FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AG/LSC/2022/0032**
Properties	**:**	**(1) Flat D, 133 – 135 Queens Crescent, London NW5 4G** **(2) Flat A, 3 Gilden Crescent, London NW5 4AG** **(3) Flat B, 3 Gilden Crescent, London NW5 4AG** **(4) Flat D, 3 Gilden Crescent, London NW5 4AG**
Applicant	**:**	**(1) Mr F Lacoutre** **(2) Mr C and Mrs S Hume** **(3) Mr P Tizard** **(4) Mr S Harding**
Representative	**:**	
Respondent	**:**	**QCP Estates Ltd**
Representative	**:**	**Mr R Alford of counsel**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	**:**	**Judge S Brilliant** **Ms S Phillips MRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**06 September 2022**

DECISION

Decision of the tribunal

The Tribunal determines that a fair and reasonable proportion of the annual expenditure incurred or to be incurred in carrying out the landlord's obligations specified in clause 6 of the relevant leases for the four service charge years ending 30 June 2019, 30 June 2020, 30 June 2021 and 30 June 2022 be as follows:[1]

Mr F Lacoutre	Flat D, 133 – 135 Queens Crescent, London NW5 4G	6.48%
Mr C and Mrs S Hume	Flat A, 3 Gilden Crescent, London NW5 4AG	9.09%
Mr P Tizard	Flat A, 3 Gilden Crescent, London NW5 4AG	10.32%
Mr S Harding	Flat A, 3 Gilden Crescent, London NW5 4AG	9.50%

The application

1. By a notice of application dated 27 January 2022, Mr Lacoutre seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 of what should be a fair proportion payable by him of the annual expenditure incurred or to be incurred by the landlord in carrying out its obligations specified in clause 6 of his lease.

2. As we shall see, this is one of those cases in which the proportion payable is to be a fair one, but that fairness is in the absolute discretion of the landlord.

3. It is now settled law that such a provision infringes s.27A(6) of the Landlord and Tenant Act 1985 and that the Tribunal is free to decide for itself what is a fair proportion: Oliver v Sheffield CC [2017] EWCA Civ 225, Aviva v Williams [2021] EWCA Civ 27.

4. The Tribunal invited other lessees in the same buildings who wished the Tribunal to carry out a similar exercise in respect of their leases to join in the proceedings.

5. Accordingly Mr and Mrs Hume, Mr Tizard and Mr Harding were joined as parties.

[1] Subject in the case of Mr and Mrs Hume, Mr Tizard and Mr Harding as to what is said in paragraphs 27 and 28 below.

The buildings

6. On the borders of Kentish Town and Gospel Oak, Gilden Crescent runs off Queens Crescent. There is situated on Queens Crescent near to the junction with Gilden Crescent a mixed use building, consisting of shops on the ground floor and 6 flats above. The flats are numbered A-F. We shall refer to this building as "QC".

7. Around the corner on Gilden Crescent there is another building close by, but we were told not contiguous to, QC[2]. This building also consists of 6 flats. It is not now a mixed use building and the flats are above a separate ground floor flat. But originally the building was of mixed use before the ground floor was converted. We shall refer to this building as "GC".

The leases

8. We were shown sample leases. The first was Flat D, QC. The second was Flat C, GC.

9. It is clear from those leases that both QC and GC are held by the landlord under the same head lease. This is why, when calculating the landlord's expenditure for the purposes of the service charge, the leases require the landlord to lump together the expenditure of QC and GC.

10. Clause 5(1)(b) of the QC leases provide:

That the Tenant shall pay to the Landlord in addition to the rent hereby reserved ***a fair proportion to be decided by the Landlord or its agents in their absolute discretion*** *… of the annual expenditure incurred or to be incurred by the Landlord in carrying out the obligations specified in clause 6 hereof.*

11. Clause 6 in both the QC leases and the GC leases contains the usual obligations of a landlord to insure and keep in repair etc, but in respect of <u>both</u> buildings. As we have said, for these purposes QC and GC are lumped together.

12. Clause 5(1)(b) of the GC leases are markedly different and provide:

That the Tenant shall pay to the Landlord in addition to the rent hereby reserved ***a fair proportion to be decided by the Landlord or its agents in their absolute discretion*** *…* ***<u>presently determined at 5.56%</u>*** *of the annual expenditure incurred or to be incurred by the Landlord in carrying out the obligations specified in clause 6 hereof.*

13. No one could explain why the QC leases differed from the GC leases or how the figure of 5.56% had been arrived at. The landlord, to its credit, did not

[2] We are bound to say though that the title plan to the head lease [27] does not make it clear that they are separate buildings at all.

attempt to justify it.

The hearing

14. It was a very hot day and people were advised not to travel if possible. Nevertheless, Mr Lacoutre travelled by Eurostar from France to be present. None of the other applicants attended. Mr Alford appeared for the landlord.

Mr Lacoutre's case

14. At present each of the GC lessees are paying 5.56% in accordance with the leases. The amount the landlord has determined should be paid by each of the QC lessees is 11.11% (so that there is a 100% recovery).

15. Mr Lacoutre is currently paying 11.11%. He says it is unfair that he should be paying so much whilst the GC lessees are paying so much less.

16. The landlord (whom we regard as having behaved responsibly throughout) agrees and has decided to switch over to a floor size basis. Each of the 12 flats is to be measured and the percentage payable is to reflect the size of each flat.

17. In paragraph 18 of its written case the landlord says:

The managing agents have, where access was obtained, undertaken a laser assisted measurement of each flat. Where access has not be obtained, floor areas have been estimated based on available EPC plans, or the fact that the layout is identical to other prop flats. Two flats, Flat F Queens Crescent and Flat D Gilden Crescent have neither been accessed nor have any other plans been available. This is because the tenants have not responded to requests for access, and the Respondent does not hold separate keys. In those cases, an average floor area and apportionment has been applied.

18. At the start of the hearing it was agreed between the parties that taking a broad brush approach it was sensible to agree the figures that the landlord had been able to arrive at.

19. The appropriate figure for Mr Lacoutre based on the size of his flat is 6.48%.

Mr and Mrs Hume's case

20. Mr and Mrs Hume own Flat A GC. So at present they have the protection of the 5.56% cap. It might seem counterintuitive that they should join in the application because, on the face of it, they could only lose.

21. However, in his written case Mr Hume makes the point that QC and GC are separate buildings and that QC appears to be significantly older than GC. This may well affect maintenance and/or insurance issues, if not now then certainly in the future. He questions the need for there to be any combined service charge items at all, and queries whether the reserve fund is being fairly charged.

Mr Tizard's case

22. Mr Tizard is in the same position as Mr and Mrs Hume. In his written statement he makes the same points as them and in particular draws our attention to the injustice of the insurance premium not been separated into different buildings. He also has concerns about the reserve fund.

23. Mr Tizard would prefer a model whereby each building was charged for separately. He would like to pay and equal apportionment between each of the GC flats.

Mr Harding's case

24. Mr Harding did not put in a written statement.

Discussion

24. On the material before us, we consider that the fair proportion to be paid is on the floor size basis.

25. Unfortunately, for Mr and Mrs Hume, Mr Tizard and Mr Harding this means that their proportion is increased from 5.5% to 9.09%, 10.32% and 9.50% respectively. They have in fact done worse than had they not applied to be joined as parties.

26. The Tribunal cannot take undertakings from counsel, but we did ask Mr Alford to see if he could obtain from his clients an assurance that they would not be prejudiced by having joined the proceedings. Having tried to take instructions he said he was unable to give an assurance but hoped that this was the approach his clients would want take.

27. Of course, we had overlooked paragraph 23 of the landlord's written case*:*

The Respondent would raise no objection to the Tribunal making an order that the First Applicant pay service charges for the years 2018 onwards by reference to the measured apportionment of 6.4841 % and would not seek any order that the 2nd to 4th Applicants pay any greater amount for those years.

28. We would expect this commitment to be honoured.

29. We would wish to expand on paragraph 24 above. We consider, in principle, that if there are two separate blocks being lumped together, certain circumstances might demand that it would not be fair to do so.

30. To take an extreme hypothetical case. Suppose an estate consists of two blocks, each of eight floors. The first is a very modern building with extensive grounds, beautifully manicured. The common floors are expensively carpeted, and which are cleaned twice a year. There is a 24-hour porterage service, a fast and efficient modern lift, a gymnasium and a swimming pool on the roof. The second is 40 years old, the common floors are wooden boards. It has no garden, porterage, lift, gymnasium or swimming pool.

31. No one could reasonably contend that lumping together the expenditure of both blocks would be fair.

32. The problem for Mr and Mrs Hume, Mr Tizard and Mr Harding (and it is no criticism because they were not represented) is that the meagre generalised evidence put forward by them comes nowhere close to the hurdle over which they have to jump. There is no reason why such an application should not be made in due course, but it will have to be supported by very thorough and detailed professional evidence which can clearly demonstrate to the Tribunal that the differences between the buildings are such that they should not be lumped together.

Name: Simon Brilliant **Date:** 06 September 2022

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).