12874

First-tier Tribunal
Property Chamber
(Residential Property)

Case reference	:	**CAM/00KF/LSC/2018/0015**
Property	:	**Flat 1, 5 San Remo Parade, Westcliff-on-Sea, SS0 7RD**
Applicant Represented by	:	**Peter John Crawley self represented**
Respondent Represented by	:	**Hickling Properties Ltd. Michelle Williams, lay representative**
Date of Application	:	**15th February 2018**
Type of Application	:	**to determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (Lawyer Chair) Stephen Moll FRICS Chris Gowman BSc MCIEH MCMI**
Date and place of hearing	:	**6th June 2018 at Park Inn by Radisson, Church Street, Southend-on-Sea, SS1 2AL**

DECISION

1. The Tribunal determines that the Applicant is not liable to pay towards the cost of installing the landlord's electricity supply to the common parts of the building in which the property is situated i.e. the entrance, staircase and landing leading to flats 2 and 3.

2. An order is made pursuant to section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") and/or Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") preventing the Respondent landlord from recovering its costs of representation before this Tribunal as a service charge or administration charge from the Applicant leaseholder.

3. An order is made pursuant to rule 13 of the **Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013** requiring the Respondent to reimburse fees of £300 to the Applicant within 28 days of the date of this decision.

Reasons

Introduction

4. This is an application by the leaseholder of the property wherein he seeks determinations as to the payability of some service charges claimed for the years 2015-2018 namely (a) the cost of fire and asbestos survey reports and (b) works described by the Respondent's managing agent in a letter dated 24th January 2018 as "to install landlord's electric in the common area".

5. At the commencement of the hearing the Applicant, Mr. Crawley, said that he wanted to withdraw his refusal to pay for the fire and asbestos risk survey report(s) which meant, in effect, that the Tribunal no longer had jurisdiction to deal with that issue (section 27A(4)(a) of the 1985 Act.

6. The history of this matter is that when the lease was granted in 1974, the building was split so that there was a ground floor flat and a maisonette above. The Respondent acquired its interest in the building in 1986 and it proceeded to split the maisonette into 2 flats. Both before the split and now, the entrance to the upper part of the building was separate from Flat 1 i.e. there is a separate entrance with a staircase to the flats above to which the Applicant has no access. The tenants of the upper flats have no access to flat 1. The service charges complained of are said by the Applicant to relate solely to the separate entrance, staircase and common parts to flats 2 and 3, and are not payable by him.

7. A directions order was made by the Tribunal on the 6th March 2018 timetabling the case to a final hearing and a bundle of documents was duly lodged. Both parties have provided statements of case.

The Lease

8. The lease is described as a headlease on the front sheet but just as a lease in the document itself and is dated the 21st June 1974 for a term of 99 years from 30th June 1973 with an increasing annual ground rent. The lease provides that the landlord shall insure the property and keep the building in repair with the tenant of this property paying one third of the costs incurred. Payments on account can be collected each year being the greater of either £40 or the previous year's service charge.

9. In the bundle of documents provided, there is what is described as a Supplemental Deed with a blank 1991 date and reference to varying terms of the lease "in manner hereinafter appearing". There are no variations set out and the Tribunal therefore assumes that this deed, if it exists, is irrelevant. There is then another deed dated 8th December 1992 between the Respondent and the Applicant which, again, is a deed of variation. Nothing in the variations affects the issues in this case.

10. As far as the service charges are concerned, clause 2(2) requires the Applicant to pay one third of the expenditure set out in the Fourth Schedule subject to certain conditions. Unfortunately pages 15-18 in the bundle which includes some of these conditions are practically illegible. From that which is visible, there do not appear to be any conditions which affect the issues in this case. A certificate of expenditure has to be provided.

11. Clause 5(1) of the lease is a covenant on the part of the Respondent landlord to keep the structure of the building in repair to include "*the staircases and other parts of the said building enjoyed or used by the Tenant in common with others*". This is significant because the entrances to the ground floor and the first floor respectively were separate and could not then be used by other tenants i.e. they were not 'common' parts. Following the alterations, the staircase to the first floor became 'common parts' so far as flats 2 and 3 are concerned because both had access. However, flat 1 still did not have access and the separate entrance and stairwell were not 'common' to flat 1.

12. The Fourth Schedule sets out the items of expenditure covered in the service charge. This includes the parts of the building set out in clause 5(1). The only other clause dealing with the staircases says:

> "*The cost of carpeting re-carpeting cleaning decorating and lighting the passage landings and staircases and other parts of the said building enjoyed or used by the tenants in common with others and of keeping the other parts of the said building used by the Tenant in common as aforesaid and not otherwise specifically referred to in this Schedule in good repair and condition*"

13. Thus, and subject to the discussion comments below, any staircase, passage etc. not used by the tenant in common with others is excluded from the service charge regime for the ground floor tenant.

The Law

14. Section 18 of the 1985 Act defines service charges as being an amount payable by a tenant to a landlord as part of or in addition to rent for services, insurance or the landlord's costs of management which varies 'according to the relevant costs'. Under section 27A, this Tribunal has the jurisdiction to determine whether service charges are reasonable or payable including service charges claimed for services not yet provided.

15. Section 20C of the 1985 Act and Schedule 11 of the 2002 Act enable the Tribunal to make orders preventing a landlord from recovering its costs of representation before the Tribunal as service charges or administration charges.

The Inspection

16. The Tribunal members inspected the front of and entrances to the building in which the property is situated in the presence of Ms. Williams and Ms. Lockett from the Respondent's managing agent, Arkasian Property Management Ltd. and the Applicant and his wife.

17. There are 2 entrance doors from the street both of which have locks. The Tribunal members went into the entrance to the first floor with the benefit of a key held by the managing agents. Just inside the door is an electricity meter apparently serving only the upstairs flats. There is then a staircase to the first floor landing. There are two doors, one being to the first floor flat

and the other door presumably led to a further staircase to the other flat on the second floor.

18. The members of the Tribunal then went into the other entrance which consisted of a simple locked front door into a hallway solely used by flat 1. In the hall cupboard were the electric meters for that flat. Mr. Crawley said that he had no access through the other entrance door and this was not disputed.

The Hearing

19. The hearing was attended by those who were at the inspection. Mr. Crawley immediately, and without any prompting from either the Respondent's representative or the Tribunal, withdrew his challenge of the charges relating to the fire and asbestos reports because, he said, he had not appreciated that the landlord was required to obtain these reports as a matter of law.

20. Ms. Williams was asked for copies of the survey reports but she said that she did not have them with her. She confirmed that the only parts of the building inspected by the writer(s) of the report(s) were the separate entrance, staircase and first floor landing of the building. None of flat 1 was included in the assessments.

21. As far as the electrical work is concerned, this followed a report from UK Power Networks. The main point in having this work done was that the electricity supply to the common parts i.e. the staircase and landing came from flats 2 and/or 3. Ms. Williams said that the Respondent thought it was unfair that one tenant should pay for this and there was also a risk that if electricity was metered and ran out, there would be no operational lights or fire alarms which was clearly a risk.

22. Mr. Crawley apparently had a spare phase in his electricity supply but it was determined, apparently, that this could not be separated and used.

23. The other relevant part of the evidence was a letter from Genesis Risk Solutions Ltd. to Ms. Williams dated 26th March 2018. They appear to be underwriters for the building's insurance policy. They say "*I am writing to confirm that it is a condition of the above Company's Insurance Policy that the Underwriters require an up to date Fire Risk Assessment and Asbestos Surveys to be maintained*". The 'above company' is the Respondent, Hickling Properties Ltd.

Discussion

24. The problems in this case, which appear to have been unforeseen by the Respondent landlord, arise from the separate entrance and staircase to the upper flats. The service charge regime in the lease includes the cost of repairing the building and the common parts i.e. those parts used by the tenant in common with others. When the lease was created, there do not appear to have been any relevant common parts so far as entrances and staircases were concerned, but when the maisonette became 2 flats,

common parts were created because the separate entrance, staircase and landing could be used by the tenants of both flats 2 and 3 (but not 1).

25. The Respondent is correct when it refers to the safety regulations requiring a landlord to ensure the safety of contractors working in the common parts to a building. The ARMA advice is that there should be a full safety and asbestos check and that this should be kept up to date on an annual basis. In other words, there does not have to be a full check every year, merely an annual inspection to ensure that no changes have occurred since the last full report. Thus, there is no doubt that these things are required. The only question was whether the Applicant should contribute to the cost. The lease says 'no' but Mr. Crawley has taken a practical approach by presumably accepting that these surveys protect him, at least indirectly. Thus he has agreed to contribute to their cost.

26. As far as the insurers for the building's underwriters are concerned, the Tribunal had some difficulty in understanding their comment. They say that it is a condition of the insurance policy that there has to be an up to date fire risk assessment and asbestos survey. Unless successive reports are obtained frequently, this is an impossible condition to maintain. Thus, the words 'up to date' need to be interpreted.

27. It is the Tribunal's interpretation of these words that reports have to be obtained and then the ARMA recommendation should be followed i.e. the property should be inspected on at least an annual basis to see whether there has been any change. Clearly, the reports should be updated reasonably frequently and every 4 or 5 years would seem to be appropriate. With such a small and straightforward building as in this case, the annual inspection should be undertaken by the managing agent (who should inspect at least once a year within their annual fee according to the RICS Code) and such inspector should take the last report with him/her and check to see whether there had been any change.

28. If the insurers are suggesting annual reports, then this is an unreasonable expense to pass on to the tenants, and the Respondent may want to consider an alternative insurer and/or underwriter. The Tribunal suggests that the underwriter is approached about this immediately.

29. The Tribunal does not believe that the terms of the lease are ambiguous. However, if the landlord should suggest that they are, the Tribunal has considered general rules of interpretation. In order to assist courts (and Tribunals) in these difficult matters, the *contra proferentem* rule was devised many years ago. It is not, of course, the only rule of interpretation but it is, perhaps the most relevant to this problem. It translates from the Latin literally to mean "against (*contra*) the one bringing forth (the *proferens*)".

30. The principle derives from the court's inherent dislike of what may be described as 'take it or leave it' contracts such as residential leases which are the product of bargaining between parties in unfair or uneven positions.

To mitigate this perceived unfairness, this doctrine was devised to give the benefit of any doubt to the party upon whom the contract was 'foisted'.

31. In the case of **Granada Theatres Ltd v. Freehold Investments (Leytonstone) Ltd** [1958] 1 WLR 845, Mr. Justice Vaisey said, at page 851, that "a lease is normally liable to be construed contra proferentem, that is to say, against the lessor by whom it was granted".

32. The question for this Tribunal, therefore, is whether the clear wording of the lease should be interpreted in a different way. As staircases are mentioned in the repairing covenant and the Fourth Schedule, it must have been in the minds of the original parties that the landlord would maintain the separate entrance and staircase and the tenants would contribute towards the cost. Regrettably, the solicitors who settled the terms of the lease had clearly not inspected or been told about the obvious fact that neither the separate entrance nor the staircase were used by the ground floor tenant at all, let alone in common with others. If ambiguity could be proved, *contra proferentem* would appear to dictate that a ruling is made in favour of the Applicant lessee. The landlord may not be happy with this but the opportunity was there to vary the lease when the Deed of Variation was prepared in 1992.

33. The end result of this is that, in law, the Applicant tenant of flat 1 has no liability to contribute anything towards the various costs involved i.e. for both the safety and asbestos reports and the electrical work. He has volunteered, to his credit, that he will contribute towards the surveys.

Conclusions

34. Taking all these matters into account and doing the best it can, the Tribunal's conclusions are as set out in the decision. It is clear that the lease is defective and should be varied so that the service charge includes a one third contribution towards the cost of obtaining and complying with health and safety, fire and asbestos reports and inspections relating to the building as a whole. The definition of common parts should remain as it is. As the landlord' predecessor was responsible for drafting the original lease, and the present landlord had the opportunity to change the lease in this respect in 1992, it should bear the cost, including the cost of the Applicant receiving legal assistance.

35. It may also be worth correcting paragraph 12 in the Fourth Schedule which states that the upkeep of the gardens is by the landlord and is part of the service charge regime. The rear garden is demised to flat 1.

36. In order to assist the Applicant leaseholder, the Tribunal will only say that in almost all multi storey blocks of flats, there is work involved from which the ground floor tenant does not receive a direct benefit e.g. maintenance of lifts, some health and safety work etc. Invariably, in the Tribunal's experience, the ground floor tenants have to pay towards this as it involves the general maintenance and safety of the building. If flats 2 or 3 should catch alight, for example, flat 1 will probably suffer. It is therefore in his interests that risks should be assessed and preventative measures put in

place. He should therefore agree to any reasonable variation or risk an application being made to this Tribunal for variation which may well involve an application by the landlord to pay the costs of such application.

Fees and costs

37. The Applicant asks for orders that the Respondent's costs of representation before the Tribunal in this case shall not be included in any future service charge or administration fee claim. The directions order recorded this and said that the Respondent should respond. It has not commented. The order is made as asked.

38. This application was caused by demands for money for which the Applicant was not liable which, in turn, was caused by an incorrectly drafted lease. In law, this was the landlord's responsibility and this application was completely unnecessary. Thus, the Tribunal orders that the Respondent reimburse the Applicant for the fees of £300 he has paid (rule 13(2) and (3) of the **Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013**.

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Bruce Edgington
Regional Judge
7th June 2018

ANNEX - RIGHTS OF APPEAL

i. 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 Tribunal at the Regional office which has been dealing with the case.

ii. 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.

iii. If the application is not made within the 28 day time limit, such application must include a request for 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.

iv. The application for permission to appeal must identify the decision of the Tribunal to which it relates (i.e. 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.