Who decides when fair's fair?

Tenants now have far greater scope to challenge the apportionment of service charges

RESIDENTIAL VIEW

Nicola Muir

What proportion of the service charge does a leaseholder have to pay? The obvious answer is whatever percentage of the service charge the tenant has covenanted to pay under his lease. But what if the lease does not state a fixed percentage and provides that the tenant shall pay a "fair" or "reasonable" proportion of the service charge, to be determined by the landlord? Again the answer may seem obvious – provided the apportionment is "fair" or "reasonable", the sum payable is whatever the landlord determines it should be. That is what the parties signed up to. However, two recent cases in the Upper Tribunal (Lands Chamber) ("the UT") have determined that such provisions are void. The landlord cannot decide how to apportion the service charge, the First-tier Tribunal ("F-tT") must decide.

Good news for tenants

In the case of *Windermere Marina Village Ltd* v *Wild and others* [2014] UKUT 163 (LC); [2014] 3 EGLR 12, the tenant of a flat covenanted to pay a fair proportion of the cost of the services to his block "to be determined by the surveyor for the time being of the lessor whose determination shall be final and binding". This formula is not uncommon as it allows for flexibility. The tenant thought that his share of the service charge was unfair and challenged it. The question arose as to whether the F-tT had jurisdiction to adjust the apportionment of the service charges if it was unreasonable. Faced with a novel argument, the UT accepted that, while as a matter of ordinary contract law the lease required the lessor's surveyor to determine how service charges should be apportioned, such a provision is void under section 27A(6) of the Landlord and Tenant Act 1985.

That section says that any 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, of any question which may be the subject of an application as to the payability of service charges. As a result the agreement that the proportion of the service charge should be determined by the lessor's surveyor must be struck out. The UT said that the resulting lacuna has to be filled by the F-tT, whose job it becomes to determine how service charge should be apportioned. It was, though, stressed that the F-tT has no jurisdiction to tinker with fixed percentages because this is a matter which has been "agreed" by the tenant for the purposes of section 27A(4).

What happens if the apportionment regime determined by the lessor's surveyor has been arrived at in accordance with the lease and is fair – can the F-tT just approve the existing scheme? Apparently not. In *Gater and others* v *Wellington Real Estate Ltd* [2014] UKUT 561 (LC); [2015] PLSCS 12, the F-tT took the view that where there are a range of different ways in which the apportionment can be undertaken, so long as the method selected by the landlord or his surveyor is a fair one, it had no power to substitute a different method. However, the UT said this was the wrong approach. The exercise to be undertaken by the Ft-T is not to ask itself whether the landlord's surveyor's method of apportionment was fair but what the fair apportionment should be. In other words, the Ft-T must decide.

Bad news for landlords

Many landlords have leases where the landlord or its surveyor is to determine the method of apportionment. It allows for flexibility where circumstances change, eg additional flats are added to the block. Common methods adopted include shares based on floor areas, rateable values, an equal split or the number of bed spaces in the flat – an approach popular with local authorities. The apportionment may be more sophisticated – there may be some costs to which all tenants contribute and others which only commercial tenants pay. There may also be historical reasons why a particular method has been adopted – perhaps some of the leases require service charges to be apportioned on the basis of rateable values (no longer a fashionable method) and it was convenient to adopt the same method for the whole block.

It will be a rare block where every leaseholder is entirely satisfied with his proportion of service charge. Tenants on the ground floor feel aggrieved at having to contribute towards the lift; single occupiers object to paying the same amount as flats in multiple occupation. Whatever method is adopted there will be winners and losers. Until recently, the advice to the tenant has been that, provided the apportionment is carried out in accordance with the lease, the tenant is stuck with it unless there are grounds for a variation under section 35 of the Landlord and Tenant Act 1987. These recent decisions change all that. A tenant can now ask the F-tT to reopen the apportionment in relation to both past and future service charges if the agreement falls foul of section 27A(6).

But if one tenant's share is reduced there will either be a shortfall or there will have to be a wholesale re-apportionment between all the contributors. Martin Rodger QC suggested in *Windermere* that if the F-tT is asked to substitute its own view of a proper apportionment by virtue of section 27A(6), it should bear in mind both the possibility of competing interests among different occupiers, and the fact that a determination under section 27A(1) binds only those who are party to it. He said that, at the case management stage, it might be appropriate for notice of the proceedings to be given to any third party who may wish to make representations.

This sounds suspiciously like a variation claim without the need to comply with one of the restricted grounds prescribed by section 35 of the 1987 Act. It also sounds rather expensive.

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Nicola Muir is a barrister at Tanfield Chambers