FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/OOBJ/LSC/2023/0055**
Property	**:**	**13 Greatham Walk, London SW15 4LR**
Applicant	**:**	**Stephen Hanson**
Representative	**:**	**In person**
Respondent	**:**	**London Borough of Wandsworth**
Representative	**:**	**Stephen Evans of Counsel**
Type of Application	**:**	**For the determination of the liability to pay a service charge**
Tribunal Members	**:**	**Judge P Korn** **Mr O Dowty MRICS**
Date of hearing	**:**	**19 September 2023**
Date of Decision	**:**	**6 November 2023**

DECISION

Description of hearing

This was a face-to-face hearing.

Decisions of the tribunal

(1) The Applicant's £6,894 share of the cost of the major works to which this application relates is payable in full.

(2) We hereby make an order in favour of the Applicant under section 20C of the Landlord and Tenant Act 1985 that none of the costs incurred by the Respondent in connection with these proceedings can be added to the service charge. We also make an order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 that none of the costs incurred by the Respondent in connection with these proceedings can be charged direct to the Applicant as an administration charge under his lease.

Introduction

1. The Applicant seeks a service charge determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**"). The challenge is to the cost of major works, specifically external/communal repairs and redecoration, including window replacement, completed in 2020.

2. The Property is a one-bedroom ground floor flat in a building comprising 15 flats, and the building is part of a wider estate. The Applicant is the long leaseholder of the Property, and the Respondent is his landlord.

Applicant's case

3. In written submissions the Applicant states that there is a total of 40 flats on the estate, 8 flats on Greatham Walk and 32 flats on Stoughton Close. Greatham Walk consists solely of 1-bedroom ground floor flats with a private entrance and one external aspect. Stoughton Close consists of raised 3-bedroom duplex flats with two external aspects and an entrance via a raised walkway.

4. The Applicant states that he has been told by the Respondent that under his lease he is obliged to pay 2.08% of the cost of any major works. He understands the logic of this split insofar as it relates to costs that benefit all flats equally, such as the repair of a boiler for communal heating and hot water, but he considers the split to be unfair when it relates to expensive elements that are solely for the use of leaseholders of Stoughton Close.

5. The Applicant estimates that at least 25% of the costs of the major works being challenged by him were for the sole benefit of Stoughton Close properties. He submits that he should not have to subsidise costs that have been incurred for the benefit of Stoughton Close residents

and that an adjustment should be made to his bill so that it more closely reflects the benefit that he received. He has been charged £6,894 and would instead be prepared to pay £5,000.

Respondent's case

6. The Respondent states that under the Applicant's lease the service charge is calculated by reference to services provided to the "Block" and that "Block" is defined not just as the building in which the Applicant's flat lies but as the following three buildings together: (a) the building containing 1-15 (odd) Greatham Walk (this being the Applicant's building), (b) the building containing 1-32 Stoughton Close and (c) the building containing 2-24 (even) Greatham Walk.

7. Pursuant to clause 3(b) of the lease, the Applicant is in fact contractually required to pay 6.8% of the costs incurred by the Respondent in complying with its obligations in the Fifth Schedule, which contains a list of the Respondent's obligations in respect of the Block. These obligations include, in paragraph 2 of the Fifth Schedule, an obligation to repair and maintain etc the exterior and the structure of the Block.

8. The Applicant was billed 2.08% (and not 6.8%) of the costs relating to 1-15 (odd) Greatham Walk and 1-32 Stoughton Close, these being two of the three buildings which together constitute the Block. The total estimated cost of the works to these two buildings was £331,422.05, and 2.08% of this sum is £6,984. The 2.08% was reached by giving each flat within 1-15 (odd) Greatham Walk and 1- 32 Stoughton Close a "gross value", which totals 16,320 for the two buildings. The gross value of the Property (i.e. the Applicant's flat) is 340, and as a percentage this is 2.08% of the total.

9. Pursuant to clause 5(e) of the lease the Respondent may, if in its opinion it is equitable to do so, recalculate the percentage contribution payable by the Applicant on an equitable basis. The Respondent submits that a provision such as the one contained in clause 5(e) is not void by reason of section 27A(6) of the 1985 Act and that this was confirmed by the Supreme Court in *Williams & Others v Aviva Investors Ground Rent GP Ltd and another [2023] UKSC 6*. The Supreme Court held that a contractual power to reapportion a service charge percentage is not void in and of itself. Accordingly, the question of whether there should be a re-apportionment and in what fractions is not a question for the tribunal within the meaning of section 27A(6). This is because the tribunal cannot trespass upon a landlord's discretionary management decisions, save perhaps where the landlord has been irrational. The Respondent does, though, accept that it may be a legitimate question for the tribunal to ask as to whether any re-apportionment was reasonable in its outcome.

10. The Respondent submits that in any event the Applicant does not appear to challenge the re-apportionment percentage of 2.08%. Instead, his complaint is that he is paying for another building's expensive works, as he sees it. However, the covenants on the part of flat owners are mutually enforceable, and all flat owners must pay their share of the costs specified in their leases in relation to other buildings and the estate as a whole. It is by no means unusual for a leaseholder to be required to pay for works which take place on a completely different part of the estate and in relation to which they receive no direct benefit, albeit that the fact that an estate is in good condition does provide some indirect value to each flat. As a result, it is contractually legitimate to charge the Applicant for what he categorises as 'expensive works' to Stoughton Close.

Elizabeth Parette's witness evidence

11. Ms Parette is the Leasehold and Procurement Manager for the Respondent's Housing and Regeneration Department and she provided a written witness statement in advance of the hearing on which she was cross-examined at the hearing.

12. Ms Parette said that despite the reference in the lease to a service charge percentage of 6.8% the Applicant has always been charged 2.08% as the higher figure has always been known to be incorrect since she has been involved. She did not know why in reducing the percentage to 2.08% the Respondent had stripped one of the three buildings out of the definition of the Block.

Tribunal's analysis

13. Clause 5(e) of the lease reads as follows: *"If in the opinion of the Council it should become equitable to do so by virtue of any of the flats in the Block or on the Estate ceasing to exist or becoming uninhabitable or not yet having been completed by the Council or for any other reason then the Council shall recalculate the percentage contributions appropriate to the flats in the Block or on the Estate (as appropriate) including the Flat on an equitable basis and shall notify the Lessee in writing accordingly and in that event then from the date of that notice the new percentage so notified shall be substituted …".*

14. None of the specific reasons for recalculating the percentage contributions listed in clause 5(e) applies in this case, but the clause contains a 'sweeper' provision which allows the Respondent also to recalculate the percentage "for any other reason". And whilst one could argue that the preamble *"If in the opinion of the Council it should become equitable to do so"* suggests a need for some change in circumstances rather than merely a realisation that the percentage was inequitable from the start, in our view that would be too literal a reading of the purpose of the preamble. The Respondent is therefore

entitled to recalculate the percentage in circumstances where it comes to a late realisation that the percentage was inequitable from the outset.

15. We also agree with the Respondent that its contractual right to vary the percentage is not rendered void by section 27A(6) of the 1985 Act. Section 27A(6) reads as follows: *"An agreement by the tenant of a dwelling … is void in so far as it purports to provide for a determination – (a) in a particular manner, or (b) on particular evidence"*. As noted by the Respondent, this issue was considered by the Supreme Court in *Williams & Others v Aviva Investors Ground Rent GP Ltd and another*. At paragraph 32 of the Supreme Court's decision, Lord Briggs stated as follows: *"In my judgment it was not the purpose or effect of section 27A(6) to deprive that form of managerial decision-making by landlords [i.e. the sort of contractual decision-making power referred to by him in the immediately preceding paragraph] of its ordinary contractual effect, save only to the extent that the contractual provision seeks to make the decision of the landlord or other specified person final and binding, so as to oust the ordinary jurisdiction of the FtT to review its contractual and statutory legitimacy"*.

16. Lord Briggs then added, at paragraph 33, that section 27A(6) *"did not avoid [i.e. did not render void] the power of the landlord to trigger and conduct that re-apportionment [i.e. the re-apportionment permitted by a contractual provision in the lease], because the jurisdiction of the FtT to review it for contractual and statutory legitimacy was not in any way impeded. The original question, whether there should be a re-apportionment and if so in what fractions, was not a question for the FtT within the meaning of section 27A(6). The question for the FtT was whether the re-apportionment had been reasonable"*.

17. The tribunal is therefore not entitled to interfere with the principle of the Respondent exercising its contractual right to re-apportion the service charge. But it is entitled to consider whether the re-apportionment has been reasonable.

18. First of all it should be noted that the Applicant's percentage has been decreased from 6.8% to 2.08%, and this is clearly to his advantage. It seems that it should have been obvious to the Respondent from the start that a percentage of 6.8% was unjustifiable, in the sense that applying that percentage to all flats would have led to a service charge recovery of well over 100% of costs, but the Respondent has applied the reduction and its rationale for doing so is consistent with the wording of clause 5(e), namely that it was 'equitable' to make the change.

19. The rationale for stripping out one of the three buildings from the definition of the Block, though, is less clear. Ms Parette was unable to explain the reasoning and there was nobody else at the hearing who

could explain it. However, it is clear that in paying 2.08% of the aggregate costs for those two buildings the Applicant is generally (and in practice maybe always) going to be significantly better off than he would have been if paying 6.8% of the aggregate costs for all three buildings. In addition, there is no credible evidence before us that the Applicant will lose out overall by paying a proportion of the costs incurred by those two buildings rather than by paying a suitable proportion of the costs incurred by all three buildings. Therefore, whilst it is not ideal that the Respondent has been unable to explain why it has not retained the original definition of "Block", we consider that the decision to strip out one of the three buildings in the context of what is a large reduction in the percentage payable by the Applicant is within the range of reasonable options open to the Respondent in these particular – and unusual – circumstances.

20. We also note that the Applicant's actual complaint is a different one, namely that he is being required to pay towards items which in his view benefit 1-32 Stoughton Close more than his own building. However, whilst it may be correct that these works will benefit 1-32 Stoughton Close more than his own building, it was already the case under the terms of his lease that he was obliged to pay a specific percentage of the cost of all services provided to all three buildings regardless of which building could be said to benefit the most from any particular service. In other words, he was contractually obliged to pay the same percentage of the cost of all of the services set out in his lease.

21. We understand why the Applicant is not happy with how this has worked out in relation to these particular works, but it is completely normal for all flat owners to contribute an equal amount to all services and there are sound practical reasons for this. For example, it is arguable that ground floor tenants do not receive as much benefit as others from the maintenance of any lifts and it is also inevitably going to be the case that not every part of an estate will benefit from each service to exactly the same degree. However, it would be impractical for the cost of every service to be apportioned differently based on the precise level of benefit enjoyed by each flat or by each building. It would also be very difficult to draft leases on that basis, and such an approach could lead to much uncertainty and could easily fuel increased litigation.

Cost applications

22. The Applicant has applied for a cost order under section 20C of the 1985 Act ("**Section 20C**") and for a cost order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**Paragraph 5A**").

23. The relevant parts of Section 20C read as follows:-

(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 … the First-tier 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 …".

24. The relevant parts of Paragraph 5A read as follows:-

"A tenant of a dwelling in England may apply to the relevant … tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs".

25. The Section 20C application is therefore an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be added to the service charge. The Paragraph 5A application is an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be charged direct to the Applicant as an administration charge under his lease.

26. The Applicant has not been successful in respect of his main application. However, the application was an understandable one in the sense that we understand why the Applicant felt that the apportionment was unfair. In addition, and importantly, at the end of the hearing the Respondent's representative said that the Respondent did not intend to charge the Applicant, whether directly or through the service charge, any part of the costs incurred by the Respondent in connection with these proceedings. In the circumstances we consider it appropriate to make both a Section 20C order and a Paragraph 5A order to formalise the agreed position, albeit without the making of these cost awards being intended to be interpreted as a criticism of the Respondent.

27. Accordingly, we hereby make a Section 20C order in favour of the Applicant that none of the costs incurred by the Respondent in connection with these proceedings can be added to the service charge and a Paragraph 5A order that none of the costs incurred by the Respondent in connection with these proceedings can be charged direct to the Applicant as an administration charge under his lease.

Name: Judge P Korn **Date:** 6 November 2023

RIGHTS OF APPEAL

A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.

B. The application for permission to appeal must arrive at the regional office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.

C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

D. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal, and state the result the party making the application is seeking.

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
   (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
   (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(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 provisions 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.

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
   (a) the person by whom it is payable,

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

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

(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 -
(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 … is void in so far as it purports to provide for a determination – (a) in a particular manner, or (b) on particular evidence.