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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BE/LSC/2013/0596**
Property	:	**77 St Helena Road, London SE16 2QY**
Applicant	:	**Derek Albert King**
Representative	:	**None**
Respondent	:	**London Borough of Southwark**
Representative	:	**Ms Ezania Bennett and Mr Gulam Dudhia**
Type of Application	:	**Determination of service charges payable – section 27A Landlord and Tenant Act 1985**
Tribunal Members	:	**Judge John Hewitt Chairman** **Mr Mel Cairns MCIEH** **Mr Nat Miller BSc**
Date and venue of Hearing	:	**7 January 2014** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**13 January 2014**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:

   1.1 The Applicant is obliged to contribute to the costs of repair and maintenance of the lift serving the building known as 1-99 St Helena Road, on the Silwood Estate;

   1.2 The Applicant is not obliged to contribute to the costs of the entry-phone system;

   1.3 The Applicant is not obliged to contribute to the costs of maintenance of gardens or landscaped areas;

   1.4 An order shall be made by consent (and is hereby made) pursuant to section 20C Landlord and Tenant Act 1985 to the effect that none of the costs incurred or to be incurred by the Respondent in connection with these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant; and

   1.5 Any application which the Applicant may wish to make in respect of reimbursement of fees shall be made in conformity with the directions set out in paragraph 41 below.

2. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background

3. The Applicant (Mr King) made an application pursuant to section 27A Landlord and Tenant Act 1985 (the Act) in which he sought a determination as to his liability to contribute to the costs of certain services provided by his landlord, the Respondent (the Council). Mr King also made a related application pursuant to section 20C of the Act as regards any costs which the Council might incur in connection with these proceedings.

4. At a case management conference held on 17 September 2013 the issues between the parties were clarified and directions were issued. By and large the parties have complied with those directions.

5. The application came on for hearing before us on 7 January 2014. It was listed for hearing at 10:00. Mr King was not present by about 10:10 and the Tribunal's case officer called him on his mobile telephone to ascertain his whereabouts. The case officer reported to the Tribunal that Mr King had informed her that he had been taken unwell and

admitted to hospital but he wished the hearing to go ahead in his absence and 'for the Tribunal to come to its own conclusions'.

6. At the hearing the Council was represented by Ms Ezania Bennett, Senior Enforcement Officer and by Mr Gulam Dudhia, an accountant. Mr Hugh Barber, a collections officer with the Council, was also present as an observer.

7. Mr King's predicament and request was reported to the Council's representatives who raised no objection to the hearing proceeding in Mr King's absence.

8. Having considered the issues, the evidence so far provided by the parties and Mr King's request and bearing in mind the overriding objective, the Tribunal considered that it was in the interests of justice to proceed with the hearing in Mr King's absence.

The issues

9. In his application form Mr King sought a determination on his liability to contribute to the costs incurred by the Council in relation to:

Lift;
Entry-phone system;
Maintenance of gardens or landscaped areas; and
TV aerial

At the case management conference Mr King withdrew his challenge in respect of the TV aerial. Mr King also confirmed that his challenge was to his obligation to contribute to the costs incurred in principle and he was not challenging the reasonableness of the costs incurred or the proportion of costs attributed to his property.

10. At the hearing the Council conceded that the terms of Mr King's lease did not oblige him to contribute to the costs of the entry-phone system.

11. Thus the issues for the Tribunal where whether the lease, as properly construed, obliges Mr King as the tenant to contribute to the costs incurred by the Council as landlord in respect of the lift and the maintenance of gardens and landscaped areas.

The lease

12. Mr King has lived in the property for some 45 years, originally as a secure tenant. In or about 1988 Mr King decided to exercise the Right to Buy conferred by the Housing Act 1985.

13. It appears initially that the right was exercised by Mr King and wife, Mrs Barbara Edith King (Mrs King). At [229 and 230] are copies of notices issued to Mr and Mrs King prior to the grant of the lease. We shall return to [229] shortly.

14. The subject lease is dated 14 November 1988. A copy is at [13]. It will be seen that as originally drafted it was to be granted to Mr & Mrs King. However, in the event it was granted to Mr King alone.

15. Some key definitions in and provisions of the lease are as follows:

The building: defined at 1-99 St Helena Road

The estate: defined as the estate known as Silwood Estate including all roads paths gardens and other property forming part of thereof

The flat: defined as the flat shown coloured pink on a plan and known as number 77 on the ground and first floors of the building

The services: defined as the services provided by the Council to or in respect of the flat and other flats and premises in the building and on the estate and more particularly set out hereunder:-

As originally drafted the list of services read as follows:

(i) central heating;*
(ii) hot water supply;*
(iii) lift;
(iv) caretaking lighting and cleaning of common areas;
(v) entry-phone system;*
(vi) cleaning of windows and common areas;
(vii) maintenance of common television aerial or landline;*
(viii) maintenance of estate roads and paths;*
(ix) estate lighting;
(x) refuse disposal;
(xi) maintenance of gardens or landscaped areas;*
(xii) unitemised repairs

However a number of those services had been crossed through with consequential re-numbering of those that remained. Those crossed through are marked with an * above.

Material for present purposes it may be noted that 'lift' was not crossed through but 'maintenance of gardens or landscaped areas' was.

16. By a manuscript addition there was added a clause 2(17) [23] being a covenant on the part of the tenant to maintain and keep in repair the

boundary walls fences or hedges now or hereafter to be erected on the sides of the property marked with the letter 'T' inwards on the plan.

17. Paragraph 2 of the First Schedule [33] grants to the tenant the *"Full right of way on foot and over such parts of the building as afford access to the flat"* and paragraph 6 [34] grants *"The right to use the lift (if any) in the building serving the flat"*.

The flat, the building and the estate

18. At the hearing the Council's representatives told us that the Silwood Estate comprised a number of buildings shown coloured blue on the plan at [46]. On the estate there are number of amenity or 'green' areas, including children's play areas, which are available for use by the residents and their visitors.

19. The building comprising 1-99 St Helena Road comprises four interconnected buildings forming an 'L' shape lying on its back towards the right of the plan. The building appears to comprise four storeys, as shown in the photographs at [221 and 226]. Some of the flats, including number 77 are accessed direct from the street as shown in the photograph at [218], in the centre of which is number 77. The photograph also shows the small front garden enjoyed with the flat. Access to the upper flats is via common parts which can be seen in the photographs at [222, 225 and 226].

20. We were told, and we accept, that as originally constructed there were two lifts serving the building. However, some ten years or so ago the decision was taken to decommission one of the lifts and retain just one lift to serve the upper parts. Evidently the view was that this would lead to a saving in the costs of lift repairs and maintenance and that with a low rise block one lift was adequate provision. The lift which remains is accessed via the door entry giving access to 1-45 St Helena Road. Evidently once inside the common parts are laid out such that all the upper floor flats can be accessed via the lift.

21. Subsequently and for security purposes the Council has upgraded the door entry system leading to the common parts serving the upper parts and this is now controlled by an electronic fob system.

22. It is self-evident that Mr King does not require lift access to get to and from the street and his property and equally he does not require to make use of the internal common parts to access his property.

The gist of the case for Mr King

23. As regards the lift the gist of the case for Mr King is set out in a letter to the Council dated 26 July 2013 [201]. He asserted that since adaptations were carried out some years ago and the fob entry-phone system installed he has not been able to access the building to get to the lift. He stated that in the 45 years he has lived at the property he has not in any way, shape or form wanted to have access to the lifts.

24. Mr King also asserted that in or about 2007 he came to an agreement with the Council that they would not charge and he would not pay contributions to the cost of lift repairs and maintenance. It was conceded by the Council that the estimated accounts year end accounts sent to Mr King from year ended 31 March 2008 to date show against the item 'Lift' the sum of '£0.00'. The Council does not concede that this was the result of an agreement reached with Mr King. We shall explain the Council's position shortly.

25. Mr King also submitted it was his understanding that if you had your own front door which opened onto the street, you do not have to pay for lifts; you only have to pay for lifts if you live in a tower block with a lift as part of the building.

26. As to grounds maintenance Mr King's case is that the lease does not oblige him to contribute as this item in the defined 'Services' was crossed through.

The gist of the case for the Council

27. As regards the lift the Council submitted that the lease obliges the tenant to contribute to the costs of the lift and it is immaterial whether or not the tenant has the right to use the lift or the need to use to lift to access the demised premises. That said the Council did say that it was willing to provide Mr King with an electronic fob so that he can access the lift should he wish to do so. Evidently a fob is issued free of charge to each resident on initial request but a charge is levied for any replacement or additional fobs requested.

28. The representatives of the Council told us that despite a search of the relevant files they could find no evidence of an agreement with Mr King that as from year-ended 31 March 2007 it would no longer charge him contributions to the costs of lift maintenance and repairs. It was explained to us that it was the practice of the Council to put a 'flag' on an account if an item of expenditure was challenged by a tenant pending the resolution of the challenge. As regards Mr King, we were told that the 'flag' had been in place for several years due to an oversight on the part of the Council in investigating and dealing with the original challenge. Evidently the 'flag' was only appreciated by the relevant officer as a result of these proceedings. The Council maintained that it was entitled to recover from Mr King contributions to the costs of repair and maintenance of the lifts. As regards prior years Mr Dudhia said that the Council was aware of the 18 months rule and the limitations imposed by section 20B of the Act.

29. As regards maintenance of gardens or landscaped areas the case for the Council was that Mr King and his family and visitors had the use and benefit of the gardens and landscaped areas and that it was fair he should contribute to the costs on a quantum meruit basis. The representatives of the Council intimated that the words 'maintenance of gardens or landscaped areas' had been crossed out in the lease in error. No evidence of this was provided but reliance was placed on a pre-lease

document [229] issued to Mr & Mrs King which set out an estimated total of service charges payable annually in the ensuing 5 years which included an entry: *"Garden Maintenance: Average Annual Cost: £16.81"*

Discussion and consideration of the issues.

30. As regards the lift we find that the lease does not grant to the tenant an express right to use the lift which has been retained in service. The right granted by paragraph 6 of the First Schedule grants only a right to use the lift (if any) serving the flat. We find there is no lift which serves the flat.

31. The 'Lift' was not crossed out in the list of Services when the lease was granted. We prefer the submissions of the Council that an obligation to contribute to the costs of a lease can arise whether or not a tenant has a right or need to use a lift to access his or her property. We do so because the submission strikes a chord with the experience of the members of the Tribunal in that it is not uncommon to find in leases an obligation on the part of a tenant of a ground floor flat to contribute to the costs of a lift.

32. Mr King does not contend that 'Lift' should have been crossed out in the list of services but was left in in error. Indeed Mr King did contribute to the lift costs from 1988 to year ended 31 March 2007.

We reject Mr King's submission that the fact of the adaptations carried out and the installation of an electronic door-entry system controlled by fobs was a material change which had or has the effect of releasing him from the obligation in the lease to contribute to costs associated with the lift.

33. There was no evidence before us upon which we could rely upon with any confidence that Mr King and the Council had reached a binding agreement to the effect that as from year ending March 2007 Mr King would no longer be liable to contribute to the costs associated with the lift. Mr King has presented no evidence and to when, how and in what circumstances such an agreement was arrived at. If such an agreement had been arrived it would have brought about a variation of the lease and we find that both parties would have recorded that is some written form.

34. We find that the fact that since year-ended 31 March 2008 the Council has not sought to recover contributions from Mr King in routine annual service charges is not evidence of an agreement of the kind contended for by Mr King. We accept the evidence from the Council about the 'flag' practice. Drawing on the accumulated experience and expertise of the members of the Tribunal we infer that the 'flag' remained in place for several years due to oversight or ineptness on the part of the Council's officers.

35. As to the maintenance of gardens or landscaped areas we reject the Council's submission that because Mr King may have the benefit of the service provided he has the obligation to contribute on a quantum meruit basis. The principal of quantum meruit arises where there is an obligation on one party to pay something to another party but there is no fixed sum payable was agreed, and the law says that such sum shall be payable as is deserved. In the present case there is no contractual obligation on Mr King to contribute because that item in the list of services to which he must contribute has been crossed out.

36. We also reject the submission that the item in question had been crossed out by mistake. First no evidence of such a mistake was presented by the Council; it was mere conjecture. The pre-lease estimate of service charge costs relied upon by the Council does not, in our view, evidence a mistake. The document was pre-lease. It is clear that the lease was prepared and engrossed and then a number of manuscript additions and alterations took place. These included the deletion of Mrs King as a joint tenant with Mr King, the addition of a covenant to keep in repair the fences or walls around the front garden and the deletion of a number of services. We infer that from the time when the lease was engrossed the parties had further negotiations which resulted in agreed manuscript alterations to the lease as originally engrossed.

37. There is no evidence or material before us upon which we can rely upon with any confidence that the crossing out in the lease was due to a mistake. In any event, even if that was the case the lease before us is the lease as granted and stands unless and until it may be varied or rectified by agreement between the parties or as declared by the court.

The section 20C application

38. The representatives of the Council informed us that the Council did not propose to put any costs which it has incurred or may incur in connection with these proceedings through a service charge payable by Mr King. The Council had no objection to an order being made by consent. We have therefore made an order pursuant to section 20C of the Act.

Reimbursement of fees

39. Mr King was unable to attend the hearing due to ill-health. If he had been present he may have made an application for reimbursement of the fees paid by him to the Tribunal.

40. In these circumstances the Tribunal considered it fair and just to give Mr King an opportunity to make an application in writing and that any such application should be determined on the papers. The Council did not raise any objections.

41. Accordingly any such application as Mr King may care to make shall be made in accordance with the following the directions:

41.1 Any application which Mr King may wish to make shall be made in writing and delivered to the Tribunal and to the Council by no later than **5pm Friday 7 February 2014**. The application shall set out all facts and matters which Mr King wishes to rely upon in support.

41.2 The Council shall by **5pm Friday 21 February 2014** file with the Tribunal and serve on Mr King a statement of case in answer. The statement of case shall set out all facts and matters which the Council wishes to rely upon.

41.3 Mr King shall by **5pm Friday 28 February 2014** file with the Tribunal and serve on the Council a statement of case in reply if he wishes to do so.

42. The Tribunal proposes that any application which may be made shall be determined on the papers pursuant to Rule 31 and notice is hereby given to the parties.

43. For avoidance of doubt we wish the parties to be clear that this Decision is our substantive decision on Mr King's application and is given pursuant to Rule 36. Accordingly for the purposes of Rule 52 any application for permission to appeal must be made within 28 days after the date on which this Decision is sent to the parties.

Judge John Hewitt
13 January 2014