

UPPER TRIBUNAL (LANDS CHAMBER)



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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

*LANDLORD AND TENANT – service charges – apportionment of costs between tenants – method of apportionment – variation of leases – appeal dismissed – Landlord and Tenant Act 1985 s 27A, Landlord and Tenant Act 1987, s 35*

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF  
THE LEASEHOLD VALUATION TRIBUNAL FOR  
THE LONDON RENT ASSESSMENT PANEL

BETWEEN

ROHAN MEHRA

Appellant

and

(1) CITYWEST HOMES LIMITED

Respondents

and

(2) ANDREW MORLEY

Re: 3-5 Orsett Terrace  
London W2 6AJ

Before: The President

Sitting at: 43-45 Bedford Square, London WC1B 3AS  
on 4 August 2011

The appellant in person

*Sebastian Kokelaar* instructed by Judge & Priestley, solicitors of Bromley, for the first respondent

The second respondent did not appear and was not represented

No cases referred to

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## DECISION

1. The appellant in this case is the long leaseholder of a flat (flat 5C) in a building, 3-5 Orsett Place, London W2 6AJ, that consists of two houses converted into nine flats. Three of the flats are let to secure tenants and the remaining six are let on long leases. The freeholder is the City of Westminster, and the first respondent is the arms length management organisation that manages the property. The second respondent is the only one of the other leaseholders to respond to the appeal

2. The appellant's flat is the largest one in the building, occupying the first floor of both houses. He holds it under a lease dated 17 September 1997 from the City of Westminster. The flat originally had three bedrooms. On 14 October 2008 the council granted the appellant a licence to carry out certain works to the flat, which included the removal of the wall between the living room and one of the bedrooms. As a result of the works carried out pursuant to this licence the flat in its present configuration has only two bedrooms.

3. Clause 3(c) of the lease of flat 3(C) provided that the lessee will pay "such annual sum...as representing a fair and reasonable proportion of the reasonably estimated amount" required to cover the service charge expenditure incurred by the landlord. Prior to the decision of the leasehold valuation tribunal that is the subject of this appeal the remaining five long leases in the building provided that the tenant was liable to pay "such annual sum...as representing the due proportion of the reasonably estimated amount" required to cover the service charge expenditure incurred by the landlord; and in each case the "due proportion" was defined as a fixed percentage. The percentages had been defined by reference to the number of bed spaces in each flat, on the basis that there were 20 bed spaces in the building. All the flats other than flat 5C had either one bed space or two bed spaces, and the percentages fixed for these was therefore either 5% or 10%. The appellant had been charged 30% of the expenditure, although, unlike the other flats, this was not a percentage fixed by his lease.

4. More recently, following representations from the appellant, Citywest decided to revise the total number of bed spaces in the building down to 19, with the number allocated to the appellant's flat being reduced from 6 to 5, and his contribution being reduced from 30% to 5/19ths or 26.316% of the total. The effect of this reduction would be that the total of the service charge contributions made by all the flats was only 96.316% of the expenditure. In view of this Citywest made two applications to the LVT, seeking to bring the total contributions up to 100%. It proposed to do this by increasing the fixed percentage of the flats with one bed space to 5.263% and that of those with two bed spaces to 10.526%. The first application was expressed to be made under section 27A(1) and (2) of the Landlord and Tenant Act 1985 and sought a determination that "in respect of service charges demanded and to be demanded" a calculation in relation to flat 5C was fair and reasonable if calculated on the basis that the service charge represented 5/19ths of the total expenditure on the building. The second application was made under section 35 of the Landlord and Tenant Act 1987 and sought variations of the leases of the other five long leasehold flats by substituting fixed percentages of, as appropriate, 5.263% or 10.526%.

5. The appellant appeared at the LVT hearing to oppose both applications, and two of the other long leaseholders did so too, objecting to the proposed increases in their contributions. The appellant's case was that the bed space method of apportionment was wrong. He argued that it was impossible to differentiate between a bedroom and a living room as people could configure their flats in different ways. His flat was less than a quarter of the building and yet it was proposed to charge him 26.316% of the total expenditure. The cut-off point between single bedroom and a double bedroom (110 sq ft) was arbitrary, and there were anomalies where a studio was used as both living and sleeping accommodation. He pointed out that, following the alterations that had been made to it, his flat had two bedrooms and thus 4 bed spaces rather than 5. His proposal was that the contributions should be based on the total living space of each flat.

6. In its decision the LVT considered first the application expressed to have been made under section 27A in relation to the appellant's flat. It said:

“26...It is accepted by the Tribunal that there is more than one method of apportioning service charges but whatever method is used, it must provide a fair and reasonable apportionment. It is for the landlord to select the methodology, as it is the landlord who has the obligation to manage a building and provide the services in accordance with the obligations in the lease...”

29. The Tribunal finds that the method adopted falls within the parameters of a fair and reasonable method of apportionment, even though it may not be the only one. The tribunal can see no reason to alter a method that it considers to be fair and has been used throughout Westminster for many years...”

The LVT rejected the arguments that the appellant had advanced. It is to be noted that in dealing with a submission from another leaseholder that the basement flats should not be asked to contribute to major works to the internal common parts, the LVT said (at paragraph 32) that in its view there was considerable merit in the argument that the cost should be divided between the 15 bed spaces allocated to the flats excluding the basement flats, with the external work being allocated on a 19 bed basis. It appears, therefore, to have accepted the fairness not only of the method of apportionment but also the attribution of 5/19ths to the appellant's flat.

7. On the application to vary the leases under section 35 of the 1987 Act the LVT said:

37 The Tribunal can see no logic in altering the percentage in all the leases with the exception of Flat 5C, where there has been a dispute about the amount attributable. The proposal as it stands could create uncertainty in the years to come. In the Tribunal's view this uncertainty can be avoided by making all the leases consistent in providing for each of the long leaseholders to be asked to pay a fair and reasonable proportion and the Applicants actually demanding the appropriate service charge, calculated consistently with their whole portfolio.

38. This would allow for any re-configuration of the Building, as suggested by the Fifth Respondent as being a possibility, when any changes could be reflected in the actual service charge collected. Although there would not be the certainty of percentages, this

exercise would fail if the Lease of Flat 5C were not consistent with the remaining leases...”

8. The LVT accordingly determined that each of the five leases should be varied so as to provide that the service charge payable should be “a fair and reasonable proportion (as determined by the lessor)” of the total expenditure on the building. Because the effect of its decision was to increase the amount payable by each of the five leaseholders it went on to award compensation to them to reflect the additional amount that they would have to pay.

9. The appellant sought permission to appeal against this decision, raising a number of points, including the contentions that had been expressly rejected by the LVT. The LVT refused permission, but I granted permission, limiting it just one of the grounds advanced: whether the LVT had failed to take account of the fact that, following the physical alterations, the appellant’s flat contained two bedrooms and not three, so that the number of bed spaces attributable to his flat should have been four. There is an agreed statement of facts that records the following matters:

- (a) The appellant, under licence from the landlord dated 14<sup>th</sup> October 2008 reconfigured his property so that it is a 2-bedroom flat with a bed space weighting of 4.
- (b) The appellant’s flat from the commencement of the lease until 14<sup>th</sup> October 2008 was a 3-bedroom flat with a bed space weighting of 5.
- (c) For the purpose of the service charge computation the landlord has at all times and continues to apportion a bed space weighting of 5 for the appellant’s flat.

10. On the basis of these facts, the appellant argues that the LVT ought to have concluded that his contribution should be 4/18ths. He points out that in paragraph 38 it expressly envisaged a recalculation if the building were to be reconfigured. For Citywest Mr Sebastian Kokelaar submits that it is fair and reasonable that the appellant’s contribution should continue to be calculated on the basis that it has five bed spaces since, as the LVT observed in its decision Westminster’s aim is to assess the potential occupancy level of the flats in the building and the appellant’s flat still has the potential to accommodate up to five people. Any reduction in the appellant’s contribution would mean an increase in the contributions of the other tenants, and there was no reason why they should have to pay more simply because the appellant has increased the size of his living room.

11. Importantly Mr Kokelaar draws attention to the following provisions in the licence granted to the appellant for the alterations to his flat:

“4. Nothing herein contained shall be deemed to authorise any other or further alterations or works to the Premises or any part thereof or in any way affect the liability of the Lessee to the Corporation under the terms of the Lease

6. As and when the Works shall have been completed all the Lessee’s covenants conditions and agreements contained in the Lease as varied by the provisions of Clause

2 hereof shall be applicable to the Premises in the same manner and as fully and extensively as if the Premises had continued in the same state as the same were in prior to the carrying out of the Works”

12. Mr Kokelaar submits that the effect of these provisions is that the council is free to ignore the works carried out pursuant to the licence in calculating the fair and reasonable proportion of the annual service charge expenditure that is payable by the appellant pursuant to clause 3(C) of the lease. I agree with this. Indeed the effect of the provisions is in my view that the council must determine the “fair and reasonable proportion” that the appellant is required to pay by reference to the state that the flat was in prior to the carrying out of the works. And that necessarily provides the complete answer to the appellant’s contention on the point on which permission to appeal was granted.

13. On the face of it this would suggest that the appeal must simply be dismissed. There is, however, a further matter that I should deal with. I have referred to the first application as having been “expressed to be made” under section 27A. The reason for so putting it is this. Under section 27A(1) application may be made to an LVT “for a determination whether a service charge is payable”; and section 18 defines “service charge” is to mean “an amount payable by a tenant...” Thus an application under section 27A(1) can only be made in respect of an amount of money. Under section 27A(3) an application may be made to an LVT for a determination whether “if costs were incurred for services...a service charge would be payable for the costs”. So an application under subsection (3) can only be made in relation to costs and for the purpose of gaining a determination as to whether a service charge would be payable for those costs. The purported section 27A application in the present case, however, does not relate to an amount of money payable as a service charge; nor does it relate to costs for which a service charge might be payable. What the application sought was a determination that “in respect of service charges demanded and to be demanded” a calculation in relation to flat 5C was fair and reasonable if calculated on the basis that the service charge represented 5/19ths of the total expenditure on the building. And the decision of the LVT was expressed as a determination that the method of assessing the service charges by applying an allocation of bed spaces was fair and reasonable and that the method resulted in a proper and fair allocation of the service charges between the respondents. (paragraph 31).

14. It is clear in the light of this that the decision can have no effect for the purposes of section 27A since it does not determine anything that the LVT had power to determine under that section. However, its conclusion that the method of apportionment adopted by the council was a fair and reasonable one undoubtedly underlay its decision to vary the lease of the other five long leasehold flats, so that its reasoning on the purported section 27A application was material to its decision. In the circumstances there is nothing procedurally that needs to be done other than to dismiss the appeal.

Dated 8 August 2011

George Bartlett QC, President