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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**MAN/00CG/LSC/2015/0041**
Property	:	**691 STANNINGTON ROAD, SHEFFIELD, S6 6AH**
Applicant	:	**JEAN FROST and others as listed in the Schedule**
Respondent	:	**WALLACE ESTATES LIMITED**
Type of Application	:	**Landlord and Tenant Act 1985 – s 27A**
Tribunal	:	**Judge J Oliver LLB (Hons)** **Mrs J Brown, MRICS**
Date of Directions	:	**29 September 2015**

DECISION

Decision

The service charges relating to the lift at 691 Stannington Road, Sheffield ("the Property") are payable by the leaseholders of 12 flats in the Property, namely flat numbers 4 to 7, 11, 12, 14, 15, and 19 to 22.

Reasons

APPLICATION

1. On 24 March 2015 Mrs Frost on behalf of herself and her husband at flat 17 and the leaseholders of flat numbers 1, 2, 8, 9, 10, 16, and 18 applied to this Tribunal for a determination as to which leaseholders at the Property should contribute towards the costs of the lift. Mrs Frost explained in her application that the parties had taken legal advice and attempted to come to an agreement but without success.

2. The application was listed for hearing on 29 September 2015, the Tribunal judge being Judge Oliver and the valuer being Mrs J Brown MRICS. The Tribunal made a determination following the hearing of evidence and arguments, but Judge Oliver subsequently became too unwell to write a record of the decision. In due course the parties were informed that the matter would be completed by Judge Davies, and were given the following alternatives: (a) this record of the Tribunal's decision being written on the basis of the hearing documents, the Tribunal's notes taken at the hearing and the conclusions reached by the Tribunal on 29 September, all of which were made available to Judge Davies, (b) a new inspection and full hearing being listed before Judge Davies and Mrs Brown, or (c) the decision being made and recorded on the basis of the existing documents and Tribunal notes but also after each party had had the opportunity to make further written representations to the Tribunal. The parties chose option (a), which is how the matter has been dealt with.

THE PROPERTY

3. The Tribunal inspected the Property on the morning of the hearing. The building was erected in 2006 and contains 21 two-bedroomed flats. The building is divided into two separate parts, each with its own secure entrance, intercom system, metered electricity supply and lighting system.

4. The right hand side contains the lift and 12 flats, ie numbers 4 to 7 on the ground floor, and flat numbers 11, 12, 14, 15, and 19 – 22 on the upper floors. The electricity supply to the lift is separately metered. The left hand side contains

the flats of the 8 Applicants, and also flat number 3. There are in addition jointly used grounds and carpark.

LEASES

5. The leasehold interests in the flats were first sold in or about 2006, each for a term of 125 years from 1 January 2006. Each tenant was required to become a member of the Eden Stannington Road Management Company Ltd, which would manage the Property and to whom service charges would be payable. At the time of sale, it was intended by the agents Eddisons that expenditure on common parts (other than the lift) and insurance costs would be divided between all 21 tenants, and that expenditure on the lift would be divided between 12 of the tenants: ie those living in that part of the Property that contained a lift. This method of apportionment was applied for some 2 or 3 years.

6. The Tribunal has been provided with a copy of Mr and Mrs Frost's lease dated 22 December 2006, and with extracts from other leases of flats at the Property. The lease is unfortunately worded in several respects.
"Management Costs" are defined as "*Such costs and expenses as shall be incurred by the Landlord and/or the Management Company under their respective obligations hereunder and generally in connection with the management of the Block and the Common Areas and in providing services to the tenants or occupiers of the Flats.*"
The "Common Areas" are such parts of the Landlord's "Entire Property" as are not let as flats, and are defined as including "*the hallways staircases lifts (if any) and landings of the Block*".
"the Block" means "*the block of flats being part of the Entire Property of the Landlord*" ie 691 Stannington Road.

7. The tenants' obligation to pay service charges is described at clause 5 (3) of the lease as follows:

> "*Unless the auditors or accountants of the Landlord consider that some other method of apportionment of the Management Costs should be made between the tenants of the Flats (having due regard to the circumstances) the amount of the Service Charge payable by the Tenant shall be as provided at paragraph 4(c) of the Sixth Schedule hereto.*"

The reference to paragraph 4(c) is likely to be an error; the correct paragraph seems to be 5(c).

8. Rights granted to the tenants are contained at the Second Schedule and include

> "5. *A right of way for the purpose only of access to and egress from the Demised Premises.....over through and across the courtyards and access ways within the Common Areas and (on foot only) over through and across the footpaths, hallways staircases and entranceways which form part of the Block and serve the Demised Premises and (with or without vehicles) over and along the estate roads.....*"

(emphasis added). The lease does not contain an express right to use the lift.

9. The Sixth Schedule contains the obligations of the management company and provides, so far as relevant:

> "4. *To keep (or cause to be kept) proper books of accounts showing: .....(c) all other expenditure and receipts (if any) including the expenses of collecting the rent and the Service Charge and incurred generally in the management of the Block.*
>
> 5. *At least once a year to procure that its auditors or accountants shall:.....*
>
> (c) *certify the amounts due from the Tenant in respect of the Service Charge which shall be one twenty first part of the Management Costs and the Insurance Charge which shall be twenty first* [sic] *of the yearly costs incurred in effecting the policies of insurance..... unless (taking due consideration of all relevant factors) the auditors or accountants shall reasonably and properly consider that some other method of calculation and/or apportionment of the Service Charge or the Insurance Charge is appropriate.*"

The Management Company's service charge year end is 31 March.

10. Extracts from other leases provided to the Tribunal show a regrettable confusion. Different approximate service charge figures for the year 2006 – 2007 were specified in the leases, the higher figure being apparently intended to apply to those flats having the benefit of a lift as there are no other differences between the flats other than floor area. However documents shown to the Tribunal provide as follows

Flat no	situation	£ intended approx. service charge	floor area ft_2
1	left side, no lift	615.10	754
3	left side, no lift	615.10	683
4	right side, ground floor	615.10	683
7	right side, ground floor	615.10	750
8	left side, no lift	808.75	754
9	left side, no lift	615.10	779
10	left side, no lift	808.75	683
11	right side, upper floor	615.10	683
14	right side, upper floor	615.10	750
16	left side, no lift	808.75	≤ 825
19	right side, upper floor	808.75	≤ 756

HISTORY

11. The parties agree that from 2006 all expenditure relating to the lift ("Lift Costs") other than the cost of electricity used by the lift were paid by the tenants of the 12 flats in the right hand side, including the 4 flats on the ground floor of that side. In or about 2009, in response to evidence produced by the ground floor tenants dating from the original sale in 2006, the then managing agents agreed that those tenants should not contribute to the Lift Costs, which were consequently re-apportioned between the 8 flats on the upper floors of the right hand side. Further, the Lift Costs which had been paid by the 4 ground floor tenants in that side of the building since 1 April 2007 were credited to their service charge accounts.

12. A question was raised, as to how major repairs to the lift in future were to be funded. Omnia Estates, having been appointed as the management company's agents, took legal advice and recommended reverting to the original arrangement whereby the 12 tenants on the right hand side of the Block paid the Lift Costs. The Management Company decided to divide the Lift Costs between all 21 tenants at the Property. This decision was contested by the tenants affected by it and it was ultimately agreed between the parties that a determination of the Tribunal should be sought.

THE LAW

13. Section 27A(1) of the Landlord and Tenant Act 1985 provides that an application may be made to the Tribunal to determine whether a service charge is payable, and if so as to

"*(a) the person by whom it is payable;*

.....

(c) *the amount which is payable....*"

14. The attention of the Tribunal was drawn to *Jeanna Gater and Others v Wellington Real Estate Limited* [2014] UKUT 0561 (LC) in which Martin Rodger QC confirmed that clauses in a lease, which give power to a third party to determine levels or apportionments of service charges or which provide for service charges or apportionments to be determined in a particular manner, are void. Service charges are to be determined and apportioned as stated in the Lease or determined by the Tribunal. In making its determination, the Tribunal is, however, entitled to have regard to any agreement between the parties.

THE HEARING

15. At the hearing the Tribunal had the benefit of the documents provided by the parties, the notes made during the inspection, and representations made by Ms Virginia Jackson for the Applicants, Mrs Martin for the Respondent and Mr Darren Williamson of Omnia Estates Ltd for the Management Company. It was agreed that apportionment of Lift Costs was the only issue to be determined. All other service charges are divided between the 21 tenants.

16. Mr Williamson stated that the Management Company believed that excluding the 4 tenants on the ground floor of the right hand side of the building was incorrect and unfair to the remaining 8 tenants. On balance, the Management Company considered that a division between 12 tenants was the fairer option.

17. Mrs Martin for the Respondent explained that attempts to come to an agreement had been affected by the wording and discrepancies in the leases, as quoted above. She stated that it is not possible to say for certain that the higher level of service charges anticipated in 2006 and included in some of the leases actually related to Lift Costs, although she was not able to offer the Tribunal any other explanation for the two-tier system of charges.

18. For the Applicants, Ms Jackson said that from the outset a two-tier system of service charges had been applied, and at no time until May 2015 had the left hand side of the building been required to contribute to Lift Costs. She said that paragraph 5(c) of the Sixth Schedule to the lease did not require each of the 21 tenants to contribute to all service charge costs, since it was clear that the freeholder had envisaged giving the accountants or auditors of the Management Company the power to divide costs differently if it was appropriate to do so, and in fact this arrangement had been established by the first managing agents. She

said that in a small block of flats such as this it was not unreasonable for the tenants on the ground floor to contribute to the Lift Costs.

19. Moreover, Ms Jackson said that the parties' real concern relates to the tenants' contributions towards the capital costs of repairing or replacing the lift. All 21 tenants contribute to a sinking fund for future repairs, and if major repairs were required to the lift this sinking fund would be utilised for the purpose. In the event that expenditure on such repairs were required, should there be a shortfall in the monies available from the sinking fund, she considered that all 12 tenants in the right hand side of the building should contribute the balance required. She argued that the market value of the flats with the benefit of a lift is greater than the flats on the left side of the building, and that was therefore unfair to expect the Applicants to contribute to major capital expenditure which did not benefit them in any way.

CONCLUSION

20. Clause 5 (3) of the lease provides that any element of the service charge may be apportioned as appears reasonable in all the circumstances, the norm being that each tenant pays one twenty-first.

21. It is clear that the original intention of the Respondent, notified to and accepted by all purchasers of the flats, was that some tenants would not pay as much in service charges as other tenants. Despite the confusion caused by the leases, it is also clear that the original managing agents divided all service charges equally except the Lift Costs which were divided between the 12 tenants of the right hand side of the building. Little or no objection seems to have been made at the time.

22. On receipt of information suggesting that the ground floor flats had not initially been intended to contribute to the cost of the lifts, the managing agents varied the apportionment to require the 8 tenants on the upper floors of the right hand side of the building to pay all the Lift Costs. Concerns about how to fund potential major expenditure in years ahead have caused this decision to be queried. The present arrangement whereby all 21 tenants contribute to Lift Costs is temporary, pending the determination of this Tribunal.

23. It is reasonable for all 12 tenants of the flats in the right hand side of the building, which has the benefit of a lift, to contribute to the Lift Costs, including any capital costs of renewal or repair. The evidence that one of the ground floor tenants was informed by the Respondent's solicitors, that she would not be expected to so contribute, is not conclusive as to whether or not it is reasonable for her to do so. Despite the wording of the lease at paragraph 5 of the Second Schedule, the lift is

in practice available for use by all tenants in that part of the building. Common parts such as roof, lift, staircases, carpark and gardens are to be maintained at the expense of all tenants able to use them, whether or not they have any direct benefit from them in practice.

24. It is not reasonable to expect the Applicants (or the tenant of flat 3) to contribute to the Lift Costs, as they have no benefit from the presence of a lift and cannot access that part of the building in which it is situated.

SCHEDULE

Flat number	**name of applicant(s)**
1	Mr and Mrs J Brown
2.	Mr I Ibbotson
8.	Mrs F Yeardley
9.	Mrs R Coates
10.	Mrs S Swift
16.	Mr P Carr
17.	Mr and Mrs J E Frost
18.	Mr D Marrison