FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BG/LSC/2019/0333**
Property	**:**	**115 Matilda House, St Katherines Way, London E1W 1LF**
Applicant	**:**	**Michael William Scott Bundy**
Representative	**:**	**In person**
Respondent	**:**	**The London Borough of Tower Hamlets**
Representative	**:**	**Barnaby Yates (Solicitor with Tower Hamlets Homes)**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal Members	**:**	**Judge Robert Latham** **Luis Jarero BSc FRICS**
Venue and Date of Hearing	**:**	**10 Alfred Place, London WC1E 7LR on 20 November 2019**
Date of decision	**:**	**10 December 2019**

DECISION ON PRELIMINARY ISSUE

The Tribunal determines that it has jurisdiction to determine whether the Applicant's service charge contribution is a "reasonable proportion".

The Tribunal will determine the substantive issue as to whether the Applicant's contribution is reasonable at **1.30 pm on 5 February 2020 with a time estimate of two hours.** The Tribunal will determine the issue on the papers, unless either party requests an oral hearing.

The Application

1. On 3 September 2019, the Applicant issued an application seeking a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable in respect of the service charge years 2014/5, 2015/6, 2016/7, 2017/8, 2018/9 and 2019/20. The subject flat at 115 Matilda House, St Katherine Way, EW1 1LF is managed by Tower Hamlets Homes, an Arm's Length Management Organisation ("ALMO").

2. On 9 September, the Tribunal gave Directions. The Procedural Judge noted that the sole issue to be determined was the reasonableness of the proportion of the service charge which was payable by the tenant. Paragraph 1 of the Fifth Schedule of his lease requires him to pay "such reasonable proportion of the total expenditure as is attributable to the Demised Premises". The Respondent has determined to compute the reasonable proportion having regard to the gross rateable values ("GRVs") of the flats. The Applicant sought to demonstrate that his flat is assessed at a significantly higher GRV than other comparable flats in the block.

3. Pursuant to the Directions:

   (i) The Respondent has filed its Statement of Case (at p.41);

   (ii) The Applicant has filed a Reply (at p.27).

4. The Applicant seeks to establish his case having regard to two comparables:

   (i) The Applicant's flat at 115 Matilda House has one bedroom. It is on the fourth floor. It is 43.48 m2. The GRV is £290.

   (ii) 103 Matilda House has one bedroom. It is on the first floor. It is 43.20 m2. The GRV is £230.

   (iii) 83 Matilda House has two bedrooms and a "deadroom". It is on the second floor. It is 67.67 m2. It has a GRV of £290.

5. The Respondent concede that there is an error and that the GRV for Flat 115 should be £280. This is attributable to a "transcription error" when manual records were transposed to a new system. The error would seem to predate January 1998, when Mr Bundy acquired the leasehold interest in the flat, The Applicant contends that the error is greater than this and that his GRV should be £230.

The Hearing

6. Mr Bundy appeared in person. He was accompanied by Ms Misselbrook, the lessee of Flat 83. She has been involved with the ALMO and has considerable knowledge of the block.

7. The Respondent was represented by Mr Barnaby Yates, a Solicitor with Tower Hamlets Homes. On 7 November, Mr Yates notified the Tribunal that the Respondent would be applying to summarily dismiss the application. He argues that the tribunal had no jurisdiction to consider the reasonableness of the apportionment of the service charge. The use of GRVs is a rational manner for apportioning the service charge. If there is any error in the computation of the GRV, this is a matter for Mr Bundy to raise with the District Valuer. Mr Yates relies upon the decision of the Lands Tribunal in *Schilling v Canary Riverside Development Ptd Limited* LRX/26/2005 (HHJ Michael Rich QC, 6 December 2005).

8. The Tribunal notes that GRVs have become increasingly irrelevant for residential properties. In 1990, rates for residential properties were abolished and replaced by the community charge, which in turn was replaced by the council tax. The last revaluation for residential properties was carried out in 1973. Although a revaluation was due in the early 1980s, this was abandoned by the Secretary of State because of the perceived unfairness of the rating system. The Respondent has sought the assistance of the District Valuer to check their rateable valuation calculations for the Applicant's flat. Mr Yates states that no response has been forthcoming.

The Background

9. In 1934, Matilda House was built by the London County Council ("LCC"). There are 133 flats built around a number of staircases. There are six storeys. We were told that it was built for dockers who worked in the London Docks. It was designed to the standards of the time. There were two design features which now would no longer be acceptable. First, the bathroom led off the kitchen. Secondly, some flats have what has been described as a "dead room", namely a room with no direct access onto the hallway which would now create fire safety issues, were it to be used for living accommodation.

10. On 1 April 1965, the LCC was abolished and replaced by the Greater London Council ("GLC"). In about 1976, the GLC vacated Matilda House with a view to refurbishing it. Funds were not available and it was apparently used for homeless families. In 1978, a Tenants Management Organisation was established.

11. On 31 March 1986 the GLC was abolished. Shortly before the abolition, the GLC housing stock in Tower Hamlets was transferred to the Respondent. The GLC had managed a much larger proportion of the stock of social housing in Tower Hamlets than in other London boroughs.

12. Prior to its abolition, the GLC had sold off a number of flats under the Right to Buy ("RTB") Scheme. The GLC had used GRV as the basis of determining the proportion of any service charge payable by its lessees. Many leases made express provision for this.

13. Mr Bundy derives his leasehold interest from a lease dated 27 June 1994. Miss Bevan acquired a 125-year leasehold interest running from 4 July 1988 under the RTB legislation. 4 July 1988 would have been the date on which Miss Bevan had submitted her RTB1 application. It would seem that part of the six-year delay was a dispute about the market value of the flat, the District Valuer reducing the Respondent's assessment of £52,000 to £45,000. Miss Bevan benefitted from a statutory discount of 54%. The lease plan confirms that the flat was unmodernised at this time. The bathroom still led off the kitchen Thus there were no structural alterations to this flat which might have had an impact on its GRV compared with other similar flats in the block.

14. At this time, the Respondent was using the wording "such reasonable proportion" in defining the service charge contribution, rather than the express reference to GRV. However, the paperwork in connection with the RTB application refers to a rateable value of £207 and a gross value of £280 (see p.121).

15. On 20 January 1998, Mr Bundy acquired the leasehold interest in the flat. It seems that the ALMO was established in 2008, but that the management of Matilda House was not transferred to the ALMO until 2012. Matilda House has only been refurbished in recent years. New bathrooms and kitchens would have been installed in the rented flats. However, any long leaseholder would have had the responsibility to upgrade the interior of their flats. In August 2019, Mr Bundy commissioned a scale drawing of Flat 103. This shows that the layout of the flat has been changed from its original design.

The Law

16. Section 27A of the Act provides:

"(1) An application may be made to a leasehold valuation 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.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a leasehold valuation 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–

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it 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,
(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.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(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 a leasehold valuation 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."

The Preliminary Issue

17. Mr Yates argues that this tribunal has no jurisdiction to determine the reasonableness of the apportionment of the service charge. He relies

upon the decision of *Schilling v Canary Riverside Development*. The tenant's lease provided for the payment of a fixed proportion of the Building Service Charge, namely 0.33%. The tenants argued that this proportion was unfair. HHJ Rich held that section 19(1)(a) of the Act gave the tribunal no jurisdiction if the overall service charges had been reasonably incurred. The reason was that they fell to be apportioned in accordance with the terms of the lease (see [19]).

18. In the current case, no percentage contribution is specified in the lease. Mr Bundy is rather required to pay "such reasonable proportion of the total expenditure as is attributable to the Demised Premises". This gives the Respondent, as landlord, a discretion as to how to apportion the service charge. However, the method of apportionment must be reasonable. Comparable flats should pay a similar proportion. This issue of principle was addressed by the Upper Tribunal ("UT") in *Windermere Marina Village Ltd v Wild* [2014] UKUT 163 (LC); [2014] L & TR 30.

19. The Deputy President, Martin Rodger QC held that the jurisdiction of the tribunal under section 27A(1) is not confined to matters of quantification; it included the apportionment of service charges. Section 27A(4) had the effect that no application could be made under section 27A(1) or section 27A(3) in respect of a matter which had been agreed or admitted, or determined by either the court or by arbitration. Thus, where the parties had agreed in their lease how service charges were to be apportioned, section 27A (4) precluded an application under section 27A (1) in respect of apportionment. *Schilling v Canary Riverside Development* was distinguished on this basis (see [43] of the judgement). In *Windermere Marina*, the tenants' leases provided that they would pay a fair apportionment of the cost of services, such apportionment to be subject to a final and binding determination by the landlord's surveyor. The UT found that this clause was void by virtue of section 27A (6). The Tribunal had therefore been entitled to determine the fair proportion of the expenses payable by the tenant.

20. The Deputy President set out the principles to be applied (emphasis added):

> "36. It is first necessary to consider the breadth of the jurisdiction conferred by section 27A(1) . A tenant may apply to the first-tier tribunal for a determination whether a service charge is payable and, if it is, may request the answer to five questions going to liability: by whom the charge is payable, to whom, when and in what manner and (usually of the greatest importance) how much is payable. <u>The primary question, whether a service charge is payable at all, is plainly capable of engaging issues concerning the proper interpretation of the lease and whether any contractual conditions of liability have been satisfied,</u> including whether any necessary certificate has been

provided. It will sometimes engage issues of compliance with statutory conditions of liability (including the stipulations as to the form and content of demands provided by s.21B, Landlord and Tenant Act 1985). In two decisions of the Lands Tribunal before the insertion of section 27A into the 1985 Act with effect (in England) from *30 September 2003 (Gilje v Charlgrove [2000] 3 EGLR 89* , and *Longmint v Marcus [2004] 3 EGLR 171*) it was confirmed that leasehold valuation tribunals had jurisdiction to determine questions of construction of leases on which issues under section 19 of the 1985 Act depended. Section 27A put the existence of that jurisdiction beyond doubt at the same time as widening it considerably.

37. The same breadth of jurisdiction is apparent in relation to the more detailed questions referred to in sub-paragraphs (a) to (e) of section 27A(1) . Most involve consideration of the effect of the parties' agreement and of the general law, rather than any issue arising out of the provisions of the 1985 Act itself. Only in determining "the amount payable" is it likely that the statutory safeguards for tenants in other parts of the 1985 Act will be important. There is therefore nothing to suggest that the jurisdiction of the first-tier tribunal under section 27A(1) is confined to matters of quantification.

38. It is perfectly possible to contemplate an application to the first-tier tribunal under section 27A(1) where the only question in issue concerns the proper method of apportionment of a sum which is agreed to have been incurred reasonably on services provided to a reasonable standard and which otherwise to fall within a tenant's contractual liability. An issue might arise about the correct classification of a particular item of expenditure where different proportions were payable for different items; or the method of apportionment itself might be open to different interpretations. In this case, as the LVT said in paragraph 97 of its decision, "the heart of the dispute" is relates to the apportionment. It was not submitted by Mr Gilchrist that an issue of apportionment could never be the subject of a determination under section 27A(1) , and such a submission would be unsustainable."

21. This decision was approved by the Court of Appeal in *Oliver v Sheffield Council* [2017] EWCA Civ 225; 2017] 1 WLR 4473, per Briggs LJ at [54]). Under the lease the tenant covenanted to pay as part of the service charge a "fair proportion", to be determined by an officer of the landlord, of the costs and expenses "incurred" by the landlord in carrying out repairs to the property. The UT allowed the tenant's appeal holding that, to the extent that the landlord's expenditure on the work had been funded by the Government, that part of the cost had not been "incurred" by the landlord within the meaning of the lease and so should not have been included in the service charge. The Court of Appeal held that since reasonable parties in the position of the landlord

and the tenant could not sensibly have intended that the lease's service charge provisions would permit the landlord to make double recovery, the lease was to be construed so as to prevent all forms of double recovery by the landlord.

22. The Tribunal is therefore satisfied that it has jurisdiction to determine the reasonableness of the apportionment of the service charge. We reject Mr Yates' argument that Mr Bundy's remedy is to ask the District Valuer to revisit his GRV. The Tribunal accepts that the use of GRV is a possible means of apportioning service charges provided that it leads to reasonable outcomes for the individual tenant. We note, however, that there has been no revaluation of residential properties since 1973, creating practical problems in using it as a means of apportionment. But it is the Respondent who has decided to adopt this as a means of apportionment and it has the responsibility to ensure that it leads to reasonable outcomes.

Determining the Substantive Issue

23. Had the Tribunal been required to determine this application on the limited material before it, we would have been minded to find that Mr Bundy's contribution should be computed on the basis of a GRV of £230, namely the same as Flat 103 and less than Flat 83 which is a two-bedroom unit.

24. However, Mr Yates argued that GRV does not depend only on room size. It may depend upon other factors such as floor level and location. He also argued that we only had two comparables and that a different outcome might arise were we to consider the block as a whole. Mr Bundy was also anxious that we should not set a precedent which might cause unfairness elsewhere at Matilda House.

25. We are therefore willing to give the Respondent the opportunity to adduce evidence as to how the GRV for Flat 115 relates to the GRV for the other flats at Matilda House. We therefore direct the Respondent to provide a schedule (in so far as the information is reasonably obtainable) setting out the following for the 133 flats at Matilda House:

(i) The GRV;
(ii) The number of bedrooms;
(iii) The GIA (if available);
(iv) The floor level;
(v) The stacking – it is understood that there are a number of identical units which were constructed above each other. Indeed, it is probable that there are a number of standard lay-outs for the flats within the block;
(vi) Any other factors which are relevant to the GRV and/or the service charge proportion which should reasonably be payable.

26. There are three further matters that the Tribunal will need to determine:

(i) The period of time over which the service charge contribution should be recomputed. The Respondent accepts that the GRV for the flat should be £280, rather than £290; the Tribunal may determine that a greater adjustment should be made. The Applicant asserts that he has been overcharged since January 2008. The parties are referred to the Upper Tribunal decision in *Avgarski v Alphabet Management Company Limited* [2016] UKUT 367 (LC).

(ii) Whether an order should be made under section 20C of the Act. Mr Bundy referred the tribunal to the e-mail dated 30 October 2018 (at p,183) in which the Respondent indicated that it would not seek to pass on its legal costs.

(iii) the refund of any tribunal fees paid by the Applicant.

Directions for the Determination of the Substantive Issue

The Landlord's Case

27. By **10 January 2020**, the Respondent shall send one copy to the Applicant and three copies to the Tribunal of its Statement of Case. The Statement shall include the Schedule specified in paragraph 25 above, together with any further submissions on the outstanding issues which the Tribunal is required to determine.

The Tenant's Case

28. By **24 January 2020**, the Applicant shall send one copy to the Respondent and three copies to the Tribunal of its Reply which shall address the Respondent's Schedule specified and the outstanding issues which the Tribunal is required to determine.

Determination

29. The Tribunal will determine the outstanding issues at **1.30 pm on 5 February 2020** at 10 Alfred Place, London WC1E 7LR. The Tribunal will determine these issues on the papers (without the parties attending) unless either party notifies the Tribunal by **24 January 2020** that they require an oral hearing.

30. It is open to the parties to seek to compromise this application. If they are able to reach agreement, they should inform the tribunal at the earliest opportunity.

Judge Robert Latham
10 December 2019

NOTES

(a) Whenever you send a letter or email to the tribunal you must also send a copy to the other parties and note this on the letter or email.

(b) If the applicant fails to comply with these directions the tribunal may strike out all or part of their case pursuant to rule 9(3)(a) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules").

(c) If the respondent fails to comply with these directions the tribunal may bar them from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules.