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FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CHI/23UB/LSC/2016/0006**
Property	:	**Wyddrington House, 55 Pittville Lawn, Cheltenham, Gloucestershire, GL52 2BQ**
Applicant	:	**Idris Davies Ltd**
Respondent	:	**Mr & Mrs Richards; Prof Ramson & Dr Martin; Mr & Mrs Willey; Mr & Mrs Jacko; Mr Cuthbert; Ms Adams; Ms Hewitt**
Type of Application	:	**s27A(3) '85Act**
Tribunal Members	:	**Judge D Dovar**
Date of Decision	:	**25th May 2016**

DECISION

Introduction

1. This is an application by the freeholder of the Property under s27A(3) of the Landlord and Tenant Act 1985 for the determination as to the payability of proposed service charges in relation to a lift.

2. By a directions order dated 11th February 2016, the Tribunal notified the parties that it intended to deal with this application on the papers without an oral hearing unless either party objected to that course of action in writing. Neither party has requested an oral hearing and so pursuant to rule 31 of the Tribunal Procedure Rules 2013 this determination has been made on the papers.

Property

3. The Property is a detached house built around 1836 which has been converted into 8 self-contained flats. The lift, which is the subject of this application, is believed to have been installed when the property was converted in around 1969.

Issue for determination

4. The Applicant proposes the replacement or refurbishment of a broken lift at an estimate cost of £30,000. The Tribunal is asked whether, if such sums are incurred, they will be recoverable under the terms of the leases.

5. The Applicant states that the current lift has broken down on a number of occasions and two independent contractors have assessed the lift as being at the end of its useful life. The Applicant is aware of the statutory

consultation requirements and confirms that if this determination is positive, it will commence that procedure.

Lease terms

6. The Tribunal has not been provided with copy leases, but extracts have been quoted in both parties' statements. The Tribunal therefore assumes that the extracts are relevant and apply to all the flats.

7. The leases provide:

   a. 'Full right and liberty for the Lessee and all persons authorised by him (in common with all other persons entitled to the like right) at all times by day or night and for all purposes to use the lift ...' (para 1, 2nd Sched);

   b. Paragraph 6 of the 4th Schedule, which sets out the sums which can fall within the service charge, includes 'the cost of insurance and inspections and maintenance of the lift.';

   c. By Clause 5 the Lessor covenants '...upon notice given by the Lessee (either alone or together with the owners or Lessees of the other flats in the Mansion) to the Lessors reasonably requiring them to do all or any of such works (and contribution and payment as hereinbefore provided) the Lessors will maintain redecorate and renew (i) the main structure and in particular the flat roof and gas flue stacks of the Mansion ...'

Respondents

8. The Lessees of Flats 1 to 5 have provided a joint statement in which they assert that the costs of a replacement lift does not fall within the service charge. They confirm most of the points above. They make the following points against the costs being chargeable:

    a. 'maintenance' under paragraph 6 of the 4th Schedule does not stretch to replacement, which is what is needed in this case. It only goes as far as dealing with wear and tear. They state that if the freeholder replaced the lift at their own cost, then they would be liable for future maintenance;

    b. They also rely on an unquoted clause which they say 'indicates that on Fourth Schedule questions of costs decisions can be taken by a majority of leaseholders.' They form a majority and they say no;

    c. The lift does not fall within the definition of 'main structure' for the purposes of clause 5. It has been out of action for a few years and it does not and has not impacted on the integrity of the building as a whole;

    d. Service charges can only be levied for costs clearly set out in the lease. When the lease was written the draftsman did not consider the possibility of the lift reaching the end of its life and therefore this cost is outside the terms of the lease.

Determination

a.) Whether maintenance includes renewal or replacement?

9. The crux of the application is whether replacement or refurbishment fall within the definition of 'maintenance' in respect of this lease and of the lift. This is a question of construction of the lease terms. The Tribunal is entitled to have regard not only to the terms of the lease but also the objectively observable matters that were in existence at the time the leases were granted.

10. At that time, the Property had been newly converted and the lift had been installed. The Tribunal assumes that the leases are for a significant term. They have been in existence since around 1969 when the Property was converted and no doubt have significant periods left to run. The lift is an item which is expected to have a long, but not indefinite, life span.

11. The lease provides a right for the tenants to use the lift. However, without more that does not impose an obligation on the landlord to keep a lift in use. The Tribunal has not been shown any express obligation on the landlord to keep a lift in service. The extent of the repairing obligation appears at clause 5, but for the reasons set out below, the Tribunal does not consider that the lift falls within that clause. However, the Tribunal notes that that clause uses the word 'maintain' alongside that of 'renew' and 'repair' and to that extent it appears that the draftsman intended those words to have separate meanings. Where the word 'maintenance' alone is used therefore, the indication is that it does not include 'renew' or 'repair'.

12. Whilst there is no obligation in respect of the lift, there appears to be a power to maintain the lift and to recover the costs of the same. This is clear from paragraph 6 of the 4th Schedule which sets out the costs that the tenants must contribute to. Clearly the day to day maintenance of the lift is expressly covered and so the landlord can recover the costs of the same should it chose to carry out maintenance.

13. The costs of refurbishment would be recoverable to the extent that they did not entail a wholesale replacement of the lift plant but were at the more substantial end of maintenance. By wholesale replacement the Tribunal means that the whole plant which currently constitutes the lift is removed and replaced with new.

14. To find that maintenance does not include renewal, would still mean that the under the terms of the lease the landlord could recover the cost of maintenance (i.e. replacing each individual part from time to time, but not the whole at one time) even if the cost of doing so was ultimately in excess of replacement. Indeed in those circumstances, it would be reasonable for the landlord to adopt this approach when otherwise they would not be able to recover the costs of a total replacement from the tenants.

15. Despite the difficulty mentioned above with the absence of the word 'renew' in this part of the lease, the Tribunal considers that in light of:

    a. The length of the leases and the fact that renewal would have been contemplated by the draftsman;

b. If renewal is not covered, then the landlord would be entitled to charge for more expensive maintenance which would operate against the interest of the tenants

the Tribunal concludes that maintenance does include renewal. That conclusion is reinforced if the reference to 'the lift' is read as a reference to 'the lift service'. In that event, the power is to maintain the lift service, which would include the replacement where necessary of a lift that has failed.

b.) Whether a lift is part of the 'main structure'?

16. Clause 5 deals with 'main structure' only and whilst the lift is a considerable item of plant, for the reasons advanced by the objectors, it does not impact on the integrity of the building and so falls outside that definition. The landlord cannot therefore rely on this clause to recover the costs of a new lift.

c.) Whether works are only required when the majority request them?

17. The Respondents have suggested that in any event costs are payable only if a majority desire the works to be done. The Respondents have not provided the wording of the part of the lease that they rely on and so the Tribunal is unable to take a view on this claim.

d.) Omission in lease

18. The final point made by the Respondents is that as the lease is not clear, the cost should not be permitted. They go onto speculate that the draftsman did not consider that the lease would require replacement. As

set out above, this is a matter of construction and whilst not necessarily clear, the Tribunal considers that the proper construction of what is and what is not recoverable is as set out above.

Conclusion

19. The lease permits the landlord to recover the cost of the wholesale replacement of the lift under the service charge.

Judge D Dovar

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.