Philip Williams, Lessees of 38 Flats in Vista, Fratton Way v Aviva Investors Ground Rent [2020] UKUT 111 (LC)

In this appeal concerning the Tribunal's jurisdiction to determine reasonableness and payability of service charges, the Upper Tribunal held that the lessees had to pay the proportions of service charges fixed by their leases. Wording purporting to give the landlord power to alter the apportionments was void, and the Tribunal had no power to review the fixed apportionments to which the tenants had agreed.

The decision

The Tribunal's jurisdiction to make determinations about service charges derives from s.27A of the 1985 Act. Subsections 1 to 3 set out the matters in respect of which determinations may be made. Subsection 4 provides that no application may be brought in respect of matters admitted or agreed by the tenant, or which have already been determined. Subsection 6 provides that:

> *(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) or (3).*

The Appellants' leases specified the proportions of various service charge items to be *'[a specified percentage] or such part as the Landlord may otherwise reasonably determine'.*

The Upper Tribunal held that the words *'or such part as the Landlord may otherwise reasonably determine'* are rendered void, due to the operation of s.27A(6) Landlord and Tenant Act 1985. Accordingly, the Appellants were to pay the percentages specified by the leases.

The Tribunal had no jurisdiction to review those specified percentages, or to make its own decision as to apportionment, due to s.27A(4) – the Tribunal cannot intervene where the parties have agreed. Any change in the apportionments would have to be achieved by a consensual variation of the leases or on an application under Part IV of the Landlord and Tenant Act 1987.

The Tribunal's reasoning

Judge Elizabeth Cooke, giving the decision of the Upper Tribunal, referred to the decision in *Windermere Marina Village Limited v Wild and Barton* [2014] UKUT 163 (LC). In that case, the lessee was required '*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…'.*

The Tribunal in *Windermere* found that this means of fixing apportionments was void as a result of s.27A(6), as it purported to determine in a particular manner that which would otherwise be under the jurisdiction of the Tribunal. Accordingly, the wording in brackets was to be deleted from the lease, and the Tribunal was to make its own decision (rather than review the landlord's decision) as to what would be a fair apportionment. The overall clause was, however, not void.

In *Vista* at first instance, the leaseholders had argued, following *Windermere,* that the effect of s.27A(6) was to render void the wording allowing the landlord to determine the percentages. This left the fixed percentage, susceptible only to consensual variation. The respondent landlord argued that

the Tribunal would retain jurisdiction to say whether the proportion chosen by the landlord was a reasonable one or not; accordingly, the wording was not rendered void by s.27A(6), and the landlord could adjust the proportions. The First Tier Tribunal found for the landlord.

The Upper Tribunal reversed the FTT's decision. The effect of *Windermere*, Judge Cooke explained, is that a clause which purports to provide for the landlord to determine apportionment is void. That is unaffected by whether the landlord agrees to submit to the tribunal's jurisdiction, and also unaffected by whether or not there is any wording stating that the landlord's decision is binding or final.

That being so, the relevant wording was to be deleted from the leases, leaving only the fixed percentages. These had been agreed by the tenants as part of agreeing to the leases, and accordingly the Tribunal had no jurisdiction to review them, pursuant to s.27A(4). This situation is to be distinguished from *Windermere*, where removing the impermissible wording left no suggestion as to what a fair proportion might be and therefore left the point open for the Tribunal to determine.

Commentary

The effect of this decision is that where a lease provides for apportionment to be a fair amount, although no doubt the landlord will decide apportionment and charge service charges on that basis, the matter will be open to be determined entirely by the FTT (if any tenant applies under s.27A) and the FTT will make its own decision about what is fair. Where, however, the 'fair amount' is in the alternative to a fixed percentage, the parties are powerless to go beyond that fixed percentage: the landlord cannot make a determination, nor can the FTT alter the fixed percentage, or even review whether that percentage is fair or reasonable.

This is, perhaps, a surprising distinction. The difference between the requirement in a lease that the proportion be "such part as the Landlord may reasonably determine" (*Williams*) and "a fair proportion (as determined by the Surveyor whose decision shall be final and binding)" (*Windermere*) appears to be grammatical. However, the reasoning in this case suggests that it is not possible to separate out the landlord's power to determine, which produces possibly unexpected results.

Many long residential leases contain clauses referring to the landlord's power to make determinations. Following *Williams*, these appear to be void in their entirety. What if the only proportion specified was "such part as the Landlord may reasonably determine"? That specification in the lease would be void, leaving no proportion at all. Similarly, a clause may provide that the landlord should determine, on the basis of what is fair, how expenditure on a mixed-use building is to be ascribed to the residential and commercial elements. That clause must also be void, leaving nothing to guide who pays what. Likewise, a clause may provide that the landlord or his surveyor should determine what service charge is to be paid in advance. That clause would also be void – apparently leaving no clause in the lease that an advance charge be payable, to be cured by s.19.

However, the practical effect of all the above clauses would be maintained if the wording did not reflect the implicit fact that in the absence of challenge, it will be the landlord who decides what is fair. It would appear to be acceptable for a clause to require tenants to pay a fair proportion of the costs, or a reasonable sum in advance on account of service charge. This distinction cannot be right.

A more practical outcome would perhaps have been to read a clause such as the one in this lease as valid in its entirety, permitting a landlord reasonably to set the proportion, but open to

redetermination afresh by the FTT if an application were made.[1] The difficulty with this is that s.27A makes a clause deciding the method of determination void. It is hard to rewrite a clause such as the one in this case as a fixed percentage or "a reasonable proportion", which is what appears to be needed to prevent wholesale invalidity.

To get past this difficulty, one would have to revisit the meaning of "determination" in s.27A(6). One would have to understand "determination" as including only conclusive determinations - that is, sub-clauses, like that in *Windermere*, meant to make a landlord's decision final and binding. If that were so, then a provision allowing a decision by the landlord would not itself be void, but would be open to review. That was what generally would have been understood to be the outcome with both the *Windermere* and the *Vista* clauses, until *Windermere* was decided.

Practical implications

Where does this decision leave landlords and tenants? There are likely to be numerous blocks where landlords have purported to vary the apportionments according to similar clauses. It may be that numerous leaseholders now decide to pursue this point before the tribunal. This decision may thus appear to be beneficial to leaseholders in limiting landlord power.

However, there are situations where it is useful to have a clause permitting a landlord variation of the service charge proportions, provided the particular variation could be challenged before the Tribunal. Consider, for example, a right to manage company acquiring the right to and then manging a single block of flats where the service charges have been calculated to give a total of 100% across multiple blocks on an estate. The RTM company will be faced with less than 100% recovery of estate-wide costs. To cure this, the lessee-controlled RTM company wishing to adjust the percentages will have to obtain agreement from all lessees, perhaps by the cumbersome and possibly impractical process of varying individual leases presumably with the consent of the landlord. Similarly, where an extra floor is added to a block, there is no mechanism by which the landlord could be compelled to incorporate it into the service charge apportionments, even where not to do so would be unfair. If the landlord could have varied the percentage to a reasonable or fair proportion, the lessees might well have been able to argue under s27A of the 1985 Act for an adjustment.

The only means for altering the proportions in the lessees' leases is variation. In the absence of consensual variation, the avenues for applications to the Tribunal are limited. In particular, if the majority of lessees required for an application under s.37 Landlord and Tenant Act 1987 cannot be achieved, then the Tribunal's jurisdiction under s.35 of that Act only extends to altering the means of computation of service charges where the apportionments do not add up to 100% of the expenditure. In the above examples, it seems unlikely that s.35 would assist.

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[1] Following *Windermere,* the FTT's jurisdiction in relation to a "fair proportion" is to decide anew what is fair. It is not, as had been argued in that case, to review the landlord's choice and determine whether it fell within the reasonable range of what is fair.