FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AH/LVT/2020/0005V**
Property	**:**	**55 Penge Road, London SE25 4EJ**
Applicant	**:**	**Fadila Atif**
Respondents	**:**	**Assethold Ltd**
Representative	**:**	**Scott Cohen solicitors**
Type of Application	**:**	**Variation of lease**
Tribunal	**:**	**Judge Nicol** **Mr K Ridgeway MRICS**
Date and venue of hearing	**:**	**22nd February 2022;** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**24th February 2022**

DECISION

The Tribunal orders that:

The Applicant's leases of Flats A and B, 55 Penge Road, London SE25 4EJ shall be varied from the date of this decision as follows:

> In clauses 1 and 4(c)(i), the words "one quarter" shall be replaced with "a fair and reasonable proportion".

Relevant legislation is set out in an Appendix to this decision.

The Tribunal's reasons

1. The Tribunal received an application for the leases of the flats at the subject property to be varied in the following respects:

(a) The leases all provide for a fixed proportion of the landlord's expenditure on the property to be recovered as a service charge. However, the proportions of all the leases together add up to 133.32% for the insurance and 166.66% for other expenses. The Applicants sought to replace the existing proportions with new ones totalling 100%.
(b) Despite the issue with apportionment, there is no provision in the lease for how overpayments are to be dealt with. The Applicants identified clause 4(c)(iii) of the lease as being the clause which should deal with overpayments but that it only addressed underpayments. They wanted this corrected.

2. The Applicants asserted that these variations were necessary because the current arrangements are unsatisfactory within the meaning of section 35 of the Landlord and Tenant Act 1987 ("the Act").

Procedural history

3. During 2020, the Tribunal received 3 applications in relation to the subject property:

(a) The first application, in relation to service charges (LON/00AH/LSC/2020/0137) was withdrawn on 1st October 2020, save that, on 2nd December 2020 the Tribunal issued a decision on costs under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.
(b) On 17th March 2021 the Tribunal issued a decision in relation to the Right to Manage (LON/00AH/LRM/2020/0023).

4. The third Application is the current one. It was brought on 8th October 2020 in the name of all the lessees at the subject property:

(a) Fadila Atif (Flats A & B)
(b) Nordica Thomas (C)
(c) Kingswood Property Developments Ltd (D)
(d) Richard Wellesley-Cole (E & F)

5. The Tribunal took the following steps in these proceedings:

(a) Directions were made on 10th November 2020 and required the Applicants to produce a bundle by 7th January 2021 (and a hearing was fixed for 1st February 2021).
(b) No bundle was produced and the hearing failed to proceed. By a Notice dated 16th April 2021, the Applicants were warned that, unless they produced a bundle by 28th April 2021, the application would be struck out. Hearing nothing, by Notice dated 24th May 2021, the parties were notified that the application had been struck out.
(c) The Applicants applied for the application to be reinstated and it was on 1st October 2021. That order was replaced by a further order on 14th October 2021. It noted that Mr Wellesley-Cole was no longer a party but asked for confirmation that Ms Thomas and Kingswood were also still parties. It also noted that a bundle had been received for the final hearing.

(d) Nothing was provided in accordance with the previous order and so further directions were issued on 3rd November 2021 removing Ms Thomas and Kingswood as parties and listing the application for a hearing on 22nd February 2022.
(e) By letter dated 7th December 2021 the Tribunal confirmed that the hearing would be in person rather than remote.
(f) There then followed correspondence from Ms Atif, the sole remaining Applicant, to which the Tribunal responded by letters dated 7th and 31st January and 14th February 2022. The Tribunal sought to clarify that the current proceedings are only about whether the leases should be varied and that the Tribunal and the parties should all have the same bundle of documents.

6. There have since been 3 further matters:

(a) In relation to costs arising from the RTM claim (received August 2021) (LON/00AH/LCP/2021/0010) between Assethold Ltd and 55 Penge Road RTM Co Ltd. It is due for hearing on 24th February 2022.
(b) In relation to service charges (LON/00AH/LSC/2021/0390), the Applicants being Ms Thomas and Kingswood. It is due for hearing on 26th May 2022.
(c) Apparently, on 25th November 2021 a notice was served preliminary to an application for the appointment of a manager.

The Hearing

7. The current application was heard on 22nd February 2022. The attendees were the Applicant, Ms Atif, and counsel for the Respondent, Mr Richard Granby.

8. The documents before the Tribunal were contained in an indexed and paginated bundle consisting of 272 pages compiled by the Applicant's former legal representative, Ms Lorna Morgan of Harmens Estate Agents.

9. Ms Atif had a number of problems with the hearing:

(a) She told Mr Kempster, who was clerking the hearing, that she felt unwell. The Tribunal expressed sympathy and asked her to expand on what her problems were. She would not provide any more detail than she felt stressed by the case and drained from how she had been treated by the Respondent. She asked if the hearing could be adjourned. There were no apparent signs of any inability to engage with the hearing due to medical issues nor any medical evidence, so the Tribunal continued with the hearing.
(b) Neither her former legal representative, Ms Morgan, nor the other lessees were now involved in these proceedings. Ms Atif was unable to provide any explanation other than to say they had let her down.
(c) Ms Atif had not prepared for the hearing because she had left this to Ms Morgan and the Tribunal. She expressed her understanding that the Tribunal had the power to "get her out of this mess" without her having

to specify what "the mess" was exactly or follow any particular procedure.

(d) At first, she said she did not understand what the hearing was about but, towards the end, she said she realised that her service charge apportionment had to be sorted out because she was currently being charged 50% across her two flats.

(e) Ms Atif is seriously aggrieved that the Respondent's predecessor-in-title allegedly did not give the lessees the option of first refusal to purchase the freehold in accordance with section 1 of the Landlord and Tenant Act 1987. Further, she feels she is being charged by the Respondent for non-existent services. However many times and in however many ways the Tribunal tried to explain it to her (both before and during the hearing), she could not accept that the current proceedings could not address those issues.

10. In the event, Ms Atif was unable or unwilling to contribute anything useful to the hearing and the Tribunal had to work from Mr Granby's submissions, which included a helpful written skeleton argument, and the documents in front of it.

Clause 4(c)(iii)

11. Clause 4(c)(iii) of the copy lease provided to the Tribunal reads as follows:

> As soon as reasonable may be after the end of the year ending 24th December Two Thousand and Seven and each succeeding year when the actual amount of the said costs for the period ending on the 24th day of December Two Thousand and Seven or such succeeding year as the case may be has been ascertained forthwith pay the balance due to the Lessor or be credited in the books of the Managing Agents or if none the Lessor with any amount underpaid by the Lessee

12. The application argued that the word "underpaid" was some kind of mistake in the drafting of the lease and should be replaced with "overpaid". In fact, the Tribunal cannot see that there is anything wrong with this clause in itself. In the Tribunal's opinion, it provides for what happens in the event that any interim or advance service charges are less than the final cost so that the lessee has underpaid. It provides that the underpayment may be made up by a direct payment of the relevant amount to the Lessor or by crediting it to the Lessor or their agents, i.e. putting a debit of the relevant amount on the lessee's service charge account.

13. In the Tribunal's opinion, clause 4(c)(iii) is silent on the issue of overpayment and was never intended to do otherwise. There is no mistaken wording, nor is any change required to make it work. The fact is that the lease does not provide for what happens when there is an overpayment. As a matter of law, any overpayment is still the lessee's

money and, one way or another, they are entitled to have it back or receive credit for it.

14. Having said that, it is arguably unsatisfactory that the lease does not make such provision. It is this absence which has, at least in part, resulted in the current dispute. The Tribunal can certainly see the value to all parties of inserting such provision into the lease.

15. However, the only suggested solution in these proceedings has been to change the reference to underpayments to overpayments. Unfortunately, on the Tribunal's interpretation of clause 4(c)(iii), that would not achieve the intended outcome. Mr Granby tried to assist with other possible solutions but they also gave rise to other consequences. It is not clear that there is a better option than leaving the lease as it is. It would certainly be inappropriate to adopt a solution of which none of the parties, including the other lessees, had any notice.

16. In the circumstances, the Tribunal refuses to make any variation to clause 4(c)(iii).

Apportionment

17. It was also argued in the application that clause 4(c)(iii) could be interpreted so that the Respondent was obliged to credit the lessees with the overpayments which resulted from applying the fixed proportions provided for in the leases. If this were the case, there would be no over-recovery from the fixed proportions and the Tribunal would be deprived of any jurisdiction to vary those proportions. However and in any event, the Tribunal's interpretation of clause 4(c)(iii) is incompatible with this suggested interpretation. The suggested interpretation would require reading into clause 4(c)(iii) matters which the wording does not justify.

18. On that basis, the Respondent conceded that the current arrangement was not satisfactory so that the Tribunal has the jurisdiction to vary the leases to arrive at a situation where they would only be able to recover 100% of their expenditure, not more. However, there are two complications:

(a) With the other lessees having dropped out as parties to the current proceedings, the Tribunal only has the power to vary the leases of Ms Atif's two flats. Therefore, it is not possible at this stage for the Tribunal to ensure that all the proportions add up to 100%. The other leases may only be varied by the Respondent using the mechanism under section 36 of the Landlord and Tenant Act 1987, by agreement between the parties or by the other lessees making their own application.
(b) There is a registered title and a lease held by Mr Wellesley-Cole for Flat F. In fact, there is no Flat F and it is possible it will never be built. Unless and until it is built, there is no contribution to be made to the service charge from it. Any variation of the leases would have to take this into account.

19. The application sought that the current proportions should be replaced with equal fixed proportions for all flats, except for one which would have slightly less. The Respondent was unaware of the basis for this and Ms Atif could not assist. The Tribunal needs some rational basis for preferring one set of proportions over another but has not been provided with any. Further, if the proportions were fixed now, they could not be changed if and when Flat F was built, other than in the unlikely event all parties could reach agreement.

20. The Respondent proposed instead that they should have the power to determine a fair and reasonable apportionment. The problem with this is that a provision for the landlord to determine the apportionment is void under section 27A(6) of the Landlord and Tenant Act 1985.

21. The Tribunal has concluded that the best solution is to replace the fixed proportion with one which is "fair and reasonable". While it would, in practical terms, be for the Respondent to propose what apportionment is fair and reasonable, they or any of the lessees would be able to apply to the Tribunal to determine that issue. The Respondent would have no power to force their proposal unilaterally on the lessees.

22. Further, this solution would allow for adjustments to be made to the apportionment if and when Flat F were to be built.

Conclusion

23. The Tribunal has decided that the leases of Ms Atif's two flats should be varied as provided for at the beginning of this decision.

Name: Judge Nicol **Date:** 24th February 2022

Appendix of relevant legislation

Landlord and Tenant Act 1987

S35 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 appropriate tribunal 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—

(a) the repair or maintenance of—

(i) the flat in question, or

(ii) the building containing the flat, or

(iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it;

(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

(c) the repair or maintenance of any installations (whether they are in the same building as the flat or not) which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation;

(d) the provision or maintenance of any services which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation (whether they are services connected with any such installations or not, and whether they are services provided for the benefit of those occupiers or services provided for the benefit of the occupiers of a number of flats including that flat);

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease;

(g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—

(a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and

(b) other factors relating to the condition of any such common parts.

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(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 either exceed or be less than the whole of any such expenditure.

(5) Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002 shall make provision—

(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and

(b) for enabling persons served with any such notice to be joined as parties to the proceedings.

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

(a) the demised premises consist of or include three or more flats contained in the same building; or

(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.

S38 Orders varying leases

(1) If, on an application under section 35, the grounds on which the application was made are established to the satisfaction of the tribunal, the tribunal may (subject to subsections (6) and (7)) make an order varying the lease specified in the application in such manner as is specified in the order.

(2) If—

(a) an application under section 36 was made in connection with that application, and

(b) the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application under section 36, the tribunal may (subject to subsections (6) and (7)) also make an order varying each of those leases in such manner as is specified in the order.

(3) If, on an application under section 37, the grounds set out in subsection (3) of that section are established to the satisfaction of the tribunal with respect to the leases specified in the application, the tribunal may (subject to subsections (6) and (7)) make an order varying each of those leases in such manner as is specified in the order.

(4) The variation specified in an order under subsection (1) or (2) may be either the variation specified in the relevant application under section 35 or 36 or such other variation as the tribunal thinks fit.

(5) If the grounds referred to in subsection (2) or (3) (as the case may be) are established to the satisfaction of the tribunal with respect to some but not all of the leases specified in the application, the power to make an order under that subsection shall extend to those leases only.

(6) A tribunal shall not make an order under this section effecting any variation of a lease if it appears to the tribunal —

(a) that the variation would be likely substantially to prejudice—

(i) any respondent to the application, or

(ii) any person who is not a party to the application,

and that an award under subsection (10) would not afford him adequate compensation, or

(b) that for any other reason it would not be reasonable in the circumstances for the variation to be effected.

(7) A tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—

(a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or

(b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or

(c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.

(8) A tribunal may, instead of making an order varying a lease in such manner as is specified in the order, make an order directing the parties to the lease to vary it in such manner as is so specified; and accordingly any reference in this Part (however expressed) to an order which effects any variation of a lease or to any variation effected by an order shall include a reference to an order which directs the parties to a lease to effect a variation of it or (as the case may be) a reference to any variation effected in pursuance of such an order.

(9) A tribunal may by order direct that a memorandum of any variation of a lease effected by an order under this section shall be endorsed on such documents as are specified in the order.

(10) Where a tribunal makes an order under this section varying a lease the tribunal may, if it thinks fit, make an order providing for any party to the lease to pay, to any other party to the lease or to any other person, compensation in respect of any loss or disadvantage that the tribunal considers he is likely to suffer as a result of the variation.