UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT- SERVICE CHARGES – apportionment of liability for service charges - wording in lease rendered void by section 27A(6) of the Landlord and Tenant Act 1985 – effect of lease once void wording deleted

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

PHILIP WILLIAMS
AND
LESSEES OF 38 FLATS IN VISTA,
FRATTON WAY

Appellants

and

AVIVA INVESTORS GROUND RENT **Respondent**

Re: Vista,
Fratton Way,
Southsea,
Hampshire, PO4 8FD

Judge Elizabeth Cooke

Determination on written representations

The appellants were not legally represented
Simon Allison for the respondents, instructed by Penningtons Manches Cooper

The following cases are referred to in this decision:

Fairman and others v Cinnamon (Plantation Wharf) Limited and others [2018] UKUT 421 (LC)

Gater and others v Wellington Real Estate Limited [2019] UKUT 561 (LC)

Windermere Marina Village Limited v Wild and Barton [2014] UKUT 163 (LC)

Introduction

1. This is an appeal by the lessees of thirty-nine flats in Vista, Fratton Way, Southsea, Hampshire. The names of all the appellants are set out in the Schedule to this decision. They appeal a decision of the First-tier Tribunal ("the FTT") about the reasonableness and payability of service charges for the year 2018. The FTT's decision related to a number of items within the service charges; the appeal relates to one matter only, namely the apportionment of service charges between the flats.

2. Central to the appeal is the effect of section 27A(6) of the Landlord and Tenant Act 1985 ("the 1985 Act"), and of the Tribunal's decision in *Windermere Marina Village Limited v Wild and Barton* [2014] UKUT 163 (LC) ("*Windermere*").

3. On giving permission to appeal in October 2019 the Tribunal directed that this appeal would be determined on the basis of written representations; I say that to make it clear that the direction was not given as a result of the current pandemic emergency. The appellants have not been legally represented; Mr Philip Williams, of 36 Vista, has corresponded with the Tribunal on their behalf. Mr Simon Allison of counsel represented the respondent, as he did in the FTT. I am grateful to the parties for their helpful representations.

The factual background and the provision about apportionment in the leases

4. I do not need to give a great deal of factual background because the appeal turns on the construction of one brief provision in the appellants' leases. Vista is a mixed use block with a commercial unit on the ground floor and 69 residential units. The FTT saw the lease of flat 36, and I take it that all the other leases are in the same form; it is a very short document, comprising three pages but referring to a "Lease Book", which contains the terms of the lease in detail. The lease sets out the tenant's share of three types of service charge as follows:

    - "your share of the insurance costs is 0.7135% or such part as the Landlord may otherwise reasonably determine

    - your share of building services costs is 0.7135% or such part as the Landlord may otherwise reasonably determine

    - your share of estate services costs is 0.5427% or such part as the Landlord may otherwise reasonably determine."

5. Those figures differ, if I have understood correctly, from flat to flat because they were calculated on the basis of the square footage of the units, but the form of the provision is the same for all: a stated percentage, or alternatively a proportion to be reasonably determined by the landlord.

6. For some years now the respondent landlord has been demanding service charges in different proportions from those stated in the lease. There are two issues in the appeal: first, whether the landlord is able to do so, subject to the jurisdiction of the First-tier Tribunal under section 27A of the 1985 Act, or whether the words "or such part as the Landlord may otherwise reasonably determine" are rendered void by section 27A and, second, if those words are rendered void, what is the effect of that.

7. In order to understand those issues we have to look section 27A and at the Tribunal's decision in *Windermere*.

The effect of the 1985 Act upon apportionment provisions.

8. Section 27A of the 1985 Act gives the FTT jurisdiction to make decisions about service charges. It reads, so far as relevant, as follows:

> "(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.
>
> …
>
> (4) No application under subsection (1) … 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)…"

9. In *Windermere* the Tribunal had to decide on the effect of section 27A on a provision in a lease that obliged the lessee of one of a number of flats:

> "To pay a fair proportion (to be determined by the Surveyor for the time being of the Lessors whose determination shall be final and binding) of the expense of all communal services…"

10. The Tribunal (the Deputy President) observed that section 27A(1) enables the FTT to make decisions about the amount of service charge payable, and that that might well include the proportion payable by one lessee of a charge incurred for the whole block:

> "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." (*Windermere* paragraph 38)

11. However, the Deputy President continued at paragraph 39, section 27A(4) provides that the FTT has no jurisdiction to make decisions about an apportionment which "has been agreed or admitted by the tenant". That includes an agreement in the lease itself. So if the lease says that the tenant is to pay 5% of the service charge for the block, that is the apportionment and it cannot be challenged in the FTT.

12. The Deputy President explained at paragraph 40 that section 27A(4) "must … be considered in the light of section 27A(6)" which renders void any agreement by the tenant about the determination of a question that could be the subject of a determination under section 27A(1). Paragraph 41:

> "the purpose of the provision is clearly to avoid agreements excluding the jurisdiction of the first-tier tribunal on questions which could otherwise be referred to it for determination."

13. At paragraph 42 the Deputy President said:

> "The question referred to the LVT in this case was what proportion of the expenses incurred by the [landlord] was to be paid by the [tenants]. By paragraph (2) of the Schedule to their leases the [tenants] had already agreed that the answer to that question was that they were to pay such proportion as was determined by the appellant's surveyor, whose decision was to be final and binding. In my judgment that agreement was void because it had the effect of providing for the manner in which an issue capable of determination under section 27A(1) was to be determined, namely by a binding decision of the [landlord's] surveyor."

14. So the effect of section 27A(6) was to delete from the lease the words "(to be determined by the Surveyor for the time being of the Lessors whose determination shall be final and binding)", leaving the FTT to decide what was a fair proportion of the service charge. The FTT was to make its own decision on that point; it was not carrying out a review of the landlord's decision. At paragraph 48 the Tribunal said:

> "Section 27A deprives the landlord's surveyor of his role in determining the apportionment. Paragraph (2) [of the lease] is to be read as if the method of ascertaining a fair apportionment was omitted altogether."

15. In *Gater and others v Wellington Real Estate Limited* [2019] UKUT 561 (LC) ("*Gater*") the Tribunal had to consider an obligation to pay:

> "a due and fair proportion of the Service Cost (such proportion to be determined by the Landlord or its surveyor (in each case acting reasonably)"

16. There is no stipulation in that clause that the landlord's determination was to be final and binding. But it was held nevertheless to fall within the scope of the words of section 27A(6); it purported to provide for a determination in a particular manner of a question (namely the apportionment of the service charge) which could be the subject of an application under subsection(1). At paragraph 73 the Deputy President said:

> "A determination of proportions by the landlord's surveyor is such a provision, whether it is said to be final and binding or not."

The FTT's decision and the appeal

17. I turn to the present appeal. The FTT was asked to make a decision about the apportionment of the service charges. The applicant tenants, the appellants here, argued that section 27A(6) rendered void the words "or such part as the Landlord may otherwise reasonably determine," so that the only way the landlord could change the apportionment was by an agreed variation of the lease (paragraph 32 of the FTT's decision). At paragraph 33 the FTT recorded the respondent's argument that those words did not purport to oust the FTT's jurisdiction and that it "retains jurisdiction to determine whether the

apportionment as determined by the Respondent, being different from that stated in the lease, is a reasonable apportionment."

18. At paragraph 54 the FTT said:

> "The Tribunal disagrees with the Applicants on this point. What those cases [*Windermere* and *Gater*] say is that the Tribunal's jurisdiction to determine a reasonable apportionment is not ousted by wording purporting to provide that the matter is one for the landlord or the landlord's agent. But in this case the Respondent is not trying to say that the landlord can alter the apportionment at its own discretion and that the Tribunal has no say in the matter. On the contrary the Respondent accepts that the Tribunal does have jurisdiction to say whether the apportionment is reasonable or not. So, the two cases quoted by the Applicants do not have the effect of nullifying the lease provision."

19. That is a misunderstanding of the decision in *Windermnere* and in *Gater*. Those decisions say that a clause purporting to provide for a determination of apportionment by the landlord or the landlord's agent is void. It is void whether or not it provides that the landlord's decision is "final and binding" or similar, and whether or not the landlord agrees to submit to the jurisdiction of the Tribunal.

20. Accordingly in the leases in question in this appeal the words "or such part as the Landlord may otherwise reasonably determine" are void. They are deleted. They no longer appear in the lease.

21. What is the effect of those words being void? Once those words are deleted, does that leave the stated proportion to stand alone? Or is there scope, as the respondent argues, for the FTT to make its own decision as an alternative to the stated percentage and instead of the landlord?

22. Mr Allison, for the respondent, accepts that the FTT must make its own decision, rather than reviewing what the landlord has decided; but he says there is still a decision to be made. I was attracted to that view when giving permission to appeal, since that had been the outcome in *Windermere* and *Gater*. But when the wording in the Vista leases is compared with the wording in the leases considered in those earlier cases, it becomes apparent that that is not correct.

23. The deletion of the void wording in *Windermere* and *Gater* created a vacuum. There was still a determination to be made, because the tenants had to pay a "fair proportion" of the service charge. In the absence of the agreed method of determination it was for the FTT to decide what a fair proportion was; and it had to make its own decision, rather than reviewing the landlord's apportionment. Similarly in *Fairman and others v Cinnamon (Plantation Wharf) Limited and others* [2018] UKUT 421 (LC) the deletion of void wording that enabled the landlord to determine when a change in the apportionment of charges was "necessary or reasonable" meant that the FTT had to decide a change was necessary or reasonable and, if it was, to decide for itself what the new apportionment should be.

24. In the present appeal the remaining wording is different. The Vista leases set out a fixed percentage, to which the landlord's discretionary apportionment is an alternative. There is no provision for a "fair proportion" or the like. Without the void wording the lease obliges the tenant to pay a stated percentage of the service charge. There is nothing left to decide. The FTT has no jurisdiction to amend the stated percentage as a result of section 27A(4).

25. Accordingly the appeal succeeds. The decision of the First-tier Tribunal is set aside and the Tribunal substitutes its own decision that the words "or such part as the Landlord may otherwise reasonably determine" in the Vista leases are void. The respondent can recover only the apportionments stated in the lease and if it wishes to change that apportionment it will have to do so by varying the leases with the tenants' agreement.

Judge Elizabeth Cooke

6 April 2020

Schedule of appellants

Flat number	Name
1	Adam Lambert
2 & 5	Suzie Turner
3	Yas Tortelli
6	Francisca Edward
7	Paul Barlow
11	Nathan Hancock
12	Nigel Phillips and Ms J Narantez Price

13 Claire Hiskey

14 Rose Symon

15 & 42 Steve Dunk

16 John Liddell and P Liddell

17 Cliff Funnell

18 Mark Austin

21 Duncan Kelbie

25 Vicki Edgar

28 Greg Johnston

29 Richard Minggang

31 Rebecca Waller-Brown

34 David Moore

38 Andy Paul

41 Andre Bernaix

43 Josh Turner and Sophie Walters

44 Mr and Mrs Anderson

45 Mr and Mrs Wang

48 David Tidd

52 Mrs Lee

53 Andrew Hutchinson

55 Mark Stainton

56 Mr and Mrs Peagram

57 Mr and Mrs Lee

58 Sasha Alexander

59 Tim Robinson

61 Rob Shaffery

63 Victoira Landi

64 Phil Williams

65 Shaun Roster

66 Herbert Anderson