety may come within this many other improvements, including energy upgrades, will not and more expansive changes are best advanced using the majority approach mechanism under LTA 1987 s.37. The problem is that it is not always possible to proceed under s.37 due to an inability to reach the required majority for the Tribunal to have jurisdiction (particularly in large blocks with apathetic or absent leaseholders[156]), and so an application under s.35 will often be the only available option.[157] In such circumstances, and given the beneficial nature of the change, it is important that the variation can at least be attempted. Of course, the Tribunal retains a discretion under s.38 to approve the variation and as we have seen, it will not do so where the variation would substantially prejudice a party to the lease and this prejudice cannot be made up for by compensation.[158]

A problem with our suggestion is it would probably require primary legislation. The Secretary of State can provide additional grounds to s.35(2) by regulation, [159] but this subsection is prefaced by the requirement that the lease fails "to make satisfactory provision". The approach of the Tribunals is interpret this narrowly and the risk is that by adding new grounds to this subsection Tribunals may take the view that the absence of *any* provision for improvements or energy upgrades does not mean that there the lease fails to make satisfactory provision in the absence of clear policy guidance that all leases *should* make provision for these things. This would be a big step from what leases currently provide for.

Ultimately, throughout this whole area, there is always a policy balance to be struck between interfering with the contractual arrangements of the leases and pursuing broader social policy decisions. Repair and maintenance is not only important to the occupiers and owners but also to wider society. So too are fire safety matters, improving the housing stock, promoting energy efficiency and the adoption of renewable energy technologies. It may be that cases brought on these expanded grounds would prove more contentious and require more difficult and compensatory decision-making than most current cases but leases last for hundreds of years and with an aging, inefficient, and sometimes unsafe housing stock there has to be an efficient mechanism for change.

Conclusion

The variation of long residential leases raises difficult questions as to the weight to be afforded to contractual autonomy, and offers important insights into the justification for non-voluntary contractual modification. Most contracts can be altered only by consensus between the parties. The fact that for long residential

[156] In practice, low levels of leaseholder participation is a very serious issue.

[157] See, e.g. *Flats 1–8 Baden House* CHI/00AH/LVT/2006/0005 at [8] where it is apparent that the variation was initially intended to proceed under s.37, but the requisite majorities could not be obtained. The same is true in *Re The Quarters* CAM/11UF/LVL/2010/0010, where an inability to obtain the requisite majorities meant that the proceedings had to proceed (unsuccessfully) under s.35.

[158] Landlord and Tenant Act 1987 s.38(6).

[159] Landlord and Tenant Act 1987 s.35(2)(g).

leases the contract terms are treated as liability rules, vulnerable to change upon payment of compensation, is an acknowledgement of the wider interests at stake. Residential leases are not simply individual contractual relationships but form part of a broader relational network and community with interdependent legal rights. Both for those within that community and for the wider society it is important that the housing stock can be maintained, that repairs can be made, that drafting errors can be corrected, and that dinosaurs can be made extinct. Our study of the reported cases reveals that the Tribunal is concerned to balance individualist rights against collectivist goals and recognises the tension that exists between upholding the contractual bargain of the parties on one hand and ensuring the preservation of the housing stock on the other. The legal relationships need to cater for a changing population, and withstand the passage of time. The lease variation mechanisms are a pragmatic tool, recognising that, subject to important controls, individual contractual autonomy must sometimes give way to the collective good. The focus, however, is upon maintenance rather than change or improvement and the current form of the legislation is not well suited to addressing wider issues about the environmental impact of our building stock, safety standards, or general renewal and refurbishment opportunities. Given the wider contemporary scrutiny of how well leasehold is working, it is time also to reconsider the variation jurisdiction to ensure that so long as we have leasehold it is fit for the future.

Appendix

Table 1[160]

Type of Applicant (n=268)							
Landlord Application					**Leaseholder application**	**Other**	**Unknown**
Landlord Only				**With leaseholders**			
Local Authority	Housing Association	Resident owned/RTM	Independent Company 61 Natural person 22				
9 (3%)	31 (12%)	60 (22%)	83 (31%)	22 (8%)	41 (15%)	6 (2%)	16 (6%)

Note that according to MHCLG figures, 2% of leasehold flats are local authority, 4% housing association, and 94% private; our data shows variation applications are 3% local authority, 12% housing association, and 85% private.

Table 2

[160] RTM is a "Right to Manage" company formed to enable leaseholders to take over management of the building, without acquisition of the freehold interest.

Tribunal Region (n=268)				
London	**Southern**	**Northern**	**Eastern**	**Midlands**
118 (44%)	73 (27%)	36 (13%)	29 (11%)	12 (4%)

Table 3

Variation Type Sought (n=372)								
Service charge			**Insurance**	**Repair and maintenance**	**Establish sinking /Reserve fund**	**Replace defunct management**	**Alter definitions in the lease**	**Other (see Table 4)**
To redress shortfall	To redress over-recovery	Other service charge						
60 (16%)	13 (4%)	105 (28%)	16 (4%)	24 (6%)	20 (5%)	17 (5%)	14 (4%)	103 (28%)

Note: The aggregate number of variation types shown in Table 3 (372) is higher than the number of applications (268) because one application may seek multiple objectives.

Table 4

Variation Type Sought within Other category (n=103)				
Remove live-in warden	**Replace communal heating**	**Improvements**	**Introduce management fees**	**Misc**
10 (10%)	12 (12%)	8 (8%)	16 (16%)	57 (55%)

Table 5

Outcomes (n=268)						
Successful		**Not successful**				**Other**
In whole	In part	Outside jurisdiction	Exercise of Tribunal discretion	Defect in application	Insufficient majority s.37 app	
169 (63%)	22 (8%)	42 (16%)	17 (6%)	6 (2%)	7 (3%)	5 (2%)