FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/00MF/LSC/2019/0031**
Property	**:**	**Flats 1, 3, 5, 7, 9 & 11 Elms Road, Wokingham, RG40 2AA**
Applicant	**:**	**Oaksmere Residents Association Limited**
Representative	**:**	**Dr Terence Lober, director of the Applicant**
Respondent	**:**	**Aviva Life & Pensions UK Limited**
Representative	**:**	**Mr Andrew Feehan of Addleshaw Goddard LLP Solicitors**
Type of Application	**:**	**Liability to pay service charges**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Mrs M Wilcox BSc MRICS**
Date and venue of Hearing	**:**	**The Coppid Beech Hotel, John Nike Way, Bracknell on 15th October 2019**
Date of Decision	**:**	**5th November 2019**

DECISION

DECISION

The Tribunal makes the determination set out in the findings section of this decision.

BACKGROUND

1. By an application dated 12th May 2019 the Applicant, Oaksmere Residents Association Limited through its Director Dr Terence Lober, sought a determination as to the liability to pay and the reasonableness of service charges for the initial period 1987 to 2009 and thereafter for the period 2009/2010 through to 2019.

2. The Respondent to the application is Aviva Life and Pensions UK Limited represented by Mr Andrew Feehan of Addleshaw Goddard LLP Solicitors.

3. The background to the matter appears to be this. In or around 1982 Tesco Stores Limited entered into an underlease with Oaksmere Residents Association Limited (ORA) of a block of flats and maisonettes at Elms Road, Wokingham, Berkshire (the Lease). The term date was 2nd October 1978 for a period of 99 years less three days at an annual ground rent of £1.

4. Within the terms of this Lease there are a number of definitions which are as follows:

   (a) "The Block" means the said block of flats and maisonettes constructed on the Estate as shown edged red on the said plans.
   (b) "The Flats" means the flats and maisonettes of the Block including in each case the interior faces and the glass in the windows of the exterior walls and the interior walls and the locks of the entrance door and the floor ceiling coverings but excluding in each case any other part of such external walls and entrance door and excluding also the joists or beams on which the floors of the flats are laid, the ceiling joists or beams and all parts above such joists or beams and the joists or beams at mezzanine floor level.
   (c) "The Demised Premises" means the Block including the joists or beams on which the floors of the flats are laid, the ceiling joists or beams, the roofs and external walls but excluding the flats and the joists or beams on which the floor at mezzanine level is laid.

5. Although the word 'Estate' is mentioned under the definition of block, that word is not itself defined within the terms of Lease.

6. The term which causes the difficulties leading to this application is to be found under the association's covenants contained at clause 3(b)(i) of the lease. This says as follows: *"To pay to the Lessor on demand a fair and proper proportion to be conclusively determined by the Lessor or its Surveyors of the expense of repairing, renewing, decorating and maintaining or rebuilding any part or parts of the Building of which the Demised Premises form part including the foundations, the joists or beams at mezzanine floor level, all structural parts, party walls, gutters, drains, entrance ways, stairs and passages and access ways which are or may be used or enjoyed by the occupier of the Demised Premises or the Building in common with any other person or persons."*

7. As with 'Estate', the word 'Building' is not defined. The association's covenants refer to repair of the Demised Premises, keeping the Demised Premises clean and the roads, paths and services in good order and condition. There is also an obligation to permit the lessor with agents and with or without workmen to examine, repair, rebuild the joists or beams at mezzanine level and any of the adjoining or contiguous premises as often as occasion shall require.

8. The Lessor's covenants, that is to say of Tescos at the time the Lease was entered into, was to provide quiet enjoyment, to insure the Demised Premises, to keep the joists or beams of the Block at mezzanine floor level in good and substantial repair and condition, but otherwise no obligation. There are rights contained in the First Schedule which includes the uninterrupted passage of soil, water, gas, electricity etc in or under the adjoining building of the lessor. In addition, there is the right to use a staircase marked G on the mezzanine floor for the purpose of gaining egress from the Block in case of fire and a right of support for the Block from the joists or beams at mezzanine floor level.

9. At the same time that the Lease was entered into, it would seem to have been the intention that there should be further underleases involving Tescos and ORA and individual leaseholders. This is to be found, for an example, at an underlease of flat 5 dated 7th February 1983 made between those parties and with a Mr Buchannon as the lessee.

10. This residential lease also has definitions. They are as follows and by reference to plans annexed to the lease:
at paragraph 1(b) "the Site" means the land shown edged red on the plans;
1(c) "the Estate Buildings" means the block of Flats and Maisonettes on the Site;
1(d) "the Block" means the block of Flats and Maisonettes in which the Flat or Maisonettes hereby demised is comprised;
1(e) "Flats" means all the Flats or Maisonettes in the estate buildings
1(f) "the Flat" means the Flat or Maisonette demised by this Underlease
1(g) "the Reserved Premises" means the Site including the Estate Buildings and Reserved Services but except all the Flats
1(h) "the Reserve Services" means sewers, drains, pipes, water etc... in or under the Estate Buildings or any part thereof, or the site or any part thereof..
1(i) "the Leased Services" means a service installations used...exclusively for the benefit of the demised premises
1(j) "the Excluded Services" means service installations used or exclusively for use by other of the flats and situated within the demises premises.
The lessors' covenants in this flat lease include that for quiet enjoyment, to grant leases on the same terms and to insure the building.

11. The demise of the Flat is set out at the First Schedule to the residential lease including the rights of passage of services, the right of entry upon the estate building and reserve premises for repairs and cleaning, rights of support and light and use of communal parts and services, all defined to be within the Estate Buildings but including the staircase marked G. In addition, there is a right to use a car parking space, such right being stated as follows: *"The right for the lessee to use one parking space in the car park situated in the building adjoining the site for the parking of one private motor vehicle the location of such parking*

space to be in the position from to time specified by the lessors." There are then various exceptions and reservations which we do not need to consider and the covenants of the lessee are set out in the second schedule. These are unremarkable but do include at clause 2 to pay the Association's maintenance charge set out in the Fifth Schedule.

12. The Fourth Schedule to the flat lease contains covenants by the Association to maintain the Reserved Premises, to re-decorate the exterior and common parts to light and keep clean the common parts and to employ staff. In the Fifth Schedule the provisions governing the maintenance charges are set out at paragraph 1. This says as follows: *"1. The maintenance charge for the Demised Premises shall be a sum equal to one sixth (herein after called "the appropriate proportion") of the aggregate cost to the Association (a) complying with the Associations covenants in this Underlease and the Associations Underlease and (b) providing such reserves for future and anticipated maintenance as the Association shall from time to time think desirable."*

13. We were provided with a substantial bundle of documents which included the directions made on 21st June 2019, which sets out a brief history of the development. It appears that Tesco vacated the site in or around 2002 and sold it to Wokingham Borough Council. After a period in the ownership of AXA the Respondents purchased the development in 2017. The questions we were asked to decide were as follows:

- What the quarterly service charges are for;
- Whether they are payable by the Applicant under the Applicant's lease dated 9th June 1982 (in error shown as 1892) in particular the correct interpretation of "Building" in clause 3(b)(i) but also what reasonable amount in accordance with section 19 of the Landlord and Tenant Act 1985; and therefore what arrears if any are outstanding.
- The directions also went on to record that an order was sought under section 20C of the Landlord and Tenant Act 1985 (the 1985 Act) and/or under paragraph 5(a) of schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the 2002 Act).
- There was also an indication that there may be requests for reimbursement of the application or hearing fee.

14. Following these directions the Respondents filed a statement. This confirms that the Respondent occupies under the terms of a long lease dated 10th September 2002 made between Wokingham District Council (1), Wokingham Denmark Street 1 Limited (1) and Wokingham Denmark Street 2 Limited (2) for a term of 150 years from 24th June 2002. It sets out the Respondent's view of the word 'Building' accepting that it does not have a definition within the ORA underlease. The Respondent's view, however, is that as the Demised Premises form part of a Building it must be the intention of the parties to the lease that this captured a larger part of the development. The Respondent's assertion is that Building relates to the Demised Premises, the Nuffield Health Gym, a restaurant, a Public House, Council offices and the car park.

15. It is accepted by the Respondent that there is some ambiguity and on the basis of the Supreme Court case of *Arnold v Britton and others [2015]UKSC36* the interpretation by the Respondent gives commercial effect to the clause in that it considers (a) the natural and ordinary meaning of the clause, (b) any other relevant provisions in the lease,(c) the overall purpose and clauses and the lease, (d) the facts and circumstances known or assumed to be known by the parties at the time the document was executed and (e) commercial common sense but disregarding subjective evidence of any parties intentions. Further, the submission goes on to say that it is not appropriate for there to be any comfort taken by considering the terms of the residential leases of the flats as their terms are significantly different with a greater number of definitions.

16. The statement then goes on to set out the various service charges which the Respondent seeks to recover from the Applicants and these were as follows:

- Management fees
- Audit fees
- FM fees
- Risk assessments, audits and reviews
- Cleaning
- Pest control
- Snow clearance/road gritting
- External landscaping

For the year ending 31st December 2019 these are budgeted at a total cost of £2,194.19 on the assumption that the Applicant is responsible for 100% of the costs provided solely for their benefit.

17. In respect of the car parking costs, this has been calculated on the simple expedient of dividing the total number of spaces of 296 by the six car parking spaces allocated giving a percentage of 2.03% of the total costs of those car parking services.

18. Those costs are detailed in this report and show a total expenditure budgeted for the year ending December 2019 of £158,158. This includes, for example, management fees, electricity, security, cleaning, lifts and repairs. 2.03% of this is £3,210.61. In fact these costs have reduced because by the time of the hearing it was established that NCP, who administers the car park were meeting the electricity costs.

19. There then followed legal submissions relating to the manner in which these costs were to be apportioned and in conclusion the submission asserts that the total costs set out in the master budget are of £5,404.80 are recoverable from the Applicant.

20. A response was made to this by Dr Lober and we have noted all that is said. In this response Dr Lober highlights the lack of concern shown by Aviva to the lessees of the flats. Nor did the submission explain the 28 years that ORA has operated as an independent management company of the Demised Premises, without paying management charges to another company. It appears that the

first time charges were levied was in 2010 but that the first complaint raised appears to have been in September/October of 2015.

21. The Applicant's reply centres on the definition of the word Building and we have noted all that has been said. The reply refers to the Arnold v Britton case but also a first tier Tribunal case under reference LON/00AG/LSC/2015/0299 relating to Hillfield Mansions at 11-21 Haverstock Hill, London NW3 4QR where a decision was issued on 18th December 2015. It is said by Dr Lober that the findings of that Tribunal appeared to "have resonance with our own situation."

22. Dr Lober then goes on to consider the Supreme Court case of Arnold and Britton in some detail and how that applies to this particular issue.

23. Under the heading "full description of the service charges and the basis of their calculation" Dr Lober comments on those and the recalculations that have been undertaken. In particular he asks why it is said that the Applicant is responsible for 100% of certain costs which includes an audit and other items. We noted all that was said.

24. Under closing remarks, Dr Lober asserts that ORA is not a normal profit making company and that if we find that the imposition of service charges was not supported by the Association Lease then they should recover repayment of all sums made. He does, however, accept that previous directors of ORA may have made mistakes and asks that the matter be returned to the situation that existed before 2010 when ORA and the Lessors, property agents and contractors worked on a co-ordinated approach that to his mind made sense.

25. A response was lodged by the Respondent to this reply and again we have noted all that was said. This reply confirms that the Respondents are not seeking to recover costs relating to the wider commercial element from the Applicants. Indeed, it is said the way in which the service charges have been recalculated by the Respondent would prevent the situation arising. This is because, it is said, as recalculated in the 2019 service charge budget the Applicant would not be responsible to contribute towards the repair and maintenance of the commercial units. In accordance with the RICS Guidance, the cost between residential and commercial parts have been split into separate schedules so the Applicant would only be responsible for costs of services which were provided solely for the benefit of the demised premises. This response confirms the budget for the year ending December 2019 indicating those costs relating solely to the property (schedule 2 of the budget expenditure) limited to £2,194.19. As we indicated earlier, the NCP obligation for electricity has now been factored in and the total costs associated with the car park and the six car parking spaces is reduced, applying the 2.03% share of the total costs of £133,158. This therefore reduces the total liability payable under the Lease to £4,897.30 giving a quarterly charge of £1,224.33.

26. The Respondents had wished to have a face to face meeting with the Applicants but that had been rejected. In the reply under legal submissions a number of points are made which are noted and under closing remarks there is a re-affirmation of the basis upon which the Respondent deals with this matter. It summarises that the Respondent is hopeful, notwithstanding the somewhat ambiguous terms of the Lease, that by limiting the costs recoverable under the

budget to those that relate solely to the property including the right to use the car park are fair and have been calculated on a reasonable and fair basis. It goes on to say that the Respondent does not wish to have an adversarial relationship with the Applicant and recognises the fact they need to work together. It acknowledges that there may have been historical mistakes on both sides but that the past cannot be changed.

INSPECTION

27. Prior to the hearing on 15th October 2019, we inspected what has been called the Plaza in which the Demised Premises as defined under the ORA lease are to be found. Dr Lober afforded us access. We firstly walked the extent of the ground floor of the Plaza. At this level was to be found a Health Club, a Public House named The Gig House and a restaurant called the Giggling Squid.

28. In the middle of the development was a car park over three/four levels the top two levels being open to the elements. It was noted that a six month car parking ticket would be £450.35. The surface of the exposed car park appeared to be in need of attention.

29. At ground floor is an entrance leading to stairs to the six flats numbered 1 to 11 being odd numbers only. At the end of the landing access could be had to stairwell C which led to the allocated car parking spaces for the lessees at level 2 of the car park. There appeared to be two entrance points to the stairwell C at the top of the level of the car park and also at the level where spaces were allocated. In addition also, there was egress from this stairwell down to Elms Road.

30. We have noted the plans to the ORA underlease. This shows four levels. At ground floor level is the entrance to the flats and maisonettes and at the left hand extremity looking at the building from Elms Road what appears to be a bin area. Rising to the first floor, there is accessway to the various flats and maisonettes and this continues with a plan of the second floor showing the upper levels of the maisonettes within the Demised Premises as set out in the ORA lease. The fourth plan shows level 4 which is the roof above the residential units.

HEARING

31. At the hearing we heard from Dr Lober who confirmed he represented the six flat owners and had purchased his flat in 2017. He told us that no quarterly demands were made in respect of service charges for the "Building" until October 2010 and that the period in dispute for us to consider was from 2010 only. However, he told us that there had been no formal complaints made until around October of 2015. Prior to then, service charges appear to have been paid without demure. We raised the provisions of section 27A(4) of the 1985 Act which says as follows: *"(4) No application under section (1) or (3) may be made in respect of a matter which (a) has been agreed or admitted by the tenant …"* In the circumstances explained to us it appears that the service charges had been paid and we therefore took the view that we could not deal with any service charges prior to the period commencing around about October 2015. Dr Lober accepted this.

32. He told us that the Association had been paying quarterly service charge contributions but that it had doubled in 2016 and this was when complaints were raised. The sum of £800 per quarter had been paid but payments were stopped altogether in 2018 and it was not clear what the arrears might be.

33. For the Respondents, Mr Feehan confirmed that a dispute was raised in October of 2015 but that Aviva acquired sometime in October of 2016 and that anything before then was not known to them. Both parties required certainty going forward and the point was raised that although service charges may not have been levied until 2010 it did not mean that they were irrecoverable. Their view is that the Building included the whole Plaza, which was the restaurant, the Public House, the gym, Council offices and the car park as well as pedestrian areas.

34. The question of the fire escape and rights of access was raised. We were told that this was not cleaned or looked after in any way by the Respondent but apparently by NCP. In respect of the ORA lease, Mr Feehan accepted that there was no definition of Building but that the Building must be more than the Demised Premises. It was not appropriate to take definitions from the flat lease and the ORA lease and apply them. Mr Feehan confirmed the Respondent had stripped out charges that were not for the benefit of the Respondents and the fact that the service charges may have been increasing was as a result of inflation and the age of the Building. It was accepted that the arrangements relating to the car park was somewhat historic and that free car parking had been available when Tescos were the owners. The costs of car parking should be recoverable as being reasonable, the more so as of course the lease to the flat includes the benefit to use a car park space.

35. During the course of the Respondent's submissions we heard from Mr Speakman who sought to explain the service charge budget to be found at J3 in the bundle. This refers to the Plaza, Denmark Street, Wokingham and sets out the costs that it is said would be passed to the residents through the ORA lease. All figures shown being inclusive of VAT. On a separate sheet appeared to be a full list of the items of expenditure, although it was in some cases difficult to discern what items on the budget were applicable just to the residential premises and how those related to the items on the budget for the Plaza. For example, on the budget for the flats a figure of £656 was recorded for landscaping but there appeared to be no similar charge in respect of the budget for the Plaza. In addition, the snow clearance and road gritting was shown as a charge of £660 of which £173 appeared to have been allocated to ORA notwithstanding on the face of it that the residential units' door exited straight onto the pavement at Elms Road. It was accepted by Mr Speakman that there would be a review of some of these expenses, although he was satisfied that the apportionment of the car parking costs at 2.03% was reasonable given number of spaces available.

FINDINGS

36. We heard all that had been said to us by both Dr Lober and Mr Feehan and have considered the various statements made and the documents produced. It is a pity that the Lease was not drafted in a better fashion. As we have indicated above, the use of the word 'Building' and 'Estate' have no definitions. What we do accept however, is that 'Building' as stated in the terms of the Lease, must include an

area greater than the Demised Premises. The question is, how much more? The definitions of the Block, Flats and Demised Premises exclude the joists of beams at the mezzanine floor level. However, there is an obligation on the landlord (Tescos in the original lease) to keep the joists and beams of the block at mezzanine floor level in good and substantial repair and condition. In addition also, there is the right to use the staircase marked G on the mezzanine floor for the purposes of gaining egress from the block in case of fire or other emergency, although it was noted by us at the time of our inspection that this did also afford ingress to and egress from the car park level where the allocated spaces had been positioned.

37. It is common ground that the definition of Building is unclear. Equally at the hearing, Dr Lober made it clear that the Applicants' case was that they had no responsibility in respect of service charges relating to anything other than the Demised Premises.

38. The issue that we need to determine is a question of lease interpretation and what does the word Building mean. We were referred to the Supreme Court case of Arnold and Britton and in particular the seven factors that Lord Neuberger set out that were necessary to consider interpreting a written contract. As is stated, we are, amongst other elements, concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract to mean".

39. The background to this matter therefore is important. This Lease was entered into in 1982 between Tesco Stores Limited and ORA. The front of the Lease refers to an underlease of "Block of flats and maisonettes at Elms Road, Wokingham, Berkshire." The Block, the Flats and the Demised Premises are clearly defined. At this time Tescos would presumably have been intending to use the remainder of the building as a supermarket and the six flats/maisonettes were something of an adjunct to the development. It is not known whether they were required as part of any planning permission and we can make no assumptions in that regard. What is clear, however, from the plans annexed to the Lease that the Demised Premises start at first floor level, save for the entrance way and the bin store, and rise to the roof level. They are clearly separate from the remainder of the development, which we shall refer to as the Plaza.

40. The guidance of Lord Neuberger in his judgment in Arnold v Britton said that the meaning had to be assessed in the light of (i) the natural and ordinary meaning of the clause (ii) any other relevant provisions of the lease (iii) the overall purposes of the clause and the lease (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed and (v) commercial common sense but disregarding subjective evidence of any party's intention.

41. The fact that the Applicants have the right to use car parking spaces, apparently without any financial obligation, is not altogether surprising given the nature of the development at the time it was built in the 1980s. The car park to be used, presumably by Tesco's clients, would be unlikely to have resulted in a charge being made to their customers. Accordingly the allowance to the residents of six

car parking spaces would, to put it colloquially, have been no skin off Tesco's nose.

42. To invoke the comments made by our colleagues in the Hill Field Mansions case it is it seems to us that the ORA entering into the Lease as a form of management company for the subsequent lessees, would have "recoiled" from the suggestion that they might find themselves liable to contribute towards the repair and maintenance of extensive commercial units, the Plaza. We do not consider that at the time the Lease was entered into the parties had in mind the fact that ORA and subsequently the residential leaseholders would be required to make contributions towards the Plaza which is a substantial commercial development. The access to the residential premises is by way of a private entrance and stairs. There is no benefit to them of any gardening nor snow clearance or any other cleaning. The use of the fire escape does have some benefit and has played on our minds in considering the extent of the Building within the terms of the Lease.

43. The facts known to the parties at the time of the entering into the Lease would have been clear. This was development by a large supermarket chain. It was not the development by a commercial company such as the present owners where commerciality relating to service charges bear a different importance. We are aware that we must be careful in relying on commercial common sense. However, we cannot ignore the identity of the parties when this lease was entered into.

44. We therefore reject the contention by the Respondents that the Applicants would be liable to make a contribution towards the Plaza. We do accept that for purposes of trying to resolve the issues they are indicating an intention to limit those costs to that which they think refers either exclusively to the residential premises or utilises the car park. In respect of those costs that are said to relate we were somewhat concerned by Mr Speakman's allocation of same as discussed at the hearing and the percentages that he sought to impose as there appeared to be no clear basis for applying them.

45. What does 'Building' mean in this case? We accept it must be something more than the Demised Premises. Based on the evidence before us, the written statements and the submissions made by both sides our finding on this definition is as follows. Given the obligations on the part of the Lessor under the Lease, which includes the maintenance of the mezzanine floor level and also the right granted under the terms of the Lease to use the staircase marked G and to have support for the block from the joists or beams at mezzanine floor level, that it makes appropriate sense for the Building to include both the fire escape known as block G and also the joists and beams of the block at mezzanine floor level for which there is an obligation on the part of the lessor to maintain.

46. We exclude from the definition Building the remainder of the Plaza for the reasons that we have set out above. This means, therefore, that the service charges which are the subject of the estimate for 2019 are not payable by the Applicants and this would appear to apply in respect of the years going back to 2015. The difficulty, however, is that it would appear that the Respondents did not acquire their interest or at least is was not registered until 8th December 2017.

Accordingly we are not sure how effective a claim by the Applicants might be to seek to recover service charges made for earlier years.

47. The parties may wish to consider whether a line is drawn under these matters and that they accept our finding going forward. As Mr Feehan said in the Respondent's response "Whatever may have happened in the past cannot be changed but the parties can influence matters going forward".

Andrew Dutton

Judge:

A A Dutton

Date: 5th November 2019

ANNEX – RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-Tier at the Regional Office which has been dealing with the case.
2. The application for permission to appeal must arrive at the Regional Office within 28 days after the Tribunal sends written reasons for the decision to the person making the application.
3. If the application is not made within the 28-day time limit, such application must include a request to an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.