IN THE UPPER TRIBUNAL (LANDS CHAMBER)

Neutral Citation Number: [2018] UKUT 421 (LC)
Case No: LRX/44/2018

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGE – apportionment – applicability and effect of section 27A(6) Landlord and Tenant Act 1985 and section 35 Landlord and Tenant Act 1987

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

MR BLAIN ALDEN FAIRMAN AND OTHERS (LESSEES OF 24 FLATS AT IVORY HOUSE AND CALICO HOUSE)	**Appellant**
- and -	
(1) CINNAMON (PLANTATION WHARF) LIMITED (2) PLANTATION WHARF MANAGEMENT LIMITED (3) CUBE REAL ESTATE DEVELOPMENTS LIMITED	**Respondents**

**Re: Plantation Wharf,
York Road,
Battersea,
London, SW11 3TN**

**Before His Honour Judge Nigel Gerald
On
5 December 2018**

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

The following cases are referred to in this Decision:

Windermere Marina Village Limited v Wild [2014] UKUT 163 (LC); [2014] L&TR 30
Gater v Wellington Real Estate Limited [2014] UKUT 561 (LC); [2015] L&TR 19
Oliver v Sheffield City Council [2017] EWCA Civ 225; [2017] 1 WLR 4473
Schilling v Canary Riverside Development PTD Limited (2005) LRX/26/2005 [2005] EWLands LRX_26_2005
Morgan v Fletcher [2009] UKUT 186 (LC)
Sections 19 and 27A Landlord and Tenant Act 1985
Section 35 Landlord and Tenant Act 1987

DECISION

Introduction

1. This is an appeal against the 8th March 2018 decision of the First-tier Tribunal Property Chamber (Residential Property) (respectively, the "Decision" and "F-tT") concerning the service charge provisions relating to Ivory and Calico Houses which form part of the development known as Plantation Wharf situate at York Road, London SW11 3TN between Battersea and Wandsworth Bridges on the River Thames by various lessees of those blocks represented by Mr Jonathan Upton of counsel as well as separately by Mr Low, the long-lessee of number 17 Ivory House who represented himself, the Respondent landlords and management company being represented by Mr Justin Bates and Miss Ayesham Omar.

2. Plantation Wharf is a large mixed-use development comprising 13 blocks of residential and commercial units, some high rise, some not, with external communal land developed by the predecessor-in-title to the present freeholder Cinnamon (Plantation Wharf) Limited, the First Respondent, long common-form leases of the residential units having been granted to which the management company Plantation Wharf Management Limited, the Second Respondent, was a party.

3. As originally developed, Ivory and Calico Houses comprised residential units on the upper floors with commercial units on the lower floors all of which contributed to the service charge provisions under their respective leases, the commercial units of Ivory House occupying 52% of the floor area yet contributing some 82% of the service charge and Calico House occupying 49.3% yet contributing to some 78% of the service charge of which approximately two-thirds was accounted for by "the Estate Costs", being estate-wide service charge costs associated with Plantation Wharf rather than block-specific costs.

4. In 2015/16, the freeholder accepted a surrender of some of the leases of the commercial units which were then re-developed, or re-configured, to provide new residential units with additional internal communal areas exclusively serving, I am told, those new units. Ivory House originally comprised 14 commercial and 14 residential units but now comprises 41 residential and 1 commercial units, the original 13 commercial units having been converted into 27 new flats with associated new communal areas. Calico House comprised 14 commercial and 12 residential units but now comprises 19 residential and 10 commercial units, the original 4 commercial units having been converted into 7 new flats with associated new communal areas. There has been no change to the area of either building.

5. The freeholder granted a long lease of the whole area comprising the new residential units to HSBC Bank plc (as trustee of Hermes Property Unit Trust) which granted an underlease of

that area to Cube Real Estate Developments Limited, the Third Respondent, which then granted or is to grant long leases of the new residential units to third parties, but nothing turns upon the legal structure adopted as all new leases are on the same terms as the previous ones. For brevity, I shall simply refer to "the new leases" and "the original leases" so far as the residential units are concerned and to "the landlord" being the First and Second Respondents.

6. In broad terms, the service charge contributions under the original leases was apportioned by measured floor area of the respective units which was adopted in relation to the new leases and are stated as a fixed percentage in the leases. This resulted in service charge shortfalls of some 29% in respect of Ivory House and 9% in respect of Calico House because the service charge in respect of the commercial units had not been apportioned by measured floor area but weighted on a basis which, as already stated, resulted in them bearing a higher share of the overall service charges than the residential units, which is referred to in the Decision as the "lost commercial Payment".

7. Despite extensive researches, it has not been possible to divine the basis upon which the commercial units' service charge contributions were weighted or apportioned or the reason why, save to say that it was not by measured floor area and that it is not uncommon for commercial units to bear a higher share of the service charge than residential units or precisely why such a high proportion of the Estate Costs were attributed to Ivory and Calico Houses. The minute a different basis of service charge apportionment is used in relation to the same space, it will inevitably result in, in this case, a shortfall which will in that sense disproportionately affect the other units because it will have to be spread across those other units if the landlord is to recover 100% of service charge costs, consistent with the usual way in which service charge provisions operate or are intended to operate.

8. It was in those circumstances, which were to some extent of its own making because the landlord could simply have apportioned the former commercial units' service charge share amongst the new residential leases, although that would have resulted in their service charge contributions being out of kilter with those of the original residential leases, that the landlord sought to exercise its right to re-calculate the service charge apportionments contained in paragraph (9) of Part I of the Second Schedule to the leases:

> "(9) 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)…".

9. The words in brackets have been referred to throughout as "the ratio requirement". The "Building" is defined by clause 1.1.4 as meaning "the building or buildings of which the Demised Premises form part [Ivory House and Calico House] including all additions and alterations and improvements thereto and … which forms part of the Estate [Plantation Wharf]". The "Units" are also defined, which I shall refer to later.

10. That power is common to all original and new leases, save that two flats, 19 Ivory House and 15 Calico House, have the benefit of a proviso preventing any increase in service charge percentages which provides as follows:

> "Provided always that any re-calculation of the Service Charge percentage proportions shall not result in an increase in the Service Charge percentages referred to in this Lease".

It is unclear why those two flats, which I shall refer to as "the two excepted units", were granted that exception, it being possible that it might have been by reason of those leases being granted at a time when the then freeholder was in administration, but nothing turns on this.

11. In the absence of agreement of all affected lessees as to the re-calculation proposed by the landlord, the Respondents, being the Applicants to the F-tT, sought *determination* by the F-tT as to the proposed new service charge percentages which had been calculated upon the expert advice of surveyors Mr Philip John MRICS and Mr Jeffrey Platts FRICS who had been engaged by the landlord in respect of which the Respondents before the F-tT, being the Appellants before this Tribunal, engaged the services of Mr Maunder-Taylor FRICS, MAE.

12. The question to the F-tT was framed as a *determination,* rather than an approval, because it was conceded and is common ground that the effect of section 27A(6) of the Landlord and Tenant Act 1985 is that to the extent that paragraph (9) ousted the jurisdiction of the F-tT it was void and falls to be determined or exercised by the F-Tt, not the Lessor or its Surveyor, by reason of *Windermere Marina Village Limited v Wild* [2014] UKUT 163 (LC); [2014] L&TR 30 and *Gater v Wellington Real Estate Limited* [2015] [2014] UKUT 0561; [2015] L&TR 19) as approved by the Court of Appeal in *Oliver v Sheffield City Council* [2017] EWCA Civ 225; [2017] 1 WLR 4473.

13. The upshot of the Decision is that the F-tT determined that the service charge apportionments be adjusted by apportioning the service charge shortfalls across the original and new residential units and also the remaining commercial units of each block so preserving the ratio of the existing proportions of the existing units, save for the two excepted flats whose service charge percentages remained unaltered as they were protected by the cap. In so doing, the F-tT adopted the same approach as that proposed by the landlord except that it determined that the shortfalls should be apportioned across all units so rejecting the landlord's proposal that the remaining commercial units be omitted from apportionment of the shortfalls, in respect of which there is no appeal.

14. During the course of the hearing before the F-tT, the actual calculations changed, but the substance of what had been proposed did not alter. It followed from the determination of the F-tT that there would have to be further recalculations which have not yet been completed satisfactorily: instead of ordering that a final agreed list of adjusted service charge percentages be prepared or, in the absence of agreement, be determined by the F-tT, it was left to the Respondents to recalculate which, it is common ground, has not proved satisfactory.

15. There are five grounds of appeal which can conveniently be arranged into three central issues which encompass the grounds of appeal of the Appellants and the discrete points raised by Mr Low, this Tribunal having granted permission to appeal on 27th July 2018 following the F-tT's refusal to grant permission dated 16th May 2018 as amended on 11th June 2018 (the "Refusal Decision").

Grounds one, three, four and five: did the F-tT properly construe and apply paragraph (9)?

Introduction

16. The central ground of appeal is that the F-tT wrongly construed or interpreted paragraph (9) in holding that it was engaged on the facts of this case and also that it, secondly, failed to properly apply what "the ratio requirement" and, thirdly, wrongly proceeded on the footing that it had been conceded that the two excepted units were irrelevant.

17. The key paragraphs of the Decision are as follows:

> "50. It was not suggested that the fact that the service charge percentages in two of the Initial Leases cannot be altered prevents the service charge percentages in the other leases from being varied. Accordingly, the two Initial Leases with fixed service charge percentages will be disregarded for the purpose of this decision…
>
> "52. I appears to the Tribunal (emphasis added) that the service charge percentages may be varied **should it at any time become necessary or reasonable to do so**:
>
> "(i) by reason of any new buildings being construed and brought within the Estate whether or not o land now forming part of the Estate;
>
> "(ii) by reason of any of the premises in the Building or 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**
>
> "(iii) for any other reason.

> "53. The Tribunal is of the view that the words "or for any other reason" are not redundant and that (i) and (ii) provide examples of situations in which it may become necessary or reasonable to vary the service charge…
>
> "62. The Tribunal accepts the applicants' case that, in re-apportioning the service charge percentages so as to redistribute the lost Commercial Payment, the ratio of the service charge payable as between the original residential units appears to have remained the same (subject to any arithmetical errors) and that, if there are any arithmetical errors, these can be corrected…
>
> "69. The Tribunal determines that the proposed new service charge percentages are not payable because the lost Commercial Payment has not been distributed across all of the units, residential and commercial, and therefore the ratio requirements not been fully complied with. The Tribunal accepts that applicants' submission that, were this to be corrected (along with any arithmetical errors) so that the ratio requirement as defined above was complied with, the resulting service charge percentages would be payable."

18. In the Refusal Decision, the F-tT elaborated thus:

> "11. In other words where, as a result of distributing the lost Commercial Payment across all of the units, the percentage in "any lease" is adjusted upwards, the percentage in all other such leases would be adjusted upwards by the same pro rata amount. The Tribunal considers this to be correct as a matter of arithmetic."

Question one: did the F-tT correctly find that paragraph (9) was engaged?

19. The Appellants (and Mr Low) submitted that the F-tT wrongly construed or interpreted paragraph (9) in holding that the words "for any other reasons" provided stand-alone circumstances sufficient to encompass the reconfiguration of the commercial units into new residential units and new common parts so engaging its operation, it being their position that those words were mere surplusage and of no effect, from which it followed that paragraph (9) was not engaged, it then being common ground between the parties that the immediately preceding words "by reason of any of the premises in the Building … being added to ceasing to exist …" did not apply.

20. Questions of the true construction of any contract or other document are ultimately for the determination of the court, or tribunal, which is not and cannot be bound by any prior concessions of or common ground between the parties because the function of the court, or tribunal, is to determine the true meaning of the words used and the applicability of, in this case, agreed facts to them irrespective of the parties' respective positions or submissions albeit that those positions or submissions are highly germane and must be taken into account and careful consideration given to them.

21. In my judgment, what has occurred is that part of the commercial premises ceased to exist (because the relevant leases were surrendered or otherwise determined and the physical space or layout occupied by them was obliterated, replaced and reconfigured) and in their stead new residential premises with associated new communal areas were added to the Building (as defined) which fall four-square within the express words "by reason of any of the premises in the Building … being added to ceasing to exist …" so engaging paragraph (9).

22. In other words, the matter before the F-tT did not, on proper analysis, raise an issue of construction but the straight-forward application of the undisputed facts of what had taken place to the express wording of paragraph (9), albeit that the meaning and effect of those words required some interpretation.

23. The parties were invited, prior to commencement of the appeal hearing, to consider and make submissions in respect of what was then a provisional view as to the applicability of paragraph (9). Neither party made any written submissions, but both represented parties made oral submissions to the effect that the Respondents, upon reflection, adopted the provisional view of this Tribunal and the Appellants resisted that view but were in some difficulty as to why that view was wrong or unsustainable, their principal argument being that the word "premises" was undefined, but must be something different from, or was used in contra-distinction to, the word "Unit" being defined by clause 1.1.31 as a "unit of accommodation within … the Building … which is let or intended to be let whether or for residential and/or commercial purposes and "Units" has a corresponding meaning".

24. In my judgment, that argument, which was not pressed with any force, falls down when the use of the word "premises" is considered within paragraph (9) and the meaning it is generally understood to bear in the law of landlord and tenant, namely, being a reference to the physical parcel or subject matter of the demise but can also, in general usage, have a wider meaning of any physical premises – singular or plural – within "the Building", which could relate to communal areas not falling within any particular demise (or Unit) as well as one or more of the demises or indeed any part or parts of them.

25. Also to be borne in mind is that the contractual definition of "the Building" extends not only to additions and improvements but to "alterations", which would be sufficient to embrace internal reconfigurations such as that which occurred upon conversion of the commercial units into new residential units and communal areas, and tends to indicate that paragraph (9) was not confined to simple additions to or reductions in the area of the Building itself (as Mr Upton and Mr Low submitted) but embrace internal alterations within the Building which do not cause any change to its actual size or area.

26. In context, in my judgment "premises" must be used in paragraph (9) as including not only the Unit or Units (as defined) but also the communal areas and any part or parts of them otherwise "premises" could not sensibly refer to anything within the Building itself with the

result that this part of paragraph (9) would be inoperative. Putting that another and more direct way, apart from the Unit or Units and communal areas, there are no other "premises" to which the paragraph could apply within the Building. By way of illustration and reinforcement, the only "premises" or areas which, for example, could sensibly be compulsorily acquired or requisitioned or rendered uninhabitable within the Building falling within paragraph (9) would be one or more of the the Unit or Units (as defined), from which it follows that "premises" must include those commercial units which ceased to exist upon conversion to new residential premises or units and communal areas.

27. Mr Upton submitted that it would be wrong in principle for an appellate tribunal to reach a conclusion which differed from the prior common ground of the parties and upon which the F-tT had neither adjudicated nor been addressed so did not form a ground of appeal. Whilst I have some sympathy for this, in my judgment it would be somewhat artificial (and impossible) for this Tribunal to proceed on what it regards as a false footing because in order to determine the central issue of the appeal – whether the F-tT was right in finding that the words "for any other reasons" was engaged – this Tribunal would need to consider what was intended to be meant by those general words in the context of what preceded it, including the applicability (if at all) of the *ejusdem generis* rule, which would to some extent be dependent upon the meaning and effect of those preceding words.

28. Having reached that conclusion, it is not necessary for me to consider the Appellants' and Mr Low's submission that the words "for any other reason" are mere surplusage and of no substantive effect, their argument being that paragraph (9) is confined to changes in the area of the Building itself, not its internal configuration, and if those words are given their literal and unrestricted meaning the preceding words would be redundant. Neither is it necessary for me to consider the Respondents' submission that they are stand-alone words of substantive effect and should be given their literal meaning, albeit that they are constrained by the pre-requisite that there must be circumstances rendering re-calculation "necessary or reasonable", the *ejusdem generis* rule being inapplicable because there was no readily identified *genus* or kind or class of thing which could be referenced in the preceding words for the rule to operate as the preceding words encompass not only physical changes to the premises and Building or Estate but also changes in use or ownership of them.

29. That said, it follows from the above that even if I had not held that the conversion of the commercial units to new residential units falls within the express wording of paragraph (9), I would have rejected the arguments of Mr Upton and Mr Low because it is plain from the wording of paragraph (9) that it is not confined to changes to the physical size or area of the Building itself but extends to changes of use, ownership and habitability of premises within the Building which do not of themselves change the physical size or area of the Building, as reinforced by "the Building" including alterations thereto which may be internal or external. I would not, however, have been inclined to accept the Respondents' submission because it would, as Mr Upton submitted, render the preceding words otiose. Rather, my view would have been inclined to a "flexible" application of the *ejusdem generis* rule to the effect that the words

"for any other reasons" are to be construed as referring to the same kind or kinds or class or classes of things adumbrated within the preceding words which would be sufficient to embrace that which in fact occurred.

30. For completeness, both Mr Upton and Mr Low also submitted that paragraph (9) simply does not permit the landlord to re-calculate service charge percentages where it is the landlord which has created the shortfall by conversion of commercial into residential units which could have been avoided by allocating the former commercial unit service charge percentage to the new residential units. I am unable to accept this argument, there being no such constraint within or limitation imposed by the wording of paragraph (9), a point underlined by the fact that it was common ground that paragraph (9) would be engaged if there was an addition to the Building by the landlord, for example, construction an additional floor with new units, residential or commercial.

31. In this regards, it should be borne in mind that there has been a five-stage process: first, the freeholder accepting surrenders of the relevant commercial leases; secondly, taking those units or premises out of commission for redevelopment; thirdly, altering their internal layout so as to create new residential premises, or units, with new communal areas; fourthly, granting new leases of them based on floor area, consistent with the original (residential) leases; and fifthly a decision to engage paragraph (9) because it was thought "necessary and reasonable" in those circumstances to do so which, following failure to agree, caused the landlord to apply for determination by the F-tT pursuant to the provisions of the 1985 Act. The point being that the decision to engage paragraph (9) was subsequent to conversion and fixing of the service charge of the new (residential) leases by floor area consistent with those of the original (residential) leases.

Question two: did the F-tT correctly apply the ratio requirement?

32. The next key argument was that the F-tT had misapplied the so-called ratio requirement, namely, that any re-calculation must be "in the same ratio as the existing proportions" which, it was submitted, was a reference to the service charge percentages of the original leases which was mathematically impossible to do in the circumstances of this case. In oral submissions, Mr Upton submitted that "remaining Units" in paragraph (9) refer to those remaining immediately before re-calculation, namely, the existing and new residential units and any remaining commercial units; that "the existing proportions" referred to those of the original and new leases and any remaining commercial units; the balance to be re-apportioned being any shortfall.

33. This submission somewhat fell apart during oral submissions. Mr Upton, as echoed by Mr Low, submitted that whilst it was possible to maintain the same ratio as the existing proportions in the event of an apportionment of any reduction or increase in service charge percentages caused by any increase or reduction in size or area of the Building by, say, addition or removal of a floor with which this Tribunal agreed. When asked if that was so, why it was

not possible to perform precisely the same task as the present case, where there was a shortfall albeit not caused by any increase in size or area of the Building, neither Mr Upton (nor Mr Low) could come up with any explanation as to how this was not as a matter of logic possible, from which it follows that the effect of the F-tT's decision was to maintain the same ratio as the existing proportions.

Question three: did the F-tT wrongly conclude that it had been conceded that the two excepted leases were irrelevant?

34. It was common ground that the Decision (paragraph 50) wrongly recorded that it had been conceded that the two excepted leases were irrelevant, it having been the submission of Mr Low, and of the Appellants who maintained the argument before me but with a little less force, that the existence of the two excepted leases, one in Ivory House and one in Calico, containing the cap on upward changes to the service charge percentages prevented operation of paragraph (9) because by definition their existing proportions could not be maintained if they could not be increased by apportioning any shortfall to them, the Respondents submission being that they were irrelevant so that the F-tT's misdirection was immaterial.

35. In my judgment, this error was of no materiality to the ultimate Decision. First, the reference to "existing proportions" in the ratio requirement of paragraph (9) is to those pertaining under the provisions of all of the relevant leases which includes any particular provision in any lease which could cause the proportions existing at the material time to change – such as the cap existing in relation to the two excepted leases which cause those existing proportions to change (albeit marginally) to new existing proportions in the event of any increase in service charge percentages. In other words, "existing proportions" is not set in aspic but is defined by any particular provision in relation to any service charge percentages contained in any leases so may change. If a service charge percentage is capped, that represents the "existing proportions" notwithstanding that the cap results in a (marginal) change.

36. Secondly, once paragraph (9) is engaged, implicit within the requirement that the service charge must be apportioned "as appropriate" to the remaining units within the Building, albeit in the same ratio as the existing proportions, is a requirement that the provisions of the various leases must be taken into account, from which it follows that if the re-calculation will result in an increase in service charge percentages but, as is the case, there are two leases which prohibit such increase, their share of what otherwise would have been apportioned to them must be apportioned to the other "remaining Units", otherwise paragraph (9) would be unworkable, which cannot have been the intention of the parties, particularly bearing in mind the next point.

37. Thirdly, and in any event, as Mr Upton himself submitted, the purpose of paragraph (9) is to ensure that the landlord is allowed to recover 100% of expenditure in the event of there being circumstances which create a surplus or shortfall, from which it follows that the "shortfall" putative marginal dis-proportion of the two excepted leases is to be allocated to all other units, residential or commercial. Furthermore, in my judgment, the purpose of the

formula is also to prohibit a wholesale re-writing or re-apportionment of existing service charge percentages in the event of a re-calculation so protecting the remaining units, including the original or existing leases, from any changes to their service charge percentages other than a simple apportionment of any surplus or shortfall. In effect, the existing proportions are to be maintained so far as possible and as a matter of practicality and common sense, which is what the F-tT did here albeit on the footing of a concession which had not in fact been made.

Ground two, part one: is paragraph (9) void by reason of section 27A(6) of the 1985 Act?

Introduction

38. The next key ground of appeal is that F-tT failed to determine whether paragraph (9) was void in its entirety by reason of sections 19 or 27A of the 1985 Act which, it was submitted, only confers a power to determine the fair and reasonable apportionment of a service charge, not to vary or substitute a service charge percentage fixed by the lease with a new one, such jurisdiction to vary being provided by section 35 of the Landlord and Tenant Act 1987 (in respect of which the Respondents have applied to vary the leases which is stayed pending the outcome of this appeal).

39. Although the F-tT was alive to this issue (see paragraph 42 to 44 of the Decision, and paragraphs 6 and 9 of its Refusal Decision), it is implicit in its Decision that it proceeded on the footing that paragraph (9) was not void and therefore it had jurisdiction to determine whether or not the fixed service charge percentages should be re-calculated under paragraph (9) albeit that it did not explicitly deal with the issue or state its reasons in either of its Decisions. The question therefore is whether or not the F-tT had jurisdiction to deal with the question under the 1985 Act or not: if it did, any procedural irregularity of failing to deal with the matter explicitly falls away; if it did not, then the appeal must be allowed and the Decision over-turned.

The relevant statutory provisions

40. Section 19 of the 1985 Act (as amended) provides:

> "**Limitation of service charges: reasonableness.**
>
> "(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—
>
> "(a) only to the extent that they are reasonably incurred, and
>
> "(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
>
> and the amount payable shall be limited accordingly.
>
> "(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant

costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

41. Section 27A of the 1985 Act (as amended) provides, so far as is material, as follows (emphasis supplied):

> "**Liability to pay service charges: jurisdiction**
>
> "(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…
>
> "(c) the amount which is payable…
>
> "(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to…
>
> "(c) the amount which would be 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…
>
> "(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) or (3).
>
> "(7) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter."

42. Section 35 of the 1987 Act provides, so far as is material, as follows:

> "**Application by party to lease for variation of lease**
>
> "(1) Any party to a long lease of a flat may make an application to the court for an order varying the lease in such manner as is specified in the application.
>
> "(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely…
>
> "(f) the computation of a service charge payable under the lease…

> "(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—
>
> > "(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and
> >
> > "(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and
> >
> > "(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would exceed the whole of any such expenditure…".

Discussion, and decision

43. In support of the proposition that sections 19 and 27A the 1985 Act does not vest the F-tT with jurisdiction to vary a fixed service charge, the Appellants relied upon *Schilling v Canary Riverside Development PTD Limited* (2005) LRX/26/2005 cited with approval in *Gater* (*supra*). Reliance was also placed upon *Morgan v Fletcher* [2009] UKUT 186 (LC) where it was held that section 35 of the 1987 Act can only be exercised where the aggregate of service charges payable amount to more or less than 100% of expenditure), rather than a re-calculation in circumstances such as this case.

44. Whilst *Schilling* (approved in *Gater*) held that sections 19 and 27A do not afford statutory jurisdiction to substitute a different percentage or apportionment to that already fixed by the leases and so agreed by the parties, neither case concerned a contractual provision such as paragraph (9) expressly permitting re-calculation in given circumstances. The instant case is not concerned with the F-tT substituting an already fixed apportionment under statutory jurisdiction *au dehors* the express provisions of a lease, but with the substitution of a fixed apportionment under or pursuant to the express provisions of or mechanism contained in, in this case, paragraph (9) of the leases.

45. 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. As was stated by the Deputy President in *Windermere* (emphasis supplied):

> "27. The issue of principle is concerned only with cases where the parties have *not* agreed the apportionment of liability at the commencement of their lease, but have left the question of apportionment to be determined by a third

party at a later date. *The issue is also likely to be relevant to leases under which more than one method of apportioning charges is identified, but where the choice of which method is to be adopted, either generally or in relation to particular categories of expenditure, is left to the landlord or to a third party.* Arrangements of that type are quite commonly encountered (often in local authority leases)…".

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 indented to, strike down the whole provision. As was stated by the Deputy President in *Windermere* (emphasis supplied):

> "46. It was common ground between counsel that if, as I have found, section 27A renders void part of paragraph (2) of the Schedule to the lease, that part was the whole of the words: "(to be determined by the Surveyor for the time being of the Lessors whose determination shall be final and binding)". I agree. The effect of sub-section (6) is to strike out *so much of* an agreement as provides for the manner in which a question capable of consideration under sub-section (1) is to be determined. The manner of determination of a fair apportionment agreed in this case is by the determination of the appellant's surveyor. The manner of determination is not limited to the parties' agreement that the surveyor's view of what is fair is to be final and binding.
>
> "47. Mr Gilchrist nonetheless submitted that the LVT should have approached the issue of a fair apportionment by asking itself whether the apportionment settled on by Mr Pogson was fair. If it was, he submitted, then there was nothing left for the LVT to consider, because the apportionment arrived at by the contractual route was fair. It would only be if the LVT was satisfied that Mr Pogson's apportionment was not fair that it could substitute its own view of what was fair. Mr Gilchrist pointed out that the LVT had not said anywhere in its decision that Mr Pogson's approach was unfair, and it had specifically acknowledged that there was more than one fair method of apportioning the charges consistently with the RICS Code.
>
> "48. I cannot accept Mr Gilchrist's submission. Section 27A deprives the landlord's surveyor of his role in determining the apportionment. P*aragraph (2) is to be read as if the method of ascertaining a fair apportionment was omitted altogether.* Mr Pogson'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.* It is not suggested that the method it preferred was unfair, and the fact that the alternative method, which it rejected, may also have been fair does not undermine its conclusion.

> "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)."

47. In *Gater*, elaborating on paragraph 48 of *Windermer*e, the Deputy President said:

> "73. …The 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 section 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.
>
> "74. As is apparent from [paragraph 48 of *Windermere*], where a provision for determining an apportionment is rendered void by the operation of s.27A(6) of the 1985 Act, and the parties cannot agree what is fair, the consequence is that the fair proportion falls to be determined by the appropriate tribunal. That is a fundamentally different exercise from the one undertaken by the First-tier Tribunal in this case, when it asked itself whether the respondent's method of apportionment was fair rather than asking itself what the fair apportionment should be.
>
> "75. In carrying out an apportionment the appropriate tribunal will have regard to the parties' agreement, so far as it remains. In this case the parties agreed that the Tenant's Share would be a due and fair proportion of the service costs which would be apportioned "taking into account the relevant floor areas within the Building or other reasonable factors". That is not a provision the effect of which is to provide for a determination "in a particular manner" and it survives the intervention of s.27A(6)."

48. In *Oliver*, Lord Justice Briggs as he then was said, when approving *Windermere* and *Gater*:

> "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 s.27A(6), whereas the latter does not, because the precise amount to be paid has been determined by the parties' agreement: see s.27A(4)(a)."

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).

50. Whilst re-calculation of the service charge percentages operates so as to re-fix what had previously been fixed by the various leases (albeit in the same ratio as the existing proportions), that does not constitute a variation of the terms of the lease *per se*, but merely the re-fixing of the service charge percentage pursuant to a power contained within the provisions of the leases. That is to be contrasted with an application under section 35 of the 1987 Act which concerns a variation to the terms of the leases *per se* – in other words, it concerns an application to change or vary the terms of a lease where there is no such mechanism within the lease itself and can therefore only be done by unanimity of all affected lessees or by resort to any applicable statutory jurisdiction, such as section 35. *Morgan* (*supra*) is concerned with a change or variation to a lease *stricto sensu*, not the operation of a contractual provisions to re-calculate such as that found in paragraph (9). By failing to make this distinction, this ground of appeal is, in my judgment, misconceived.

Ground two, part two: did the F-tT exercise its own discretion to re-calculate, and should it have?

Introduction

51. In the event of it being held that paragraph (9) was not rendered void so that it was for the F-tT to exercise the discretion afforded by that provision, the Appellants argued that the F-tT had not exercised its discretion at all so that the existing fixed service charge percentages remained and, secondly, that if it had exercised its discretion, it had failed to ask itself the correct question, namely, whether it should exercise the discretion and if so how.

Question one: had the F-tT exercised its discretion?

52. As I understood it, the Appellants' (and Mr Low's) argument was that the F-tT had not exercised its discretion at all because it had not itself determined the new service charge percentages but had left it up to the Respondents to do (which they had to date failed to do), from which it follows that the percentages fixed in the leases should pertain: see paragraphs 33 to 38 of Mr Upton's skeleton Argument. (It is common ground that not only is there no concluded schedule or list of re-calculated service charge percentages, apparently because the landlord's agents have not approached the calculation systematically, using the correct original fixed percentages and then applying or distributing the shortfall across both remaining

residential *and* commercial units based upon the correct service charge percentages as determined by the F-tT.)

53. There is nothing wrong in principle, and it is very common, for the F-tT, as with any tribunal or court, to direct the parties to re-calculate and agree such a schedule based upon its findings and, in the absence of agreement, to restore the matter for determination by the tribunal itself. Whilst it would have been helpful and best-practice for the Decision to have resulted in a schedule or list of new service charges percentages, this is not of itself sufficient to unseat the Decision which, as I have held, adequately states the basis upon which the re-calculation should take place. It was not suggested in oral submissions that this could not be easily cured by consequential directions by this Tribunal.

Question two: did the F-tT ask itself the correct question?

54. It was common ground that the correct question for the F-tT to have asked itself was whether it should exercise the paragraph (9) discretion and determine or re-calculate the service charge percentages itself, rather than whether it should simply endorse or approve what had been proposed by the landlord, and, if so, how, but this was not materially elaborated upon in the Appellants' skeleton argument (see paragraph 33) or that of Mr Low.

55. The question raised by this ground of appeal (ground two, sub-paragraph (3)) is quite narrow, and requires a proper consideration of the whole of the Decision. In my judgment, read as a whole, the F-tT was conscious that the question it was determining was whether or not it was "necessary or reasonable" to exercise the paragraph (9) discretion to re-calculate the service charge percentages based upon the arguments put before it and, if so, the meaning and effect of the formula set out in that paragraph which it stated in paragraph 69 and in so doing was exercising the discretion itself on the basis of the allegations and materials before it, rather than simply adopting the stance of the Respondents.

56. Having emphasised in bold that the question was whether or not it was "necessary or reasonable" to vary the service charge (paragraph 52 of the Decision), the F-tT carefully considered that the power was engaged (albeit for different reasons to those this Tribunal has found, but based upon the arguments before it) and then considered and dismissed each of the two material arguments advanced by the Appellants and Mr Low as militating against, or to be take in into account when, exercising the discretion.

57. First, the F-tT considered and dismissed the argument that the Respondents had acted in bad faith or for improper motive in the exercise of the discretion because it was solely for commercial gain and could have been avoided had the commercial units' service charge percentages been apportioned amongst the new leases, so accepting the evidence of the Respondents' experts to the effect that the service charge percentages for the new residential units were calculated to ensure parity between original and new residential lessees and that such was fair and reasonable: see paragraphs 63 to 68 of the Decision.

58. Secondly, the F-tT considered and dismissed the argument that the impact of the Estate Costs would have a disproportionate effect on any increase in the service charge percentages because the Building Costs comprise a large amount of Estate Costs as there was insufficient evidence before the F-tT, and that issue was not before it: see paragraphs 70 to 73 of the Decision. That implies that it might have been a factor to be taken into account had there been sufficient evidence before it and it had that issue been before the F-tT, but that the issue was not before it and there was insufficient information before it (which there was not), as to which see paragraph 73 of the Decision.

59. I am unable to accept Mr Upton's oral submission that it was sufficient for the F-tT to know (as it did) that the impact would be disproportionate merely because a large amount of the Estate Costs had been apportioned to Ivory and Calico Houses of which the commercial units paid the lion's share (and those Costs accounted for some two-thirds of the service charge payable) because the issue is more complex than that. To properly consider that aspect, not only would it have to have formed a central part of the case before the F-tT, but there would have had to be evidence on an estate-wide basis as to how the Estate Costs were apportioned between the various blocks, the impact on those blocks and the residential and commercial units within them as well as some evidence relating to not only what services were covered by the Estate Costs but the nature and extent to which they benefitted each of the individual blocks, with particular attention being placed on Ivory and Calico Houses. Instead, although there was some evidence relating to Estate Costs before the F-tT (*vide* paragraphs 3.6.2 to 3.13 of Mr Maunder-Taylor's report), it did not descend to any level of particularity, merely consisting as it did of generalisations and unanswered questions.

60. Further, whilst the issue of the Estate Costs did feature in the Appellants' Statement of Case in relation to the ratio requirement (paragraph 27 thereof), it did not feature as a factor which the F-tT should have taken into account in deciding whether it was "necessary or reasonable" to exercise the discretion at all, neither did it form any part of this ground of appeal or the relevant part of the Appellants' Skeleton Argument (albeit that, in the event of the appeal being successful, this Tribunal was invited to take it into account), from which it follows that it was not open to the Appellants to advance this essentially new ground (of appeal) in oral submissions. Likewise, it formed no part of Mr Low's cases before the F-tT that the disproportionate effect of the Estate Costs on service charge percentages should have been taken into account when considering whether or not it was necessary or reasonable to re-calculate the service charge percentages, as set out in his 17th October 2017 witness statement.

61. Having accepted the Respondents' expert evidence to the effect that the new leases' service charge percentages had been fixed by area to promote parity (and consistently) with those of the original leases, it followed that there was a shortfall which, implicitly, the F-tT found to be necessary or reasonable to cause a re-calculation of the service percentages by application of the paragraph (9) formula. That in my judgment, is the effect of the Decision, from which it follows that this ground of appeal falls to be dismissed: in short, the F-tT did itself exercise the discretion on the basis of the material and allegations before it.

62. That the F-tT was seized of the correct question and was itself exercising the discretion is, in my judgment, demonstrated by the fact it was the F-tT which alighted upon the fact that the shortfall had not been apportioned across all of the residential *and remaining commercial* units. Whilst at that stage of the process the F-tT was merely applying the pre-ordained formula laid down by paragraph (9), it serves to indicate that the F-tT was conscious that it was itself exercising the discretion and setting out the parameters by which the re-calculation must take place, albeit leaving others to carry them out. Also to be borne in mind is that the Respondents before the F-tT, the Appellants and Mr Low before this Tribunal, did not put forward, so far as I am aware, an alternative analysis as to how the discretion could have been exercised save to say that it should not be.

63. There is, in my judgment, a more general point in regard to this question, which is the nature of the jurisdiction being exercised. In this regard, I accept the submissions of Mr Bates that although the F-tT is itself exercising the paragraph (9) discretion, it is not an inquisitorial tribunal but makes its decision based upon the issues, arguments and evidence before it. Whilst it no doubt could of its own volition make inquiries and raise issues and call for evidence not ventilated by either party, if it does not do so it in my judgment is not open to a party to appeal the decision on the basis of issues and arguments which had not been put before it or, indeed, complain.

Oral submissions – a slight change of tack

64. In oral submissions, Mr Upton considerably widened the scope of criticism of the Decision to the effect that not only had the F-tT failed to consider whether it was "necessary or reasonable" to re-calculate the service charge percentages but that it failed to give adequate reasons as to why it had decided to exercise the discretion (if that is what it did) and, in particular, failed to give sufficient weight to the disproportionate impact of the Estate Costs. Mr Low endorsed those submissions, laying particular emphasis upon the argument that it was neither necessary nor reasonable to re-calculate the service charge percentages because all could have been avoided had the commercial Units' service charge simply been passed on to the new residential Units by the landlords who were acting for commercial gain or profit, also laying great emphasis upon the disproportionate effect of the Estate Costs.

65. To the extent necessary, it generally being impermissible for an appellant to so widen the grounds or nature of the appeal in oral submissions, I have already dealt with these issues. However, I would observe that in my judgment, it is not the apparently disproportionate allocation of Estate Costs to Ivory and Calico Houses as against other blocks within the Estate which is the root cause of the disproportionate impact of allocation of the shortfall, but the change in the basis of apportionment of the former commercial units' service charge from weighted floor area to one based on measured floor area, which was not only consistent with the original residential units but is also a common and well-established method of residential service charge apportionment.

66. Once that is identified, it is difficult to resist the conclusion that it was not only "necessary" but "reasonable" for there to be a re-calculation of the service charge to promote, within the confines of the contractual arrangements and formula laid down by the existing and new leases, commonality or consistency between all residential units: the fact that it results in an uplift in *actual* service charge payable is not a function of spreading the shortfall but of the underlying apportionment of the Estate Costs to Ivory and Calico Houses (agreed by all by dint of the Estate Costs apportionment contained within the leases themselves), from which it follows that the existing leases are in no different position than they would have been had the commercial leases in question been residential leases from the outset.

67. Putting that point to one side and even on the basis of the case as put to the F-tT, having dismissed the bad faith argument and given that the F-tT had no jurisdiction to alter the service charge apportionments of the new leases and that the issue of the allocation of Estate Costs to Ivory and Calico Houses as against other blocks within the Estate was not before the F-tT (assuming such could be altered by the F-tT, which is doubtful given that the percentage allocations are laid down by the leases) and in respect of which there was insufficient evidence, and that (as accepted by Mr Upton) paragraph (9) was directed at ensuring recovery by the landlord of 100% of service charge expenditure, it is very difficult to see how, based upon the arguments, evidence and issues before the F-tT, it could have reached any determination different from that which it did reach.

Conclusions

68. For those reasons, the appeal is dismissed.

His Honour Judge Nigel Gerald
8 January 2019

ADDENDUM DECISION

69. By section 20C of the Landlord and Tenant Act 1985 (as amended):

> "(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal … are not to be regarded as relevant

costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

"(2) The application shall be made—

"(c) in the case of proceedings before the Upper Tribunal**]**, to the tribunal;

"(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances."

70. Application, and Representations, have been made by the unsuccessful Appellants (by Mr Donebauer), and by Mr Low for an order that the costs of the appeal be irrecoverable pursuant to said section 20C.

71. On the assumption that the costs of the appeal are recoverable under the service charge provisions of the various leases and on the footing that this decision is restricted to those who are making the application under section 20C, the relevant question is whether or not it is "just and equitable in the circumstances" to make an order that such costs are not to be regarded as "relevant costs" to be taken into account in determining the amount of any service charge payable by such applicants.

72. Despite the complexity and prolixity of arguments advanced and the volume of documentation and evidence adduced, the essential question of whether the service charge shortfall occasioned by conversion of some of the commercial units to residential amounted to no more than a straightforward application of the formula laid down by paragraph (9) of the leases in respect of which the Respondents, being the Applicants before the F-tT, have been successful, albeit for different reasons, and that the appeal has been unsuccessful in all material respects.

73. It follows that it would be neither unjust nor inequitable for the costs of the appeal to be recovered through the service charge, subject to what is said in the next paragraph. Whilst the need to engage paragraph (9) was in one sense of the Respondents' own making, in reality it was of the Appellants' own making because it was they who challenged the Respondents' activation of paragraph (9) without which there would have been no need for the application to the F-tT or the appeal. Whilst the Respondents succeeded in this Tribunal for reasons different to those articulated in the F-tT, that is of no materiality because the ultimate result has been the same, the appeal being to no avail.

74. It is therefore ordered that the Respondents be entitled to recover the costs of the appeal as "relevant costs" under the service charge provisions.

75. The extant re-calculation should now be relatively straightforward. If that cannot be resolved by agreement and the fault lies with the Respondents, it will be appropriate to revisit the section 20C question in relation to costs subsequent to 21st December 2018. But if same are resolved by agreement, it will not be.

His Honour Judge Nigel Gerald
10 January 2019