UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL
(PROPERTY CHAMBER)

LANDLORD AND TENANT – SERVICE CHARGES – landlord given discretion to apportion charges amongst leaseholders who "have the use of" certain services – whether leaseholder liable to contribute to cost of replacing a lift which he did not use – appeal dismissed

BETWEEN:

BRUCE ANTHONY REEKIE

Appellant

-and-

OAKWOOD COURT RESIDENTS ASSOCIATION LIMITED

Respondent

Re: Flat 5, Oakwood Court,
11 Bolsover Road,
Eastbourne

Martin Rodger KC, Deputy Chamber President

Hearing date: 14 February 2023

Mr Bruce Reekie, the appellant, represented himself
Mr Jonathan Wragg, instructed by PDC Law, solicitors, for the respondent

No cases are referred to in this decision

Introduction

1. Mr Reekie makes no use of the lift which serves the upper floors of Oakwood Court, the converted building in Eastbourne in which he owns three flats. Is he nevertheless obliged by the lease of his flat on the first floor to contribute towards the cost of refurbishing that lift? By a decision issued on 2 March 2022 the First-tier Tribunal, Property Chamber (FTT) decided that he is. This is Mr Reekie's appeal from that decision.

2. The FTT found that Mr Reekie was liable to pay £3,870 demanded by Oakwood Court Residents Association Ltd (OCRA), as his on account contribution towards the cost of proposed works to refurbish the lift. The FTT refused Mr Reekie permission to appeal, but permission was subsequently granted by this Tribunal.

3. Mr Reekie represented himself at the hearing of the appeal, as he had done before the FTT. OCRA was represented by Mr Jonathan Wragg.

The facts

4. Oakwood Court is a large three storey Victorian house which was converted in about 1989 to create eight self-contained flats, with two on the ground floor and three on each of the two upper floors. Mr Reekie owns the leases of Flats 1, 2 and 5.

5. Flats 1 and 2 are on the ground floor and are accessible by the original front entrance to the building. The remaining flats (numbers 3 to 8) are reached by a side entrance leading to a communal hallway, with a staircase and a lift serving the upper floors. When the building was first sub-divided into flats there was no access to the communal hallway, the staircase or the lift from Flats 1 and 2, except by going out of the building and re-entering through the side door.

6. Each of the eight flats in the building is let on a long lease. The FTT referred to the lease of Flat 5, which is on the first floor. It was granted on 18 September 1991 for a term of 125 years and Mr Reekie acquired it in 2015. The lease was made between the landlord, the leaseholder, and a management company which was responsible for carrying out repairs and providing other services at the leaseholders' expense. I will refer to the terms of the leases in more detail later.

7. At some time before Mr Reekie acquired Flat 5, Flats 1, 2 and 5 were converted to form a single large dwelling occupying most of the ground floor and part of the first floor of the building. A new internal staircase was installed between Flat 1 and Flat 5, allowing the owner to use the three flats as a single unit. Since then, access to Flat 5 on the first floor has been available without using the communal side entrance, the staircase, or the lift.

8. Although Flats 1, 2 and 5 were converted for use as a single dwelling they have always been subject to separate leases which were granted at different times, and no new lease of the combined unit has ever been granted. Mr and Mrs Reekie purchased Flats 1, 2 and 5 together and they have lived in the combined unit ever since.

9. Mr Reekie informed the FTT that although there is still a door allowing access to Flat 5 from the first-floor landing, it is not in use and is kept locked. Neither he nor his wife have ever had cause to use the lift.

10. The original lift serving Flats 3 to 8 was installed in about 1989 and on 19 November 2019 OCRA asked the leaseholders to pay £3,870.00 towards the cost of its refurbishment. That figure represented one sixth of the estimated cost of the work. Mr Reekie was not asked to make a contribution in respect of the two ground floor flats, but only for Flat 5.

11. Mr Reekie refused to pay his contribution. As a result the proposed works were not carried out and the contributions of the other leaseholders have been held in reserve while OCRA pursued a County Court money claim against Mr Reekie. The question whether any service charge was payable was transferred to the FTT and a single concurrent hearing was held at which the Judge sat both as a Judge of the FTT and as a Judge of the County Court to determine all issues at a single hearing.

Mr Reekie's lease of Flat 5

12. The leases of the eight flats in the building were granted between August 1990 and March 1994, and the FTT was told that they were essentially in the same form. Further investigation (undertaken for the first time during the hearing of the appeal) demonstrated that that was not the case. A standard form of lease appears to have been modified in certain important respects on each grant so that Mr Reekie's three leases are different from each other, and none of them is in the same form as the leases of the other five flats.

13. The interest of the landlord is now vested in OCRA which has also assumed responsibility for the obligations to be performed by the management company.

14. Those obligations are described in Part I of the Fifth Schedule to the lease and include keeping all parts of the building not included in any demise in good and substantial repair and condition. That obligation requires that OCRA keep the lift in repair. In return, the lease of Flat 5 includes an express right to use the lift (at paragraph 2(c) of the Second Schedule).

15. The cost of performing the management company's obligations in any one year (and of maintaining a sinking fund for future years) is referred to in the lease as the "Total Service Cost". Each lease of a flat in the building includes provision for the leaseholder to pay a specified percentage of the Total Service Cost, a sum referred to as the "Service Charge".

16. The various flats are of different sizes and these are reflected in their different contributions towards the total service cost. In the case of Flat 5 the Service Charge is defined in recital 1(p), as follows:

> "Service Charge" means 7.338% per centum per annum of the total service cost subject to Clause 2 of Part II of the Fifth Schedule."

The contributions required by Mr Reekie's leases of Flats 1 and 2 are much greater and, in aggregate for all three flats he is responsible for almost 45% of the Total Service Cost.

17. The definition of Service Charge is expressed to be subject to clause 2 of Part II of the Fifth Schedule. Part II of the Fifth Schedule has two clauses, which I will refer to as "clause 1" and "clause 2". Clause 1 is the main source of the dispute between Mr Reekie and OCRA. The whole of Part II provides as follows:

> "1. In respect of any parts of the main structure of the Building (for example the lift flat roofs or balconies) and the driveway leading to the garages at the rear which are the responsibility of the Company under Part One of this Schedule but of which only a tenant or certain tenants have the use the Company may charge such tenant or those tenants either the whole or such part as the Company thinks fit of the cost of maintenance of those parts to reflect such use
>
> 2. Any doubt difficulty or dispute as to the apportionment of the total service cost under this Schedule shall be resolved and settled by the Company whose decision shall be final and binding on all the tenants"

18. Mr Reekie is obliged to make equal half-yearly payments on account of the Total Service Cost followed by a balancing charge or credit when the annual account has been prepared. By way of exception to this pattern clause 3(1) of the lease entitles the management company to give notice at any time requiring payment within fourteen days of a contribution towards "any unusual or unexpected expenditure" required for the performance of its covenants. This was the provision under which the demand of 19 November 2019 was made.

19. The FTT interpreted the reference in clause 1 of Part II of the Fifth Schedule to parts of the main structure "of which only a tenant or certain tenants have the use" as a reference to parts of the main structure which a particular tenant is "able to use". Mr Reekie was able to use the lift to come and go from Flat 5, if he chose to do so, and on that basis the FTT determined that he was liable to contribute towards the cost of the proposed work.

Other leases

20. The FTT was not shown the leases of other flats in the building. During the hearing of the appeal Mr Reekie produced his own leases of Flats 1 and 2 and copies of the leases of Flats 3 and 8.

21. The leases of Flats 1 and 2, on the ground floor, are different from the lease of Flat 5 on the first floor, in at least the following three respects. First, they do not include a grant of the right to use the lift. Secondly, in Part Two to the Fifth Schedule, clause 1 does not include a reference to the lift amongst the examples of parts of the main structure used only by some of the leaseholders, nor does it refer to the driveway leading to the garages at the rear. And thirdly, the lease of Flat 2 (but not of Flat 1) includes a proviso at the end of clause 1 stating specifically that the tenant is not required to contribute towards the cost of lift insurance, lift maintenance or staircase lighting or cleaning.

22. The leases of Flats 3 and 8 (and, as far as Mr Reekie is aware, those of the Flats 4, 6 and 7) differ from that of Flat 5 only by the inclusion of a covenant by the tenant to: "contribute and pay one sixth part of the cost of maintaining, insuring, servicing and (if necessary) renewing the lift, lift shaft and all other machinery comprised or used in connection with the lifts installed in the Building."

Mr Reekie's position

23. In presenting his appeal Mr Reekie referred to a number of matters concerning the conduct of the affairs of OCRA and its decision making which are outside the scope of this appeal. His key point was straightforward. Clause 1 required the cost of work to the lift to "reflect" the use made of it by different leaseholders. Since he made no use of the lift he considered that he could not be expected to contribute towards the cost of its refurbishment.

Discussion

24. I have no doubt that the FTT was correct in its interpretation of the lease and that Mr Reekie is required to contribute towards the disputed costs.

25. The plan attached to the lease of Flat 5 is based on a 1989 construction drawing showing the work required to subdivide the building into flats, but not showing the later work undertaken to instal the internal staircase connecting it to the ground floor. The lease was not varied when the additional work of amalgamation was carried out, and its meaning did not change. Each of the leases must be interpreted according to its own terms and in the circumstances which existed when it was granted. At that time the only access to Flat 5, according to the plan, was by using the communal stairs or the lift.

26. As one would expect of a lease of a flat on the first floor, the lease of Flat 5 includes an express grant of the right to use the lift, as well as a right of way over the porch, hallways, staircases and landing of the building for the purpose of obtaining access to the flat itself. It also includes an obligation on the management company to keep the structure and any parts of the building used in common by of the tenants in good and substantial repair.

27. The normal expectation where a building is fully let on long leases would be that each leaseholder would contribute towards the cost of keeping the whole of the building in repair (with the exception of the interior of individual flats). That normal expectation is reflected in the definition of "Service Charge" in recital 1(p) which specifies a percentage of the Total Service Cost, meaning the cost of performing the maintenance company's obligations, including the repair of the lift and common parts.

28. The Service Charge is defined so as to be "subject to clause 2 of Part II of the Fifth Schedule", but it is not obvious what that qualification is intended to achieve. Clause 2 provides only for the resolution by the management company of any dispute about the apportionment of the total service cost under the Fifth Schedule. The only provision of the Fifth Schedule concerned with apportionment is clause 1, which is not referred to in the definition of Service Charge. It is possible that the drafter of the lease made a mistake and intended to refer in the definition to Part II of the Fifth Schedule (the apportionment

provision in clause 1 and the dispute resolution provision in clause 2) or simply to refer to clause 1, rather than clause 2. Whether there was a mistake or not, the intention of the parties was clearly that clause 1 and the definition of the Service Charge would both have effect. The practical consequence is that the leaseholder's obligation to pay 7.338% of the costs incurred by the management company is qualified when clause 1 applies.

29. Without clause 1, the leaseholder of Flat 5 is to pay the agreed percentage of the actual cost incurred by the management company in repairing the lift and communal areas. What effect does clause 1 have on that obligation?

30. There are a number of important points to note about clause 1.

31. First, it is concerned only with costs of maintenance (and not, for example, costs of insurance or cleaning).

32. Secondly, it is concerned only with particular parts of the building, namely, those parts of the main structure and the driveway (including the lift, flat roofs or balconies) of which only one tenant or certain tenants have the use.

33. Thirdly, and most importantly, it gives the management company a discretion, and does not impose an obligation; it provides that the company "may" charge the tenants who have the use of the relevant part of the building "such part as the Company thinks fit of the cost of maintenance", not that it "must" or "will" do so.

34. Finally, if the company chooses to make use of that power it is for it to determine how much each leaseholder is to pay. It is not required to apply a particular method of apportionment (although, on general principles, it must not exercise its power capriciously or for an inappropriate purpose).

35. The effect of clause 1 is therefore that it allows the management company to charge a different proportion than the fixed percentage for certain works.

36. The key to identifying which works may be the subject of a different apportionment is the phrase "have the use of". Where only one tenant, or only certain tenants, "have the use of" part of the building, the management company may, if it chooses, make use of the power in clause 1. I agree with the FTT that, in this context, the ordinary meaning of "the use" is that it refers to the right or ability to use, and that a person "has the use of" a staircase or a lift if in practice and as a matter of entitlement they are able to use it. Whether in fact they use it or not is neither here nor there; they still "have the use" of it.

37. The inclusion of the words "to reflect such use", on which Mr Reekie placed much stress, does not require a different interpretation of clause 1. The management company may charge the relevant tenant or tenants the whole or such part of the cost as it thinks fit "to reflect such use". "Such" use means such use as has previously been identified i.e. the charge is to reflect the right to use, not the quantity of use. How the right to use is to be reflected in the charging structure is a matter for the discretion of the company and need not be based on actual usage.

38. Mr Reekie's alternative approach would require that he alone, amongst all of the leaseholders, would contribute according to the amount of use he actually made of the staircase or lift. If, as he says is the case, he never uses the lift, he would avoid liability for its maintenance altogether. That approach would be a recipe for uncertainty and dispute. From one year to the next the company would not know whether it could count on a contribution from the leaseholder of Flat 5 towards the cost of work to the lift. If the leaseholder chose not to use the lift there would be a shortfall, since the other five leaseholders with access to the lift are each obliged to pay only one sixth of the cost.

39. Mr Reekie's scheme would either require a high degree of trust amongst the residents of the building (who may or may not be leaseholders) or would necessitate the installation of some method of surveillance. Mr Wragg pointed out that the lease says nothing about the period of time to be taken into account in deciding whether a particular leaseholder had the use of the lift. Needless to say, there is nothing in the lease to indicate that the parties had any such complications in mind.

40. In summary, OCRA is free to choose whether to charge more or less than the 7.338% specified in the definition of Service Charge for costs of maintenance of those building components within clause 1, including the lift. It has decided that Mr Reekie should pay the same proportion as the other leaseholders with flats on the upper floors and access to the lift. Mr Reekie's complaint that that approach is unfair is completely unsustainable.

41. For these reasons I dismiss the appeal.

Martin Rodger KC,

Deputy Chamber President

16 February 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.