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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : LON/00AG/LSC/2013/0845

Property : Centre Heights 137-151 Finchley
Road London NW3 6JG

Applicant : Anaspel Limited

Representative : Mr S Allison of counsel

Respondent : 28 leaseholders of Centre Heights

Representative : Ms A Gourlay of counsel for the
Centre Heights Residents
Association
Ms A Pathirana Solicitor for the
leaseholder of Flat 7

Type of Application : For the determination of liability to
pay service charges under s27A of
Landlord and Tenant Act 1985

Tribunal Members : Judge P Leighton LLB
Mr A Lewicki FRICS
Mr A Ring

**Date and venue of
Hearing** : 1st and 2nd October 2014
10 Alfred Place, London WC1E 7LR

Date of Decision : 31st October 2014

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the Applicant has complied with the provisions of Section 20 of the 1985 Act and the Service Charges (Consultation Requirements)(England) Regulations 2003.
- (2) The tribunal determines that the estimated cost of the proposed works involving lift replacement and the decoration of the common parts is reasonable and is recoverable from the Respondents.
- (3) The tribunal determines that the Applicant has given notice in accordance with the provisions of the leases and that as a result the Respondents are liable to contribute 100% of the cost of replacement of the residential lifts.
- (4) The tribunal determines that the cost of the works is recoverable in advance of the carrying out of the works in accordance with the terms of the Respondents' leases.

The Application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the liability of the leaseholders of **Centre Heights 137-151 Finchley Road London NW3 6JG** ("the property") to contribute to the costs of major works and in particular lift replacement cost and decoration of common parts in the building
2. The Applicant is the freehold owner of the purpose built block comprising 28 flats and commercial premises known as Centre Heights. The respondents are the leasehold owners of the residential flats on the top five floors of the premises
3. The relevant legal provisions are set out in the Appendix to this decision.

The Hearing

4. The application was opposed collectively by the Residents Association representing 14 leaseholders and separately by Ms Kyoko Morito the leaseholder of Flat 7. The remaining leaseholders took no part in the proceedings.
5. Mr S Allison of counsel appeared on behalf of the landlord and Ms A Gourlay of counsel appeared on behalf of the leaseholders represented by the Residents Association and Ms Pathirana a solicitor represented

by Ms Morito the leaseholder of flat 7 The leaseholder of flat 3 was supposed to be separately represented but no one appeared at the hearing on his behalf.

6. Following detailed negotiations between the parties' representatives an agreement was reached which was embodied in a consent order signed or approved by 13 of the leaseholders. As a result the proceedings against them were stayed on the terms set out in the consent order.
7. This did not however dispose of the proceedings as Mr Allison recognised that, having regard to the extent of the works involved and the large sums of money to be expended it would be necessary to obtain a determination from the tribunal against the remaining respondents who were not parties to the agreement. However, the application would now proceed as unopposed and it was requested that the decision should not be issued before 31st October 2014, as it was anticipated that a number of other leaseholders might wish to take advantage of the consent order before that date.

The Background

8. The property which is the subject of this application is a purpose built block or blocks of 28 flats in Finchley Road almost immediately opposite Swiss Cottage Underground Station. The ground floor consists of several shops and a bank, and the first five floors comprise office accommodation ("the commercial premises"). Floors 6 to 10 comprise 28 residential flats all of which are held on long leases.
9. The building was constructed in the 1960s and at the time four lifts were installed to serve the upper floors. Two of the lifts accessed from the front of the building were designed to serve the commercial premises and the other two lifts which are reached from a side entrance were designed to serve the residential flats but in fact stopped at each floor and were frequently used by the occupants of the commercial premises. The commercial lifts at the front are approached by a small flight of steps with a Stannah chair lift for disabled access. The lifts are referred to as the commercial lifts and the residential lifts respectively.
10. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.
11. The present owners, a Cypriot company, acquired the building in 2012 and have been engaged in discussions with the leaseholders regarding the replacement of the lifts and decorative works to the common parts. It is accepted that the building has been largely neglected by previous landlords and the Applicant is anxious to restore the building to a good condition.

12. At a meeting with the Residents Association in October 2012 it was established that that one of the commercial lifts was permanently out of service and the other commercial lift worked sporadically. Both were original lifts and neither is now working. With regard to the residential lifts one of the lifts is an original lift and has been out of service since 2008. The other is a replacement lift which was installed in 2008 and is being used by the occupants of the residential and commercial units because it extends to the basement which is accessed by the commercial units. It was intended to replace the second residential lift and a second lift was acquired but the project was abandoned and the second lift was placed into storage.
13. As the stored lift had been not used for over 12 months it was not within the manufacturer's warranty and further monies would need to be spent to acquire additional parts. The applicant decided therefore not to acquire it.
14. At the time when the left hand residential lift was installed no Section 20 notices were served and a dispute with leaseholders probably resulted in the failure of the then landlord to proceed with the installation of the right hand residential lift.
15. The Applicant decided therefore to replace all lifts in the building both for the residential and commercial units. It is intended, however, in the near future that as commercial tenants leave the lower floors will be gradually converted into 5 residential units and that the costs of the commercial lifts will ultimately be reimbursed from the sale of those units and the costs re credited to the present leaseholders, but that they will be required to meet the costs in the first instance.
16. With regard to the refurbishment works the Applicant intends to carry out works of replacement to spalled and defective concrete on the outside of the building . The internal common parts are in serious need of decoration. Carpets are to be replaced, broken louvers repaired, entrance doors (which are currently mismatched) repainted and problems with heating and condensation dealt with.
17. The communal heating system consists of four gas boilers of which one has broken down and the other three are inefficient. The boilers and old pipework which is scaled will need to be replaced. A detailed list of works to be carried out is contained in the Section 20 notice dated 22nd March 2013.
18. The first stage Section 20 notices for the works to the lifts were sent out on 8th January 2013 and tender documents were sent out in the spring of 2013 and tenders were received from 3 contractors. The lowest tender was from Kone in the sum of £458,413 which the Applicant intends to accept and second stage notices were sent out on 26th June 2013 to this effect. In addition the Applicant answered observations

which had been raised in connection with the original notice and invited any further observations on the tender figures by 2nd August 2013 . Those observations were also dealt with and a Stage 3 letter was sent in December 2013 shortly before the issue of the application.

19. Kone has indicated to the Applicant that it can increase the speed of the lift to 1.5 metres per second at an additional cost of £3,850 plus V AT, which one of the other tenderers could not achieve. Having regard to the amount of the expenditure involved and the fact that consensus could not be reached with leaseholders the present application was issued.
20. Consultation has also taken place regarding the refurbishment of the common parts and notice of intention was given in respect of these works in March 2013.

The Leases

21. Flats 1 to 10 and 20 to 28 are subject to a headlease, although this is now merged with the Applicant's freehold title. These leases are known as "old leases" Flats 11 to 17 are granted direct from the freehold title and are referred to as "new leases". Flat 18 is a separate form of lease which is in identical terms to the headlease. Although the numbering of the clauses in the leases is different the terms of the covenants relevant to the issues in this application are identical.
22. By clause 3(a) of the old lease the tenant is required to pay a rateable proportion of the of the costs payable by the landlord from time to time pursuant to clause 3(a) of the headlease and the costs of the landlord's reasonable management fees
23. The costs under clause 3(a) include
 - (a) 3/5 of the costs of services in the Third Schedule,
 - (b) 1/2 of the costs of carrying out the matters in the Fourth Schedule,
 - (c) the costs of repairing maintaining and replacing the two lifts serving the 6th to 10th floors subject to such provision applying only once such notice has been served.
24. The Third Schedule of both leases includes a list of day to day services which the landlord provides to the block including staff wages, auditor and management costs.

25. The Fourth Schedule sets out the expenditure for the insurance, repair and maintenance of the block as a whole and sub clause (5) of the Fourth Schedule makes provision for a sinking fund for anticipated expenditure.
26. The service charge year runs from 1st April to 31st March each year and the tenant is required to pay by two instalments on 24th March and 29th September one half of the rateable proportion of the expenditure and is required to pay any balance on presentation of the annual certificate of accounts.

The Issues

27. In the statement of case advanced by the leaseholders of the residents association it was contended first that as the commercial tenants will continue to use the residential lifts it is not reasonable for the leaseholders to contribute 100% of the costs of renewal of the two residential lifts.
28. Second it was contended that as some of the leaseholders had paid in advance in the year 2013/4 and the works had not been done during that year, the monies paid should be returned to them and that the lease did not authorise retention or the setting up of a sinking fund.
29. The statement of case of the Residents Association further contends that the costs are unreasonably incurred and that the works should be phased with replacement of the commercial lifts first followed by the replacement of the residential lift which is not working.
30. It is alleged that the costs incurred are unreasonable in that they exceed 100% of the cost of replacing the residential lifts or alternatively if they amount to 100% this is unfair as the lifts are used extensively by the commercial tenants.

The Evidence

31. All these objections, however, have been met by the applicant and the 13 members of the Residents Association and Ms Morito in the terms of the consent order and the tribunal is not required to investigate them in detail.
32. Mr Allison referred the tribunal to the notice given to each of the tenants in accordance with clause 3(a) (iii) of the head lease and clause 3.1.3 of the new leases that if the tenants elected not to contribute towards a proportion of the cost of replacing the commercial leases the landlord could give notice in accordance with that clause to require them to pay 100% of the costs of the replacement of the residential leases.

33. He also referred the tribunal to sub clause 5 of the Fourth Schedule which permitted the landlord to set up a sinking fund. He contended in the alternative that even if any monies were to be credited they should only be credited after the auditor's certificate and that had not been received by March 2014 and the monies should be retained and used in reduction of the demand for the year 2014/5 during which year the works will be carried out.

34. He also referred to the Section 20 notices given in respect of the work to the lifts and the refurbishment works. The Applicant had served the notices and on receiving observations from leaseholders had answered them.

35. The Tribunal's Decision

36. The tribunal was satisfied on the evidence adduced by Mr Allison the landlord had complied with the statutory procedures under Section 20 of the Landlord and Tenant Act 1985 and the Service Charges(Consultation Requirements) Regulations in the service of the notices and the response to observations.

37. The tribunal was also satisfied that it was reasonable for the landlord to seek to replace all the lifts at the same time while the contractors were on site and that the total estimated costs of £458,413 would be reasonably incurred. It also considered that the additional costs of £3,850 plus VAT was reasonable to secure the increased speed of the lift to 1.5 metres per second having regard to the height of the building. If the final costs came without that estimate they would not be open to challenge later

38. The tribunal was also satisfied that notices had been properly served in relation to Clause 3(a)(iii) and 3.1.3 so that the tenants would be required to meet 100% of the costs of the residential lift replacement.

39. The tribunal accepted that sub clause 5 of the Fourth Schedule of the leases allowed the landlord to set up a sinking fund for the collection of monies for major works including the lift replacements. Accordingly the Applicant is permitted to demand the monies in advance of the carrying out of the works and in the circumstances is not required to return any monies paid provided of course that the works are carried out reasonably expeditiously.

40. The tribunal has decided that in the case of the remaining leaseholders who have taken no part in the proceedings it would not be just or equitable to make any order under Section 20C of the 1985 Act even if such an application had been made . No application has been made for reimbursement of fees so that it is not necessary for the tribunal to consider this question or make any order.

Name: Peter Leighton

Date: 31st October 2014

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
 - (a) Which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
 - (b) the whole or part of which varies or may vary according to the relevant costs.
- (2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
- (3) For this purpose -
 - (a) "costs" includes overheads, and
 - (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
 - (a) only to the extent that they are reasonably incurred, and
 - (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;and the amount payable shall be limited accordingly.
- (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

- (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
 - (a) the person by whom it is payable,
 - (b) the person to whom it is payable,
 - (c) the amount which is payable,
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable.
- (2) Subsection (1) applies whether or not any payment has been made.
- (3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
 - (a) the person by whom it would be payable,
 - (b) the person to whom it would be payable,
 - (c) the amount which would be payable,
 - (d) the date at or by which it would be payable, and
 - (e) the manner in which it would be payable.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
 - (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20

- (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
 - (a) complied with in relation to the works or agreement, or
 - (b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .
- (2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of

service charges) to relevant costs incurred on carrying out the works or under the agreement.

- (3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.
- (4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—
 - (a) if relevant costs incurred under the agreement exceed an appropriate amount, or
 - (b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.
- (5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
 - (a) an amount prescribed by, or determined in accordance with, the regulations, and
 - (b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.
- (6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.
- (7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

- (1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
- (2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under

the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
 - (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
 - (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.