FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AU/LSC/2023/0227**
Property	:	**10 Mathews Court, Highbury Grange, London, N5 2PD**
Applicant	:	**Emily Topham**
Representative	:	**Nicholas Topham**
Respondent	:	**The Mayor and Burgesses of the London Borough of Islington**
Representative	:	**Mr Sachin Israni-Bhatia (solicitor) of Law & Governance at Islington Council**
Type of application	:	**Payability of service charge under s27A Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge Tueje** **Miss M Krisko FRICS**
Date of hearing	:	**8th December 2023**
Hearing venue	:	**10 Alfred Place, London, WC1E 7LR**
Date of decision	:	**5th January 2024**

DECISION

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In this determination, statutory references relate to the Landlord and Tenant Act 1985 unless otherwise stated.

Decisions of the Tribunal

(1) The Tribunal determines the amount payable by the Applicant in respect of service charges for 2023/2024 relating to works carried out to the block as part of the Respondent's Cyclical Improvement Programme is 2.56%.

(2) The Tribunal makes 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. The Tribunal also makes an order under paragraph 5A of Schedule 11 of 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 her lease.

The application

1. The application, dated 20th June 2023, seeks a determination pursuant to section 27A as to the amount of service charges payable for the 2023/2024 service charges, in respect of which the Respondent claims £17,514.12.

2. The application relates only to the amount the Respondent claims in respect of cyclical block repairs.

3. By an order dated 19th July 2023 the Tribunal gave directions, including provision for the parties to apply for permission to rely on expert evidence, and listing the final hearing on 8th December 2023.

The hearing

4. Neither party requested an inspection by the Tribunal, and the Tribunal did not consider one was necessary or proportionate.

5. The Applicant did not attend the hearing; she was represented by her father, Mr Nicholas Topham. The Respondent was represented by its in-house solicitor, Mr Sachin Israni -Bhatia.

6. The Respondent prepared a 123-page hearing bundle; amongst the documents in the hearing bundle were the following:

    6.1 A witness statement dated 9th October 2023 from Mr Richard Powell, the Respondent's project manager in its Home Ownership Department;

6.2 A Disputed Service Charges schedule completed by both parties; and

6.3 Estate agents' floor plans for various properties provided on behalf of the Applicant, including for one-bedroom flats in Matthews Court and Bowen Court, and 2 and 3 bedroom flats in Bowen Court.

7. During the hearing the Respondent provided a document titled "Head of Charge", setting out the estimated 2023/24 service charges that would have been payable by the Applicant under the old system of £17,076.17, and estimated service charges claimed under the new system, being £17,514.02[1].

8. The Tribunal heard evidence from Mr Richard Powell. No other witnesses gave evidence.

9. During the hearing Mr Topham requested an adjournment; the Tribunal refused that request for the reasons set out at paragraphs 28 to 28.3 below.

The background

10. This application relates to the property known as 10 Matthews Court, Highbury Grange, London, N5 2PD ("the Property"). The Property is a one-bedroom flat within a low-rise purpose-built block comprising 36 flats, containing the following dwellings:

24 flats with 1 bedroom
9 flats with 2 bedrooms
3 flats with 3bedrooms.

11. The Respondent owns the freehold of the Property and granted a lease to the Applicant's predecessor dated 24th November 2003, for a term of 125 years commencing 29th September 1984. That lease was assigned to the Applicant on 14th October 2019.

12. According to Mr Powell's oral evidence, from 2005 to 2022 the Respondent used a bedroom weighting system to apportion service charges. The baseline under the old scheme was to calculate service charges based on 2 and 3 bedroom properties, but applied a 10% supplement for each additional bedroom, or a 10% discount for each bedroom deficit. In 2022 the Respondent introduced a new scheme for reapportioning service charges across the borough. Mr Powell said that in 2022 the Respondent considered introducing a new scheme based on rateable values, but there were insufficient records regarding the rateable value of properties within the borough. Therefore, it decided to use a points-based scheme.

[1] This figure is stated to be £17,514.12 in the section 20 notice of intention dated 20th June 2023

13. Under the points-based scheme, each property is allocated 4 points for its living room and kitchen, plus an additional point for each bedroom. Based on the bedroom sizes and the number of flats within Matthew Court, the block had a total of 195 points. The Property's points allocation was 5, equating to 2.56% of the service charges payable. Mr Powell said one benefit of the new scheme was it allowed the Respondent to recover 100% of the expenditure, which was not the case under the old bedroom weighting scheme.

14. On 20th June 2023, pursuant to the section 20 consultation requirements, the Respondent sent the Applicant a notice of intention to carry out qualifying works under its Cyclical Improvement Programme. The Applicant's estimated charge to carry out these works to the Applicant's block is £17,514.12, which the Respondent calculated using the points-based scheme.

The issues

15. The Tribunal identified the following issue for determination.

    (1) Whether the Respondent's reapportionment of the service charges by use and application of the points-based system to 2023/2024 service charges payable in respect of the Cyclical Improvement Programme is in accordance with the terms of the lease.

    (2) The application also includes applications under section 20C and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Relevant terms of the lease

16. Under the lease, paragraph 4 of the particulars provides the following definition:

    "The Building: being number [1-36 Matthews Court, Highbury Grange, London, N5 2DP] shown edged yellow on the location plan annexed hereto together and including the garden and or amenity land shown edged yellow on the location plan."

17. From now on we adopt this definition.

18. By clause 1(2)(2) the lessee agrees to pay:

    By way of further rent the service charge ("the Service Charge") payable as provided in Clause 5 hereof and to be recoverable by distress or other process of law.

19. Clause 5(3)(f) deals with the amount of service charges as follows.

(*f*) *The annual amount of the Service Charge payable by the Tenant as aforesaid shall be calculated as follows.-*

(i) *by dividing the aggregate of the expenses and outgoings incurred or to be incurred by the Council in respect of the matters set out in Part 1 of the Third Schedule hereto in the year to which the Certificate relates by the aggregate of the rateable value (in force at the end of such year) of all dwellings and other rateable parts in the Building the repair and maintenance renewal or servicing whereof is charged in such calculation as aforesaid and then multiplying the resultant amount by the rateable value (in force at the same date) of the demised premises ("the building element")*

(ii) *by dividing the aggregate of the expenses and outgoings incurred or to be incurred by the Council in respect of the matters set out in Part 2 of the Third Schedule hereto in the year to which the Certificate relates by the aggregate of the rateable value (in force at the end of such year) of all residential units on the Estate and then multiplying the resultant amount by the rateable value (in force at the same date) of the demised premises ("the estate element")*

(iii) *a fair and reasonable proportion of the expenses incurred [sic] to be incurred by the Council in connection with the matters set out in Part 3 of the Third Schedule in the year to which the Certificate relates (hereinafter called "the management element")*

(iv) *by adding together the building element the estate element (if any) and the management element to any expenditure under Clause 5(3)(e)(ii)[2] hereof*

PROVIDED ALWAYS

(A) that the Council shall have the right at any time fairly and reasonably to substitute a different method of calculating the Service Charge attributable to the dwellings in the Building; and
(B) that in the event of the abolition or disuse of the rateable values for the property the reference herein to the rateable value shall be substituted by a reference to the floor areas of all dwellings in the Building and on the Estate (excluding any areas and lifts (if any) used in common) and calculated accordingly.

The Legal Framework

20. By section 27A(1):

[2] Clause 5(3)(e)(ii) deals with payment of the insurance by the tenant

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.

21. In ***Williams and others v Aviva Investors Ground Rent GP Limited and another [2023] A. C. 855*** the Supreme Court clarifies the Tribunal's jurisdiction under section 27A(1) where a landlord seeks to re-apportion service charges as follows:

> *14. Generally speaking, the making of a demand upon a tenant for payment of a service charge in a particular year will have required the landlord first to have made a number of discretionary management decisions. They will include what works to carry out or services to perform, with whom to contract for their provision and at what price, and how to apportion the aggregate costs among the tenants benefited by the works or services. To some extent the answers to those questions may be prescribed in the relevant leases, for example by way of a covenant by the landlord to provide a list of specified services, or by a fixed apportionment regime. But even the most rigid and detailed contractual regime is likely to leave important decisions to the discretion of the landlord, such as whether merely to repair or wholly to replace a defective roof over the building, with major consequences in terms of that year's service charge. Usually the conferring of this discretion on the landlord will be implicit, in order to give the lease business efficacy. But sometimes it may be express, as in the power of the landlord to re-apportion which is the subject of this case. It may be little more than happenstance whether these discretions are conferred expressly or implicitly.*
>
> *15. Speaking again generally (and this is a necessary predicate in construing a statutory provision applicable across a wide range of landlord and tenant relationships), the jurisdiction of the FtT under section 27A(1) to decide whether a service charge demand is payable will extend to the contractual and/or statutory legitimacy of these discretionary management decisions. ... But, leaving aside section 27A(6) for the moment, it would not be a part of the FtT's task to make those discretionary decisions itself, let alone for the first time. It would be too late, on an application under section 27A(1) , and there would be no warrant either contractually in the lease or in the statutory regulatory regime under the 1985 Act for it to do so. If the landlord's discretionary decision in question was unaffected by the statutory regime and fell within the landlord's contractual powers under the lease, then there might at the most be a jurisdiction to review it for rationality: see Braganza v BP Shipping Ltd [2015] 1 WLR 1661 .*

The Parties' Submissions

22. The application form states the current points-based scheme is inequitable because leaseholders of one-bedroom flats are subsidising service charges that should be paid by leaseholders of 2 and 3 bedroom flats. The application form claims a one-bedroom flat has only 40% of the kitchen and living space available in a two or three bedroom flat. Therefore, it continues, the apportionment for a one-bedroom flat for kitchen and living space should be 1.6 points, being 40% of the 4 points currently allocated to 2 and 3 bedroom properties. On that basis, and allowing for the additional point awarded for its one bedroom, under the Respondent's points-based scheme, the Property would be apportioned 2.6 points.

23. There is a similar argument in the tenant's column of the Disputed Service Charges form which reads:

    Using publicly available information upon the dimensions of flats upon the estate:
    1 x bed flat – 178.78 sqft
    2 x bed flat – 469.71 sqft
    3 x bed flat – 481.52 sqft

    Approximately, a 1 x bed flat is 40% the size of a 2 and 3 x bed flats. As such, the 1 x bed fat should be allocated 40% of the estimated costs (excluding the windows) of the 44.2% of the total cost estimate allocated to the whole block works OR a points allocation of 1.6 and not 4.

24. The publicly available information relied on regarding property sizes were the floor plans referred to at paragraph 6.3 above. However, the floor plan provided for a one-bedroom flat in Matthews Court indicates the gross internal area is 416 sq ft, while the living room is 18'6 x 12'3, so measures 228.78 sq ft in total. These do not tally with Mr Topham's stated dimensions for either a one-bedroom flat in Matthews Court, or its living room and/or kitchen. In any event, the dimensions he gives seem somewhat small.

25. The Respondent's position is that under clause 5(3)(f)(A) of the lease, it has discretion to substitute a new apportionment method at any time providing it does so fairly and reasonably.

26. Additionally, the Respondent argues it has adopted a broad-brush approach using the points-based system, taking floor area into consideration as stated at clause 5(3)(f)(B). This is adopted as the most cost and time effective way of allocating service charges, and it's claimed, results in a system that is fair and reasonable.

27. As to the scheme proposed by Mr Topham, the Respondent argues it is unworkable and incomplete, because it fails to address how service charges will be re-apportioned to other dwellings within the Building. Mr Israni-Bhatia also argued the disclaimer printed on all the floor plans Mr Topham relies on, expressly stated they were approximate and/or for illustration purposes only.

28. As stated, Mr Topham requested an adjournment. He requested the adjournment to allow an opportunity to obtain more expert evidence regarding a greater number of measurements for properties in Matthews Court. The request was refused for reasons announced orally at the hearing, which in summary, were as follows:

    28.1 The Tribunal's directions dated 19th July 2023 provided that any party wishing to rely on expert evidence must apply to the Tribunal for permission to do so. If Mr Topham wished to rely on expert evidence, the appropriate time to do so was when he received the directions order.

    28.2 In its entries on the Dispute Service Charges schedule, the Respondent objected to expert evidence being obtained on the grounds that it would be expensive, time consuming and intrusive. The Tribunal considers those objections are justified, and notes it was unclear how many, if any, residents at Matthews Court would grant access for an inspection.

    28.3 In the circumstances, it would be contrary to the overriding objective to adjourn the hearing, given the uncertainty about obtaining access to other premises, the likely costs involved and the unexplained lateness of the application.

The Tribunal's Determination

29. The Tribunal reached its decision after considering the witness's oral and the parties' written evidence, and taking into account its assessment of the evidence.

30. This determination does not refer to every matter raised by the parties, or every document the Tribunal reviewed or took into account in reaching its decision. However, this doesn't imply that any points raised, or documents not specifically mentioned were disregarded. If a point or document was referred to in the evidence or submissions that was relevant to a specific issue, it was considered by the Tribunal.

The Tribunal's Decision

31. The Tribunal determines that the amount payable by the Applicant in respect of service charges for 2023/2024 relating to works carried out pursuant to the Respondent's Cyclical Improvement Programme to the Building is 2.56%.

Reasons for the Tribunal's Decision

32. ***Williams*** reaffirms the lease is the starting point when considering re-apportionment. We also remind ourselves the Supreme Court held (at paragraph 15 of the judgment) that a review of the rationality of the decision made by the Respondent is likely to be sufficient. Rationality is

referred to in the *Wednesbury* sense, of a decision that is so unreasonable no other landlord would ever reach the same decision.

33. In our judgment, the Applicant's lease provides three apportionment methods:
    33.1 Firstly using rateable values in accordance with clause 5(3)(f)(i);
    33.2 Secondly substituting rateable values at any time with another method providing that is done fairly and reasonably clause 5(3)(f)(A); or
    33.3 Thirdly, if rateable values are abolished or disused, the rateable value is to be substituted with a reference to floor area clause 5(3)(f)(B).

34. In 2022 the Respondent considered using rateable values when introducing a new method to apportion service charges, but couldn't do so as its records were incomplete. The Tribunal notes that rateable values are effectively disused, and accepts for the reasons Mr Powell explained, apportionment based on rateable values is impractical.

35. In our judgment, that left the Respondent with two alternative apportionment methods: it could substitute rateable values with some other method which made reference to the floor area. That option was available because rateable values have effectively been discontinued. Alternatively, it could *"…substitute a different method of calculating the Service Charge attributable to the dwellings in the Building…"*

36. The Tribunal considers the Respondent had the broad discretion under clause 5(3)(f)(A) to introduce a new scheme, as this discretion can be exercised at any time. This clause does not prescribe any alternative method, providing the method adopted makes reference to floor area and is fair and reasonable.

37. In our judgment, the points-based scheme is not irrational in the *Wednesbury* sense: in fact Mr Powell states that other local authorities and social landlords have adopted a similar scheme. Nor do we consider it is unfair or reasonable in the ordinary sense. Our reasons are as follows:

    37.1 At the very least, fair and reasonable needs to be considered from the perspective of both parties to the lease. We consider a method that is straightforward is fair and reasonable to both parties. It is fair and reasonable to the Respondent because it will save the time and expense of applying a more complex scheme. Consequently, it is reasonable and fair to the leaseholder because the additional time and expense of a more complex scheme will not be reflected in the management element of their service charges.

    37.2 It is fair and reasonable to have a scheme which provides for 100% recovery of service charge expenditure. It has obvious benefits for the Respondent, as it will not have to make up any shortfall. To some degree it benefits the tenant who, while being protected by the section 19 requirements regarding reasonableness, can be assured a

landlord's financial or budgetary position is less likely to undermine fulfilment of its contractual obligation to maintain, repair and renew the building as required.

37.3 Taking into account that, irrespective of the size of the demised premises, all tenants benefit from the structural integrity of the building, and have use and enjoyment of the communal areas, we do not consider the Respondent's points-based scheme results in tenants of one-bedroom flats unfairly or unreasonably subsidising tenants of larger properties.

37.4 The Respondent's Head of Charge document states under the old apportionment scheme the Applicant's estimated service for the cyclical works would be £17,076.17, compared to the £17,514.02. While noting the Applicant is required to pay more under the new scheme, the difference is approximately 3% when comparing estimated service charges under the old and the new schemes. The previous scheme having been in force for 17 years.

38. Alternatively, in our judgment, the points-based scheme fulfils the criteria at clause 5(3)(f)(B), by using the same formula at clause 5(3)(f)(i) but substituting rateable values with points. That is because it divides the aggregate of the expenditure on the Building by the Building's total points (i.e. 195), and then multiplies it by the points apportioned to the Property.

39. We note that clause 5(3)(f)(B) does not require the Respondent adopts a scheme based on measurements, for instances such as the gross internal area of the properties. What is required is a scheme that apportions service charges by reference to the floor areas of the dwellings. We consider the wording at clause 5(3)(f)(B) is sufficiently broad to encompass the points-based scheme. The Respondent's scheme refers to the floor areas of the dwellings and apportions points according to whether the floor area includes one, two or three bedrooms.

40. We also note, the way Mr Topham presents the application is not as an objection to the points-based system in principle, but instead as an objection to the points apportioned to the Property under the Respondent's system: he argues that based on the Property's measurements, 2.6 points should be allocated instead of 4. His calculations are based on the floor plans he provided for two and three bedroom properties. However, as the floor plans for the larger properties do not relate to Matthews Court, we do not find these to be of assistance. Furthermore, as the Respondent points out, the measurements are approximate and/or illustrative only.

41. In any event, in our judgment, an apportionment method based on floor measurements is not what the lease requires, and is likely to be expensive, time-consuming and impractical to implement and to keep up to date. We consider it reasonable that the Respondent applies the same methodology to its properties across the borough. However, it would be unreasonably expensive for the Respondent to obtain measurements for its properties

across the borough. Furthermore, a system based on measurements is likely to require recalculation each time a leaseholder alters and/or extends their property.

42. Accordingly, in our judgment, the amount payable by the Applicant for 2023/2024 in respect of works carried out to the Building under the Respondent's Cyclical Improvement Programme is 2.56%.

The Tribunal's Decision

43. The Tribunal makes 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. The Tribunal also makes an order under paragraph 5A of Schedule 11 of 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 her lease.

Reasons for the Tribunal's Decision

44. The Respondent was unable to point to any provisions under the lease which permit recovery of its costs by way of service charge or an administration charge.

Name: Judge Tueje **Date:** 5th January 2024

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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.

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

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.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).