FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00BW/LVT/2018/0001**
Property	**:**	**1-38 Herons Wharf** **Appley Bridge** **Wigan** **WN6 9ET**
Applicant	**:**	**Mr Ian Shacklady**
Representative	**:**	**Mr Ford, Alker Ball Healds Solicitors**
Respondent	**:**	**The Moorings (Appley Bridge) Management Company**
Representative	**:**	**Mr Hollins, Clear Building Management (Managing Agent)**
Type of Application	**:**	**Rule 51 set aside Application**
Tribunal Members	**:**	**Deputy Regional Valuer N. Walsh** **Deputy Regional Judge J. Holbrook**
Date	**:**	**6 February 2020**

DECISION

DECISION

The application to set aside the Tribunal's decision dated 30 August 2018 is refused.

BACKGROUND

1. The Tribunal received, on 18 February 2019, an application by letter from Mr Shacklady's representative under rule 51 of the Tribunal Procedures (First-tier Tribunal) (Property Chamber) Rules 2013 to set aside its decision of 30 August 2018 in respect of this Property. The Upper Tribunal (Lands Chamber) has by order stayed Mr Shacklady's application for permission to appeal, pending this Tribunal's determination of the rule 51 application.

2. The Tribunal previously refused Mr Shacklady permission to appeal principally because he was invited to participate in the proceedings when the Tribunal issued its directions but it appeared that he chose not to do so. In his application to the Upper Tribunal, and for the first time, Mr Shacklady claimed not to have received the Tribunal's directions and consequently was unable to participate in the Tribunal proceedings. The Upper Tribunal considered that it would be more appropriate, in the first instance, for this Tribunal to consider an application for setting aside its original decision.

3. The Tribunal established, having reviewed its own records, that all the Respondents to the original application were sent a copy of the application and the Tribunal's written directions on one of two dates, either the 20 or 23 April 2018. A copy of the letter sent to Mr Shacklady has since been provided to his representative.

4. The Tribunal accepted Mr Shacklady's rule 51 application and held a case management hearing on 18 November 2019 at the Tribunal's hearing room in Manchester. The Tribunal held a case management hearing to better understand the parties' position in respect of this rule 51 application, to clarify the issues between the parties and to decide upon the appropriate final directions required to enable the Tribunal to determine this application fairly and justly.

5. At the CMC hearing the Tribunal explained that on the basis of the written submissions received to date, the Tribunal accepted that Mr Shacklady had not, for whatever reason, received the original directions. Mr Hollins helpfully also confirmed at the CMC hearing that he did not wish to contest this point and was content to proceed on this basis. The Tribunal therefore informed the parties that it would, in determining this application, be solely focused on whether it is in the interests of justice for the decision to be set aside and remade. Essentially the question to be decided by the Tribunal is: do the arguments being advanced by Mr Shacklady have a reasonable prospect of causing the Tribunal to make a different decision if the matter was to be re-heard.

6. The Tribunal then issued final directions to allow the parties the opportunity to make final written submissions. The Tribunal is grateful to both representatives for their assistance in confirming and agreeing the following two important facts at the CMC hearing:

(a) The Applicant's Lease mirrors and is on the same terms as all the other flat leases situated within this development.
(b) The original terms of the flat leases require each leaseholder to contribute the same contribution towards the Building Services Costs (4.88%) which includes expenditure incurred in respect of the common areas.

7. Following the CMC hearing the Applicant availed of the opportunity to make additional written submissions, for which the Tribunal is grateful. The Respondent to this application, the management company, was content to rely upon its previous written and oral submissions.

Law

8. Paragraph 51 of the Rules permits:

> 51. –(1) The Tribunal to set aside a decision which disposes of proceedings, or part of such a decision, and re-make the decision or the relevant part of it, if—
>
> (a) the Tribunal considers that it is in the interests of justice to do so; and
>
> (b) one or more of the conditions in paragraph (2) are satisfied.
>
> (2) The conditions are—
>
> (a) a document relating to the proceedings was not sent to, or was not received at an appropriate time by, a party or a party's representative;
>
> (b) a document relating to the proceedings was not sent to or was not received by the Tribunal at an appropriate time;
>
> (c) a party, or a party's representative, was not present at a hearing related to the proceedings; or
>
> (d) there has been some other procedural irregularity in the proceedings.

The Applicant's submissions

9. The Applicant contends that historically he paid for services "on a pro-rata basis, dependent upon which services were consumed." He accordingly objects to paying for certain communal services such as the heating, lighting, intercom and the bin store which he does not utilise because his property, while attached to the block, is separately accessed with its own door bell and

bin store. The only services the Applicant contends that he should be charged for are:

- Block building insurance
- Window cleaning
- Ground maintenance.

10. The Applicant also "can see no reason why the Tribunal should intervene" when the Respondent's initial application stated that the percentages already add up to 100%. The Applicant therefore questions the Tribunal's jurisdiction to vary the Leases under S35(2)(f) of the Landlord and Tenant Act 1987.

11. The concern of the Applicant is that the management company is motivated by convenience as opposed to fairness. Consequently, he asserts that the Tribunal's order varying the Leases falls foul of the reasonableness test under s19 of the Landlord and Tenant Act 1985.

12. The Applicant also contends that the Tribunal should "examine the question of Due Proportion, as it has in several procedural cases before this one." He considers that the equal division of the service charge between all the flats is unfair, given the vary sizes of the flats and the fact that some flats do not benefit from all the services. He is particularly concerned that this could lead to him picking up an unfair proportion of repairing liabilities and potentially other costly major works in the future.

13. Lastly, the Applicant submits that the Tribunal erred in not making an order for compensation under Section 38 of the 1987 Act because he has "suffered loss and has been placed at a disadvantage as a direct result of the variation."

The Respondent's submissions

14. The Respondent contends that the Tribunal's jurisdiction is limited to addressing the defect, namely that the totality of the service charge contributions in respect of the Building Service Costs, excluding insurance, fail to add up to 100% of the sums expended. Citing the First-tier Tribunal decision LON/00BG/LVT/002 & 0012 it submits the Tribunal's jurisdiction does not extend to an examination of each item of service charge expenditure or its reasonableness under Section 19 of the Landlord and Tenant Act 1985.

15. The Respondent outlined that even if you leave aside these jurisdictional points, the terms of the Leases are reasonable and it is not necessary for each leaseholder to directly benefit from each item of expenditure for these to be payable and considered reasonable. The Respondent provided the example of the 8 ground floor flats currently contributing towards the cost of maintaining and cleaning the stairwell leading to the 8 first floor flats.

Discussion

16. The main thrust of the Applicant's case is that it is unjust for him and his wife, as leaseholders, to be expected to contribute to the services when they derive no direct benefit from them. The Applicant has repeatedly claimed that previous management companies accepted this, made allowances for it and that consequently they were charged either a different percentage service charge contribution to others or only for the items that directly benefited them (Mr and Mrs Shacklady). The Tribunal invited the Applicant's representative to submit evidence, either at or after the CMC hearing, in support of this assertion but none has been forthcoming.

17. The Tribunal must therefore rely on the facts as agreed between the parties. Namely, that each identical flat lease requires the same contribution towards the Building Services Costs (4.88%) which includes expenditure incurred in respect of the common areas.

18. The Respondent has cited a previous first-tier tribunal decision in respect of another property, which while not binding on this Tribunal is nevertheless helpful to consider because the facts and issues are very similar to the present case. In the decision of LON/00BG/LVT/002 & 0012, the Tribunal considered the jurisdiction conferred on it by section 35 of the Act and its ability to alter wider lease terms, concluding:

> "We consider that the jurisdiction conferred on us by section 35 of the Act is, necessarily and properly, a narrow one. The tribunal only has the power to do what is necessary to deal with the relevant fault set out in the Act, in this case the Service Charge proportions. We consider that what we were being invited to do by the Respondents was to go beyond this limited jurisdiction and to re-write parts of the lease to give it a different meaning from the one it plainly has.
>
> As stated above, the Respondents' case really is one of a claim for rectification of their leases; that is a re-writing of their leases so that they accord with the intentions of the parties to those leases when they were originally granted. That is of course not a matter for this Tribunal"

19. We consider that the Applicant in this case is also seeking to rectify or amend the terms of his Lease and for the same reasoning, we conclude that the Tribunal does not have the jurisdiction to amend the terms of the Lease - the actual bargain entered into by the original parties. Similarly, we do not consider that section 35 grants the Tribunal the jurisdiction to examine the reasonableness of the service charges by reference to section 19 of the 1985 Landlord and Tenant Act. Although there is no reason why the Applicant cannot make a section 27A application to the Tribunal for a determination of the reasonableness of the service charges levied. However, the recoverability of any service charge items would and must be determined by reference to the agreed terms set out within the Lease.

20. Unlike the present case where the Leases specifically stipulate that each leaseholder makes the same percentage service charge contribution, at 416 and 418 Manchester Road the percentage varied significantly between each leaseholder and totalled considerably more than 100%. This therefore required the Tribunal to determine what the fair percentage contribution should be between each of the respective flats. While this is not particularly relevant to the present case, given that an equal division of costs is explicitly provided for in the Leases, it did however require the Tribunal to consider the issue of the how to properly reflect, or not, the benefit derived by individual flats from the respective services. The Tribunal's findings in this respect are helpful and state:

"The Tribunal has decided that the best course of action is to take no account of benefit.....It takes this view for the following reasons. First the lease, by and large, does not other than in very broad terms, seek to address the question of benefit from services. Second, once one embarks down the road of the detailed consideration of benefit, the way forward becomes unclear and fraught with difficulties."

21. This seems to us to be an eminently sensible conclusion. However, we are further reinforced in reaching this conclusion by the fact that the Leases in this instance clearly set out the proportion or percentage contribution of each leaseholder (it is done simply on the basis of an equal division between the number of flats, irrespective of size or accommodation) and also importantly exactly what each leaseholder is expected to pay for. The parties have also agreed that the original Leases state that the allowable costs include those incurred in respect of the common parts. The Tribunal can therefore see no grounds for deviating from the agreed terms of the Leases in these respects.

22. The Tribunal notes that the Applicant contends that he should only be liable for the following services; building insurance, window cleaning and ground maintenance. The Tribunal cannot see how the Applicant can claim to be exempt from contributing towards the external repairing and maintenance costs of his flat specifically but also the block's, given the terms of his Lease.

23. The Applicant also seems to be under the misapprehension that the contributions received from individual leaseholders currently total up to 100% in respect of "the Building Service Costs" given the following statement annexed to the Respondent's application form:

"The total percentages (Houses 19 x 0.64% and Flats 18 x 4.88%) is 100% of the Building Services Costs."

24. The Respondent however goes on on the same page to clarify and explain the exact position, which gives rise to the deficit, stating:

"In respect of the other items of Building Service Costs, not including insurance costs, the house leases do not require their leaseholders to contribute towards any other such costs. The flat leaseholders are the only contributors towards these costs i.e. the costs listed in Part II of the Sixth Schedule of the flat leases as set out in the bullet points above.

It follows that the flat owners' individual percentage contribution will not be sufficient to pay the total of these costs i.e. they only amount 87.84% of the overall costs. A variation of the flat leases is therefore required to increase the percentages payable by the flat leaseholders so that the total of these Building Service Costs equate to 100%."

25. The Tribunal is satisfied, having reviewed the terms of the original Leases prior to their variation, that this is an accurate representation of the position then. We are satisfied that section 35(2)(f) is therefore engaged. We suspect that possibly the Applicant's confusion may have derived from the fact that the original application sought a variation encompassing the block's insurance arrangements, which for reasons that the parties are now acquainted with were not ultimately included within the Tribunal's order and the leaseholders' position in respect of insurance remains unaltered.

26. The Applicant is also claiming compensation under Section 38 of the 1987 Act because he has suffered a financial loss on being required to pay an equal but greater percentage proportion of the service charge costs incurred. This point was acknowledged and fully considered previously in Tribunal's decision dated 30 August 2018. The Tribunal does not consider that are any new grounds to amend its existing decision in this respect and to make an order for compensation to be payable to the Applicant or indeed any other leaseholder.

Conclusion

27. The lease variations sought and granted by the Tribunal do not make Mr Shacklady liable to contribute towards heads of expenditure for which he isn't already liable to contribute to: they merely rectify the deficiency in the overall recoverability of the service charge expenditure, whilst leaving the relative liabilities of the individual leaseholders (as between one another) as they are now. It is for this reason that Mr Shacklady's arguments have no reasonable prospect of causing us to take a different view and thus why it is not in the interests of justice to set aside the original decision.

28. Having carefully considered the parties written and oral submissions and for the reasons set out above, the application to set aside the Tribunal's decision dated 30 August 2018 is therefore refused.

N. Walsh
Deputy Regional Valuer
7 February 2020