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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/24UC/LIS/2016/0001**
Property	:	**1-33 Windmill court, St Mary's close, Alton, Hampshire, GU34 1EQ**
Applicant	:	**Hanover Housing Association**
Representative	:	**Devonshires LLP, Solicitors**
Respondent	:	**Various Leaseholders**
Representative	:	**Laytons, Solicitors**
Type of Application	:	**For the determination of the liability to pay a service charges**
Tribunal Members	:	**Judge I Mohabir**
Date of Hearing	:	**20 June 2016**
Date of Decision	:	**20 June 2016**

DECISION

Introduction

1. This is an application made by the Applicant under section 27A of the Landlord and Tenant Act 1985 (as amended) ("the Act") for a determination of the Respondents' liability to pay service charges for the year 2015 in relation to Windmill Court.

2. Windmill Court is comprised of two separate blocks of residential flats for the elderly. Block 1 consists of 18 flats situated over three floors with corridors, a reception/entrance area and has the benefit of a lift.

3. Block 2 consists of 15 separate self-contained maisonettes each of which has its own entrance. It does not have the common areas and the lift found in Block 1. In addition, the lessees of Block 2 do not have access to Block 1, as this can only be done by means of fob keys and these are only issued to the lessees of Block 1 by the Applicant.

4. The development also contains gardens, paths and parking areas, which are lit and maintained by the landlord and are regarded as common areas by both parties.

5. All of the leases of the flats were variously granted on the same terms. By clause 4(i) of the leases, the lessee covenants to pay an equal thirty second share of the service charge expenditure incurred by the Applicant pursuant to the heads of expenditure set out in the Schedule to the leases.

6. However, it seems that historically, the service charge expenditure has been apportioned according to the actual expenditure incurred in relation to each block. Therefore, Block 1 has had a higher overall service charge expenditure and greater service charge liability because

of the additional cost of cleaning, lighting and heating the common parts and the lift in that block ("the additional costs")

7. The Applicant now contends that the overall service charge expenditure should not be apportioned as before and each of the leaseholders should bear an equal thirty second share of the overall expenditure. Unsurprisingly, the majority of the leaseholders in Block 2 who have responded to this application have objected.

8. Consequently, on 18 February 2016, the Applicant made this application to the Tribunal seeking a determination on the Respondents' contractual liability to pay a service charge contribution for the following expenditure in relation to Block 1:

   (a) the cost of cleaning, lighting and heating the common parts.

   (b) the cost of providing and maintaining the lift.

   The application is not concerned with the reasonableness of the expenditure in relation to these matters.

Lease Terms

9. Paragraph 1 of the Recitals to the leases defines "the Property" as being *"...the freehold land and buildings situate at Windmill Court...comprising a block of flats* ***and*** (my emphasis) *a block of maisonettes...known as numbers 1 to 33 inclusive Windmill Court..."*.

10. Although the Respondents' correctly submit that the leases do not expressly define the common parts, it is clear from the wording in paragraph 2 of the Recitals that these areas are comprised of the non-demised parts of the property retained by the landlord and used in common by the lessees.

11. As stated earlier, the lessees' covenant to pay a service charge contribution is contained in clause 1 of the leases for the heads of expenditure set out in the Schedule. These includes, *inter alia*, the following:

"(2)(b)the cost and expenses of maintenance of the structure exterior and common parts of the Property...

(c) the expense of cleaning and where necessary lighting the areas used in common by the Lessee and the other lessees and the Company.

...

(f) the cost of providing and maintaining any services or amenities used in common by the lessees of the dwellings on the Property...".

Decision

12. The Tribunal's determination took place on 20 June 2016 and was based solely on the respective statements of case and documentary evidence filed by the parties. There was no oral hearing and the Tribunal did not inspect the subject property.

13. The Applicant contended that the historic apportionment of the additional costs incurred in relation to Block 1 had simply been wrong. It submitted that the lessees of Block 2 are contractually liable for an equal thirty second share of the overall expenditure for the property as a whole and no apportionment should take place as between the blocks of flats.

14. The Applicant submitted that the cost of cleaning and lighting the common parts in Block 1 was recoverable under paragraph 2(c) above and common use was not a precondition of liability to pay. The same submission was made for the recoverability of expenditure incurred for the provision of heating and the lift under paragraph 2(f) on the basis

that this was a service or amenity. Alternatively, the Applicant submitted that the cost of lift inspection and insurance was recoverable under paragraph 2(b) because it formed part of the maintenance costs.

15. It is common ground in this case that the leaseholders have a general service charge liability under clause 1 of the leases of an equal thirty second contribution for the heads of expenditure set out in the Schedule unless that contractual liability is varied. Because all of the leases were granted on the same terms, it was necessary for the Tribunal to construe the meaning and effect of paragraphs 2(b), (c) and (f) of the Schedule above and the intention of the parties to determine whether the Respondents are in fact liable for the additional costs in issue.

16. The Tribunal concluded that the cost of providing cleaning, lighting, heating and the lift in Block 1 was not contractually recoverable from the lessees of Block 2 for the following reasons. In the Tribunal's judgment, the correct test to be applied for liability to arise under paragraphs 2(c) and (f) of the Schedule is not whether they are, arguably, common parts but whether they are ***areas used in common*** (my emphasis) by the lessees of Block 2 with the lessees of Block 1.

17. Clearly, the answer must be no because that has not historically been the case. They are discreet buildings with no other shared facilities. Access to Block 1 can only be gained through the use of key fobs, which are not issued by the Applicant to the lessees of Block 2. It follows that they are not capable of using these areas in common with the lessees of Block 1[1].

18. Even if the Tribunal is wrong in its conclusions above, it is material that the Applicant has intended over the last 20 years or so to apportion liability for the additional costs as between the two blocks of flats. To

[1] see *Arnold v Britton* [2015] UKSC 36 at pages 164 to 200

say that this course of action over such a long period of time was now wrong is somewhat simplistic and ignores good arguments that may be advanced to submit that it is now *estopped* from doing so. The Tribunal has no equitable jurisdiction and was not able to consider the submissions made by the Respondents in this regard.

19. The Tribunal was also satisfied that the Applicant could not recover the cost of lift inspection and insurance was not contractually recoverable under paragraph 2(c) of the Schedule to the lease because it was not an expense of maintaining the structure, exterior of common parts of the property. Therefore, it did not fall within the scope of paragraph 2(c) and was not recoverable. This cost was the cost incurred in the provision of a service or amenity and for the reasons given above it was also not recoverable under paragraph 2(f).

20. Accordingly, the Tribunal determined that the Respondents have no contractual liability under the terms of their leases to pay a service charge contribution to the Applicant for the cost of providing cleaning, heating and lighting to the common parts of Block 1 nor the cost of providing and maintaining the lift.

Fees & Costs

21. The principle applied by the Tribunal in relation to both of these matter is that "costs should follow the event".

22. Given that the Applicant has not succeeded in the application, it must be correct that it should not recover any fees it has paid to the Tribunal to have the application issued and heard and the Tribunal makes no order in this regard.

23. The Tribunal treated paragraph 46 of the Respondents' statement of case as making an application under section 20C of the Act. When considering the application, it should be made clear that the Tribunal makes no finding as to whether the Applicant has a contractual liability

under the terms of the leases to recover its costs or the quantum of those costs. The exercise of the Tribunal's discretion is whether the Applicant should be entitled to recover any costs it had incurred in making the application.

24. As stated earlier, the Applicant has not succeeded in the application. It was, therefore, not just or equitable for it to be allowed to do so because potentially the Respondents may be liable for the costs of the unsuccessful application. Accordingly, the Tribunal made an order under section 20C of the Act preventing the Applicant from recovering any costs it had incurred in these proceedings as "relevant costs" through the service charge account.

Judge I Mohabir

20 June 2016