Neutral Citation Number: [2021] EWCA Civ 27

Case No: C3/2020/1004

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LAND CHAMBER)
Judge Elizabeth Cooke
[2020] UKUT 0111 (LC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th January 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE MALES
and
LADY JUSTICE ROSE

- -

Between :

(1) AVIVA INVESTORS GROUND RENT GP LIMITED **(2) AVIVA INVESTORS GROUND RENT HOLDCO LIMITED**	**Appellants**
- and -	
PHILIP WILLIAMS AND OTHER LEASEHOLDERS OF 38 FLATS IN VISTA, FRATTON WAY	**Respondents**

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- -

SIMON ALLISON & BROOKE LYNE (instructed by Penningtons Manches Cooper LLP) for the Appellants
JAMES SANDHAM & ROBERT BROWN (instructed on a direct access basis by Philip Williams**)** for the Respondents

Hearing date : 17th December 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Monday 18th January 2021.

Lord Justice Lewison:

1. The issue on this appeal is the extent to which a provision dealing with service charges in a residential lease is invalidated by section 27A (6) of the Landlord and Tenant Act 1985. At the end of the short hearing we announced that the appeal would be allowed. These are my reasons for coming to that conclusion.

2. The appeal concerns a number of flats in Southsea. They form part of a mixed residential and commercial development. The development was once in common ownership, but that is no longer the case. It is that which gives rise to the current problem. The service charge contained in each of the relevant leases consists of three components; insurance costs, building services costs, and estate costs. The amount payable by the lessee (in the example lease, which is for flat 64) is stated as follows:"

> "• your share of the insurance costs is 0.7135% or such part as the Landlord may otherwise reasonably determine;
>
> • your share of building services costs is 0.7135% or such part as the Landlord may otherwise reasonably determine; and
>
> • your share of estate services costs is 0.5427% or such part as the Landlord may otherwise reasonably determine."

3. The question is whether the landlord is restricted to the specified percentage in respect of each category of cost; or whether the ability to specify a different percentage is transferred from the landlord to the First Tier Tribunal ("the FTT"). In her decision in the Upper Tribunal ("the UT") Judge Cooke, reversing the decision of the FTT, held that the first of these alternatives was correct. The landlord was restricted to the fixed percentage. Her decision is at [2020] UKUT 111 (LC), [2020] L & TR 20.

4. The jurisdiction of the FTT (or, in Wales, the LVT) arises under section 27A of The Landlord and Tenant Act 1985 ("the 1985 Act"). It provides, so far as relevant:

> "(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to—
>
> (a) the person by whom it is payable,
>
> (b) the person to whom it is payable,
>
> (c) the amount which is payable,
>
> (d) the date at or by which it is payable, and
>
> (e) the manner in which it is payable….
>
> (4) No application under subsection (1) or (3) may be made in respect of a matter which—
>
> (a) has been agreed or admitted by the tenant,

> (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
>
> (c) has been the subject of determination by a court, or
>
> (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement….
>
> (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
>
> (a) in a particular manner; or
>
> (b) on particular evidence,
>
> of any question which may be the subject of an application under subsection (1) …"

5. The UT held at [20] that the effect of section 27A (6) was that the words "or such part as the Landlord may otherwise reasonably determine" were void. They were deleted. They no longer appeared in the lease. The consequence of that was that the landlord was restricted to the fixed percentages of costs.

6. Mr Sandham argued that the purpose of the legislation was to protect lessees of residential flats. Section 27A (6) in particular was designed to prevent landlords from manipulating service charges. The legislation should be interpreted and applied in a way that was simple for a residential lessee to understand without the need for complex legal advice. The "blue pencil" test that Judge Cooke applied fulfilled these criteria. The tribunal must strike out that part of the clause that offends section 27A (6) and then interpret what remains. It was invariably the landlord's lawyers who drafted the details of service charge provisions; and it was their responsibility to ensure that they were lawful and enforceable. If they did not, that was their risk.

7. Mr Sandham accepted that the effect of section 27A if he were right would be that the FTT has no jurisdiction to consider an application to vary the proportions set in the lease. This is because section 27A(4) provides that no application may be made to the FTT in respect of a matter that has been agreed by the tenant and, on his case, the tenants would have agreed to the fixed percentage. However he submitted, with force, that if the effect of section 27A (6) was as the UT held it to be, the landlord was not without a remedy. Although Judge Cooke canvassed the possibility of a consensual variation of the lease, there was a statutory route to the same result. Under section 35 (1) of the Landlord and Tenant Act 1987 a party to a long lease of a flat may apply to the FTT for the lease to be varied. The grounds upon which such an application may be made include a failure by the lease to make "satisfactory provision" for the computation of a service charge payable under the lease: section 35 (2) (f). A lease fails to make satisfactory provision for the computation of service charge if:

> "(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and
>
> (b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and
>
> (c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure."

8. If, therefore, the fixed percentages under the lease did not enable the landlord to recover all of its expenditure, an application could be made to the FTT to alter those percentages. I do not consider that the availability of this process assists the tenants' case. The effect of pursuing it would be that the FTT could and would determine the appropriate percentages of costs recoverable from each tenant. That of itself shows that there is nothing objectionable in the FTT determining service charge apportionments (as is, indeed, already inherent in its wide jurisdiction under section 27A (1) of the 1985 Act). But pursuing that route would require a separate application to the FTT with the consequence of greater expense for the parties. If a simpler route to the same destination is available through a more limited notional deletion from the lease, that seems to me to be the preferable result. Further, a variation under section 35 of the 1987 Act is only available when the aggregate of the service charges payable by tenants does not add up to a hundred percent of the landlord's expenditure, but that is not the only situation in which the apportionment of service charges may be unfair or unreasonable.

9. The UT has considered the effect of section 27A (6) on a number of occasions.

10. In *Windermere Marina Village Ltd v Wild* [2014] UKUT 163 (LC), [2014] L & TR 30 the lease provided for the tenant to pay a fair apportionment of the cost of services, such apportionment "to be determined by the surveyor for the time being of the Lessor whose determination shall be final and binding". The Deputy President (Martin Rodger QC) pointed out that the jurisdiction of the FTT under section 27A (1) could include questions of apportionment of expenditure. He went on to say at [40] that section 27A (6):

> "… renders void any agreement by the tenant in so far as it "purports" to provide for the determination of any question which could be the subject of an application under subss.(1) or (3) "in a particular manner" or "on particular evidence". The purpose of the provision is clearly to avoid agreements excluding the jurisdiction of the first-tier tribunal on questions which could otherwise be referred to it for determination."

11. Having referred to the decision of this court in *Joseph v Joseph* [1967] Ch 78, he went on to say at [41] that section 27A (6) required "the same broad approach". He concluded at [42]:

> "The question referred to the [FTT] in this case was what proportion of the expenses incurred by the appellant was to be paid by the respondents. By para.(2) of the Schedule to their leases the respondents had already agreed that the answer to that question was that they were to pay such proportion as was determined by the appellant's surveyor, whose decision was to be final and binding. In my judgment that agreement was void because it had the effect of providing for the manner in which an issue capable of determination under s.27A(1) was to be determined, namely by a binding decision of the appellant's surveyor."

12. At [48] he said:

> "Section 27A(6) deprives the landlord's surveyor *of his role in determining the apportionment*. Paragraph (2) is to be read as if the method of ascertaining a fair apportionment was omitted altogether. [The surveyor's] conclusions cannot therefore have any contractual effect. That being the case, it was for the LVT to decide what was a fair proportion of the expense of communal services payable by the respondents." (Emphasis added)

13. Thus the FTT was entitled to consider for itself what was the fair proportion of the expenses payable by the tenants, because the contractual mechanism for identifying that fair proportion was rendered void by section 27A(6) of the 1985 Act. It is to be noted, however, that the lease in that case had a two part structure which (a) provided for the tenants to pay a fair proportion of the costs and (b) provided that that fair proportion was to be determined by the landlord's surveyor. It was only the second part that was void, which left the first part intact.

14. In *Gater v Wellington Real Estate Ltd* [2014] UKUT 561 (LC), [2015] L & TR 19 the lease provided for the tenants to pay:

> "an amount equal to a fair proportion (such proportion to be determined by the Landlord's Surveyor [whose] determination shall be final and binding) of all sums incurred by the Landlord in and providing the Services"

15. But it also contained a further provision which required the tenants to pay:

> "… a due and fair proportion of the Service Cost (such proportion to be determined by the Landlord or its surveyor (in each case acting reasonably) and taking into account the relevant floor areas within the Building or other reasonable factors in making the determination."

16. The first of these purported to make the determination of the landlord's surveyor final and binding. The second did not. The Deputy President said at [72]:

> "For the reasons given by the Tribunal in *Windermere* the words "such proportion to be determined by the Landlord or its surveyor (in each case acting reasonably)" which appear in the definition of the Tenant's Share in para.1.5 of the Third Schedule to the White Lease are void. For the same reasons the words "(such proportion to be determined by the Landlord's Surveyor whose determination shall be final and binding)" which appear in the definition of Service Charge in cl.1(16) of the White Lease are also void."

17. It was argued by the landlord that the effect of section 27A (6) was more limited; and that only the words "whose determination shall be final and binding" were avoided by the sub-section. But the Deputy President rejected that submission. He said at [73]:

> "The statutory anti-avoidance provision renders void so much of the agreement as has the effect of providing for the determination in a particular manner of any question which could be referred to the appropriate tribunal under s.27A(1). A determination of proportions by the landlord's surveyor is such a provision, whether it is said to be final and binding or not."

18. Accordingly, he held at [74] that where a provision for determining an apportionment is rendered void by the operation of section 27A(6) of the 1985 Act, and the parties could not agree what is fair, the consequence was that the fair proportion fell to be determined by the FTT.

19. In *Oliver v Sheffield City Council* [2017] EWCA Civ 225, [2017] 1 WLR 4473 the lease provided:

> "The Service Charge payable by the Lessee shall be a fair proportion to be determined by the City Treasurer or other duly authorised office of the Council…"

20. One of the issues on an appeal to this court was whether *Windermere* (and more especially *Gater*) had been correctly decided. Briggs LJ (with whom Longmore LJ and I agreed) said:

> "[54] In my view those cases were rightly decided, for the reasons given by the Upper Tribunal in each of them, to which I have already referred. The Upper Tribunal was careful in both those cases to distinguish between a situation where the determination was to be carried out in a prescribed manner (for example by a person with discretion as to the result), and a situation where a particular determination was the only possible consequence of the application of an agreed formula. The former provision falls foul of section 27A(6), whereas the latter does not, because the precise amount to be paid has been determined by the parties' agreement: see section 27A(4)(a) .
>
> [55] In my judgment the Upper Tribunal was right to say in the *Gater* case that for this purpose it mattered not whether the

> provision that the determination be carried out in a particular way or by a particular person was expressed to be final and binding. The avoidance of such provisions is not expressed in subsection (6) to be dependent upon the presence of such an express provision. It is void wherever it would otherwise be of contractually determinative effect."

21. The UT (HHJ Alice Robinson) reached a similar conclusion in *Roberts v Countryside Residential Ltd* [2017] UKUT 386 (LC). In that case the service charge was a fixed proportion "or such other fair and reasonable proportion to be determined by the Landlord's Surveyor". She held that only the provision providing for determination by the Landlord's Surveyor was invalidated by section 27A (6), leaving the obligation to pay a fair and reasonable proportion unscathed.

22. In *Fairman v Cinnamon (Plantation Wharf) Ltd* [2018] UKUT 421 (LC) the service charge provisions provided:

> "If in the opinion of the Lessor it should at any time become necessary or reasonable to do so by reason of any new buildings being constructed and brought within the Estate whether or not on land now forming part of the Estate or by reason of any of the premises in the Building or the Estate being added to ceasing to exist or to be habitable or being compulsorily acquired or requisitioned or ceasing to form part of the Estate or for any other reason the Lessor or its surveyor shall re-calculate the Service Charge percentage proportions either as appropriate to the remaining Units within the Building (but in the same ratio as the existing proportions) or to the Building in relation to the Estate (as the case may be)…"

23. One issue before the UT (HHJ Gerald) was whether section 27A (6) made that provision void. At [45] the UT said:

> "Section 27A(6) is concerned with jurisdiction and ouster of the court's jurisdiction, not with the substantive contractual provisions of a lease as is clear from the wording of the section itself, in particular by the words "in so far as" appearing in sub-section (6), which is underlined by the reference to "jurisdiction" in sub-section (7) and, indeed, by the whole subsection which is concerned with *jurisdiction*, not operation of the substantive contractual provisions. The effect of section 27A(6) is that where there is a contractual discretion to re-calculate service charge apportionment, whether that discretion should be exercised and if so how is abrogated to the F-tT." (Original emphasis)

24. Having referred to *Windermere*, he continued at [46]:

> "In the instant case, in the event of any of the stated circumstances occurring, there arises in "the Lessor" (as defined) a discretion as to whether to continue with the

> apportionments fixed by the existing and new leases or re-apportion or re-calculate pursuant to paragraph (9), in which case "the lessor or its Surveyor" (as defined) shall re-calculate. The effect of section 27A(6) is to do no more than deprive the Lessor or its Surveyor of its or his role in determining any new apportionment, or recalculation in accordance with paragraph (9). It is not, and is not intended to, strike down the whole provision."

25. The UT then considered both *Gater* and *Oliver* and said at [49]:

> "Applying that citation directly to paragraph (9), section 27A(6) substitutes the references to "the Lessor" and "the Lessor or its Surveyor" for "the F-tT" so that it is that tribunal which has the discretion to decide whether in the given circumstances it is "necessary and reasonable" to re-calculate the service charge percentage proportions and if so exercise its discretion in applying the formula laid down by paragraph (9) namely, in this case, "as appropriate to the remaining Units within the Building (but in the same ratio as the existing proportions)". What the section does not do is strike down those words or render them void. The F-tT was therefore right in proceeding upon the footing that it had the jurisdiction to determine the issue of re-apportionment, or re-calculation, under paragraph (9)."

26. Thus the contractual provision was read as if it said that if in the opinion *of the FTT* it was necessary and reasonable to do so, *the FTT* was to calculate the revised percentages. If that approach were to be applied to the lease in the present case, it would be read as if it provided for the fixed percentage or such part as *the FTT* may otherwise reasonably determine.

27. Is that the right approach? In the present case, The UT thought not. Judge Cooke said:

> "[23] The deletion of the void wording in *Windermere* and *Gater* created a vacuum. There was still a determination to be made, because the tenants had to pay a "fair proportion" of the service charge. In the absence of the agreed method of determination it was for the FTT to decide what a fair proportion was; and it had to make its own decision, rather than reviewing the landlord's apportionment. Similarly in *Fairman v Cinnamon (Plantation Wharf) Ltd* [2018] UKUT 421 (LC) the deletion of void wording that enabled the landlord to determine when a change in the apportionment of charges was "necessary or reasonable" meant that the FTT had to decide a change was necessary or reasonable and, if it was, to decide for itself what the new apportionment should be.
>
> [24] In the present appeal the remaining wording is different. The Vista leases set out a fixed percentage, to which the landlord's discretionary apportionment is an alternative. There

> is no provision for a "fair proportion" or the like. Without the void wording the lease obliges the tenant to pay a stated percentage of the service charge. There is nothing left to decide. The FTT has no jurisdiction to amend the stated percentage as a result of s.27A(4)."

28. There is no doubt in my mind that the conclusions in these paragraphs followed logically from the premise that, as she held at [20], the effect of section 27A (6) was that the words "or such part as the Landlord may otherwise reasonably determine" were treated as having been excised from the lease. But that was not what HHJ Gerald decided in *Fairman*; and Judge Cooke did not say that he was wrong. The alternative approach is to hold that the effect of section 27A (6) was that the lease was to be read as if it had said "or such part as … may otherwise reasonably determine." If that is the true effect of section 27A (6) then there would be a void which the FTT could fill. In short, by the time that she got to paragraph [23] Judge Cooke had already painted herself into a corner.

29. In my judgment Mr Allison was right to say that some help as to the correct approach to provisions of this kind can be found in the decision of this court in *Tindall Cobham 1 Ltd v Adda Hotels* [2014] EWCA Civ 1215, [2015] 1 P & CR 5. That case concerned the anti-avoidance provisions contained in section 25(1)(a) of the Landlord and Tenant (Covenants) Act 1995 which provided that any agreement relating to a tenancy was void "to the extent that" it would have effect "to exclude, modify or otherwise frustrate the operation of the provisions of the Act". Patten LJ said at [46]:

> "Although the words "void to the extent that" indicate that Parliament did not intend to invalidate more of the relevant agreement than was necessary to safeguard the objectives of the Act in the context of the particular assignment under consideration, those words do not in my view preclude the Court from taking a balanced approach to invalidation which, whilst neutralising the offending parts of the contract, does not leave it emasculated and unworkable."

30. At [46] he added that in interpreting a statutory provision of this kind, the principles of severance of unlawful parts of contracts at common law were not of much assistance, even by way of analogy.

31. In *Sutherland v Network Appliance Ltd* [2001] IRLR 12 Lindsay J (sitting in the Employment Appeals Tribunal) adopted a similar approach. An employee entered into a compromise with his employer which was expressed to be in "full and final settlement of any claim". He had some claims that were statutory and some which were common law claims. Section 203 of the Employment Rights Act 1996 provided that any agreement was void "in so far as" it purported to preclude a person from bringing claims before the ET. Lindsay J said that the section was to be interpreted as not affecting the compromise of contractual claims and continued at [12]:

> "In that legislative context, we do not see it, in any pejorative sense, as rewriting the agreement to allow it to take effect as to the contractual claims whilst denying it effect as to the statutory ones. Section 203(1) is concerned with the effect and

> enforceability of agreed provisions, not their language or form. The court picks up the agreement after the statutory scissors of s.203 have cut out the parts to which effect is not to be given and enforces the remnant. To oblige the scissors to dismantle the whole agreement would be to do more than the Act stipulates."

32. This was clearly not a case in which the "blue pencil" test was applied.

33. Mr Sandham accepted that *Fairman* did not fit with his suggested approach. He also accepted that the result of his approach meant that the result turned on the precise way in which the lease in question had been drafted. But, he submitted, all leases are different; and each case must be examined on its own facts.

34. In my judgment, the clear thread that runs through the previous decisions of the UT is that section 27A (6) is concerned with no more than removing the landlord's role (or that of another third party) from the decision-making process; in order not to deprive the FTT of jurisdiction under section "27A (1)". That is made clear by *Windermere* at [42] and [48]; *Oliver* at [54] and *Fairman* at [45] and [46]. As the UT held in *Fairman*, the statutory objective is satisfied if the landlord's role is transferred to the FTT. To reach a broader conclusion than that would, in my judgment, leave the contract emasculated and, in practical terms, unworkable. Nor, as those cases also show, is there any objection in principle to a degree of flexibility in the apportionment of a service charge, provided that the decision is taken by the FTT.

35. What we are concerned with, in my judgment, is not the form of drafting but the substance of the impugned provision. As Lindsay J put it, it is a question of the effect and enforceability of agreed provisions, not their language or form.

36. In the present case the service charge provision envisages that the lessee may be liable to pay (as an alternative to the fixed percentage) a different percentage (a) which is to be identified by someone acting reasonably and (b) that that someone is the landlord. In my judgment, only the second component is invalidated by section 27A (6). To put it another way, the "particular manner" in which the percentage is determined is by the landlord. All that is necessary for compliance with section 27A (6) is to deprive the landlord of its role in making the determination.

37. As Mr Sandham pointed out, the effect of that conclusion is that what the lease envisaged as being a unilateral right of the landlord (i.e. at least to propose a different percentage) would be converted into a bilateral right in which the lessee could also propose a change. Mr Allison argued that the position was more nuanced than that. The contractual machinery remained in place except to the extent that it ousted the jurisdiction of the FTT. He relied, in this respect on what the Deputy President held in *Windermere* at [49]:

> "It should be noted that there are other forms of lease in which the provision of a certificate or the making of a determination is a condition of the liability of the tenant to make a payment. The lease in this case is not in that form, but in cases where such a determination triggers a liability it may well be that the contractual procedure continues to bind the parties, even

> though the content of the certificate or determination may be open to challenge because of the operation of section 27A(6)."

38. On that basis, he said, the UT was wrong in *Fairman* to conclude that the landlord's ability to decide that it had become necessary or reasonable to vary the apportionment had been transferred to the FTT. It was still for the landlord to make that decision, even if the apportionment itself was to be carried out by the FTT (which he accepted might decide that no variation was required). Likewise, in the present case, it was the landlord and the landlord alone who could propose a change from the fixed percentages. The problem with this argument is that, carried to its logical conclusion, it follows that the actual decisions in *Windermere*, *Gater* and *Roberts* were also wrong. In each of those cases the "fair" or "fair and reasonable" proportion was left at large, with the consequence that either the landlord or the lessee could apply to the FTT for a determination. But *Windermere* and *Gater* at least were approved by this court in *Oliver*. Moreover, I do not think that, in his observations on different parts of service charge machinery in *Windermere* at [49], the Deputy President can have intended to promulgate a decision that was internally self-contradictory. On this point, therefore, I accept Mr Sandham's submission. It is open to either the landlord or the lessee to refer the question of a different reasonable percentage to the FTT if it cannot be agreed.

39. For these reasons, I consider that Judge Cooke notionally excised more from the lease than was necessary to achieve the statutory purpose of section 27A (6). As Mr Allison submitted, the effect of her decision was in fact to deprive the FTT of all jurisdiction over the apportionment of service charges; which is not what section 27A (6) was intended to achieve. In my judgment the lease should be read as if it had provided for the fixed percentage "or such part as … may otherwise reasonably determine." If further slight linguistic adjustment is needed to make grammatical sense, so be it. On that reading, there is a vacuum to be filled, and it is filled by the FTT. Accordingly, the function of making that determination is, as HHJ Gerald held in *Fairman*, transferred from the landlord to the FTT.

40. I would allow the appeal and restore the decision of the FTT.

Lord Justice Males:

41. I agree.

Lady Justice Rose:

42. I also agree.