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HM Courts & Tribunals Service

Leasehold Valuation Tribunal
Case Number: CAM/26UJ/LSC/2012/0138

Premises	:	**Centennial Court & Millennium Wharf, Wharf Lane, Rickmansworth, Herts WD3 1AZ**
Applicant	:	**Millennium Wharf Management Co. Ltd,**
Respondent	:	**Ian Peter Lees**
Date of Application	:	**22nd October 2012**
Type of Application	:	**Application for a determination of the reasonableness and payability of service charges pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act")**
Date of Hearing	:	**28th March 2013**

Attendees:

Applicant	**Respondent**
Ms. Zanelli, Solicitor **Mr. L'Estrange, Director of Applicant**	**Ian Peter Lees (in person)**

Tribunal:

Mrs. J. Oxlade	**Lawyer Chairman**
Mr. N. Martindale FRICS	**Valuer Member**
Mrs. N. Bhatti	**Non-legal Member**

DECISION

The Tribunal finds that the Respondent lessee is liable to contribute to the maintenance costs of the two lifts located in Millennium Wharf.

REASONS FOR DECISION

Background

1. The Applicant is a residents' management company ("the company") of the estate, which includes two buildings: Centennial Court, and Millennium Wharf.

2. Centennial Court stands to the north-west of the Estate, is a self-contained building, and contains 8 flats.

3. Millennium Wharf stands to the south of the plot, and contains 29 flats. The building is separated as two semi-detached houses would be, each "half" with its own entrance, serving 16 flats (the western "half") and 13 flats (the eastern "half") respectively. The Respondent's flat is located in the eastern "half" of Millennium Wharf (flats 17-29).

4. The company has responsibly to maintain the estate, and the lessees have obligations to contribute to the costs of running the estate.

5. The obligation to maintain the estate includes maintenance of two lifts located in each "half" of Millennium Wharf. Currently, the company charges the cost of maintaining both lifts to all save three lessees of Millennium Wharf, irrespective of whether the lift is located in their own "half" or the other "half", and so irrespective of whether the lessees can and do have access. There are three lessees from whom a contribution to lift costs is not sought by the company (flats 2, 3, and 17) as they have their own front doors, and do not have access to the communal entrances. Lift maintenance costs are also not charged to Centennial Court, as they do not have access to Millennium Wharf, nor the lifts in them, and so do not benefit from them.

6. It is the liability of ground floor flats (1,18, and 19, who do not have their own front doors) to contribute to the costs of maintaining the lift, which the Applicant raises as an issue, and in respect of which a section 27A application was issued.

7. In correspondence dated 1st November 2012 the Tribunal said that it appeared that the Applicant wished for a declaration, which fell outside the Tribunal's jurisdiction; that only if there was a demand for service charges which were in issue would the Tribunal have jurisdiction. In reply, the Applicant's Solicitor said that there was one lessee who had disputed liability to pay, the lessee of flat 18, and who is a now the sole Respondent in these proceedings. The application was served on all lessees, with instructions as to how to be made a party to proceedings, but none has applied to be made a Respondent.

8. The application was accepted on the basis that the Applicant seeks a determination as to the reasonableness and payability of service charges by the lessee of flat 18 in respect of the costs of maintaining the lifts.

9. In the application the Applicant says that all leases are drafted in broadly the same terms as the lease of flat 18 and the Applicant's statement of case specifically asks for clarity that the lessees of 1,18 and 19 are liable to make a contribution to the costs of maintenance. However, in the absence of declaratory powers of the Tribunal, in the absence of the Tribunals' sight of all relevant leases, and the absence of a dispute as to flats 1 and 19, the Tribunal necessarily confines its determination to the issues between these two parties in respect of flat 18.

10. On 20th December 2012 Directions were made for the filing of evidence, with which the parties complied.

Inspection and Hearing

Inspection

11. The application was listed for hearing on 28th March 2013, with an inspection beforehand.

12. At the inspection the Respondent provided each member of the Tribunal with a copy of the lease plan, which materially assisted in establishing the following: the layout of the estate; the facilities in Millennium Wharf (17-29) and the absence of connection between the two halves; the provision of stairs and a lift (as an alternative) to the upper three floors; that the Respondent's flat could be accessed through patio doors and so without entering the communal hallway; that if the Respondent's flat was accessed by use of the common entrance this could be done without making use of the stairs or the lift.

Hearing

Preliminary Issues

13. At the commencement of the hearing the Tribunal considered whether the Tribunal had power to consider an application issued by the Respondent which centred on the alleged failure of the Applicant to keep separate three funds, the resultant effect was a breach of a fiduciary duty and breach of section 42 of the 1985 Act. The Tribunal heard submissions as to jurisdiction, and provided an oral ruling that the Respondent was seeking to raise accounting matters over which the Tribunal did not have jurisdiction. Further, the Respondent said that the Applicant was required to calculate and apply a balancing charge/credit at the end of each financial year, but had not done so,

and so he considered that the Applicant's were not entitled to demand £1891.74. The Tribunal ruled that the Respondent was inviting the Tribunal to undertake a forensic accounting exercise, which was outwith the Tribunal's jurisdiction, and so declined to deal with that application.

14. Accordingly, the Tribunal would deal with the matters only which were raised in the Applicant's section 27A application, as clarified in correspondence; namely, the liability of the lessee of flat 18 to contribute to the maintenance costs of the lifts.

Substantive Issue

15. In accordance with the Directions the parties set out their cases very fully in writing: the Applicant relied on a statement of case dated 9th October 2010 (pages 42 to 50), and a statement of Mr. Stephen L'Estrange (Director of the Applicant) dated 5th March 2013 (page 315 to 320); the Respondent relied on an undated statement of case (page 105 to 178).

16. Accordingly, at the hearing the parties were invited to make oral submissions in reply to the written submissions of the opposing party.

The Parties Respective Positions

17. At the outset it is worth recording that the Respondent did not dispute that the Applicant was required to maintain the lifts, and that it could recover costs from other lessees under the terms of the lease. The issue was whether or not the lease for flat 18 obliged him to do so.

The Applicant's Position

18. The Applicant's case is that the terms of the lease are clear and unambiguous: the Applicant is obliged to maintain the lifts, that the costs are reasonably and properly incurred in doing so, and the Respondent has an obligation to make a contribution to the costs of maintaining the estate, including the lifts.

19. The Applicant relies on the following terms of the lease. Clause 5 contains the Applicant's covenant to observe and perform the obligations specified in Part I and II of Schedule 7. These covenants require the Applicant to keep in good repair and to renew and improve a list of items. In that list is "the building", and "common access"; it is the reference to "common access" that brings in the requirement to maintain the lifts, which is defined in particular 11 as:

> "the shared entrance hall landing and lift and stairs (if any) serving the demised premises (flat 18) and shown coloured yellow on the plan".

20. The plan provided to the Tribunal by the Respondent shows that the areas "shown coloured yellow on the plan" are the areas now used as communal entrance halls, stairs, landings, and corridors on all four levels in each "half" of Millennium Wharf and three levels in Centennial Court. They include the spaces in which the lifts are installed in Millennium Wharf.

21. The corresponding obligation on the Respondent is a covenant by clause 3.2 to comply with obligations in Part II of Schedule 4, to pay a maintenance charge as a contribution to the expenses, which the company shall reasonably and properly incur on the estate. The lessee is required to pay £770.18 each year in two instalments, and there are provisions for balancing payments. However, the lease does not define the exact contribution which each lessee shall pay to discharge of the maintenance charge (as to percentage, or by square footage, commonly seen in leases), as this is a matter within the Applicant's discretion. The Applicant does so by square footage, and not by reference to the floor on which the flat is located.

22. The lease provides that the Applicant has the power to vary the division of the maintenance charge, by Part 1 Schedule 6, if in the "reasonable and proper opinion of the surveyor appointed by the Company it is necessary or equitable to do so". In accordance with this provision, a variation had taken place in respect of lift costs, and a schedule at page 52 showed how this had been done. The principle behind it is that the flats in Centennial Court and flats 2,3, and 17 of the flats in Millennium Wharf pay nothing towards the costs of the lifts, as none had access; all other flats in Millennium Wharf (including ground floor flats) pay a percentage, dependant on the square footage of the flat (which methodology was adopted in respect of all other service charges).

23. The Applicant's position was that flat 18 (and flats 1 and 19) all require access to the communal areas, in which the lift is located, and so are liable to meet the costs; that the Respondent does not use it does not have a bearing on liability to pay.

24. The Applicant made the point that it is illogical for the Respondent to take issue with the lift, and yet not to take issue with the heating, carpeting, cleaning, and lighting of the common parts in the floors above him, from which he does not benefit or make use. It therefore undermines the Respondent's benefit and use argument, which does not appear in the lease. In essence, the maintenance requirement is a requirement to contribute to a fund which serves all blocks; the Applicant has agreed variations are logical.

The Respondent's Position

25. The Respondent's position is that no reasonable reading of the lease requires that he make a contribution to the costs of lift maintenance

("primary argument"); in the alternative, that he should be liable only for a portion on costs relating to maintenance of the lift in his "half" of Millennium Wharf ("the Respondent's secondary argument")

The Respondent's primary argument

26. The Respondent's starting point was to adopt the interpretation of the lease, relying on the approach taken in The Earl Cadogan and Cadogan Estates Limited v 27/29 Sloane Gardens and Wayil Mahdi [2006] EWLands LRA/9/2005 ("27/29 Sloane Gardens") by HHJ Rich, namely that it is (i) for the landlord to show that a reasonable tenant would perceive that his lease required him to make the payment sought, (ii) such a conclusion should emerge clearly and plainly from the words used, (iii) if words could reasonably be read as providing for some other circumstance, then the landlord will fail to make out his case, but (iv) this does not allow a rejection of the natural meaning of the words used in their context in favour of some fanciful meaning and purpose, (v) where consideration of the clause leaves ambiguity then this will be resolved against the landlord, the proferror.

27. The Respondent said that when he bought his lease, being mindful of the high costs of maintaining leases which he did not want, he sought and was given reassurance from the developer's representative and his conveyancing Solicitor that he would not be required to contribute to the costs of maintaining the lifts. This was given, but he made no contemporaneous note about this advice. As a reasonable lessee he therefore made specific enquiries, and was satisfied from his reading of the lease and the advice received. When he first became aware of the Applicant's position, he disputed it.

28. The Respondent said that the Applicant's position is not maintainable when one looks at the logical consequence: being, that he would be required to contribute to what could be high costs of maintaining the lift in the other "half" of Millennium Wharf, over which he has no use or control.

29. Further, the only purpose of the lift is to transport people and/or goods vertically between floors, and no ground floor tenant would have any practical use for a lift. The Applicant's reliance on the statement that the Respondent requires access to the communal entrance and areas is undermined by the fact that he can enter his flat using the patio doors on the North-side, so bypassing the communal areas completely.

30. The Respondent in no sense benefits from the lifts in either "half" of Millennium Wharf, even when using the communal area; he is indifferent to their existence and operation. He acknowledged the case of Billson and Others v Tristem [2000] L7TR 220, in which it was said that a lease can be interpreted as imposing a liability on the tenant to pay a service charge, even when they did not derive a benefit; however, subsequent case law makes it clear that there is no hard and

fast rule. The Respondent set out some of the cases, by way of example of a deviation from the hard and fast rule.

31. The Respondent made the point that the words "common access" appear in all of the leases, but would mean something different for each flat; for example those in Centennial Court, by reason of location and reality use different things in Millennium Wharf. Accordingly, "common access" must be interpreted strictly on a flat by flat basis.

32. The Respondent considered the words "if any" in the definition of common access (set out at paragraph 19 above) required that the extent of the common access (and so liability to pay) had to be made against each facility referred to (stairs, lift, shared entrance hall, landing), recognising that none of the areas were uniform. The Respondent relied on the recognition in the right of way (set out in Schedule 2) that imports an element of necessity, by the words "if necessary"; further that there was a direct reference to "benefit or use". In the Respondent's case he neither benefits from nor uses the lifts.

33. The Respondent relied on the case of Jallane v LB Camden LON/00AG/LSC/2006/0375 which when considering apportionment of costs as between a number of tenants, considered the ability to make use of the facilities as a fundamental factor.

34. Further, "common access" included the works "serving" the demised premises (his flat), which when applying an Oxford English Dictionary definition of "to be of use in achieving or satisfying" or "be servant (to), do service (to), to be useful (to), it excluded lifts from his common access. The Respondent relied on the decision in the case of Rafiq v LB Waltham Forest LON/00BH/2011/0175 in which an external staircase used only by the top floor flat to gain access to it, did not serve the demised premises, because the ground floor flat derived no use or benefit.

35. The Respondent relied on correspondence which he has with Hazelvine in 2003, which he said conceded the scheduling was not correct.

The Respondent's secondary argument

36. The Respondent generally agreed that the maintenance charge payable by reference to floor area, was reasonable. The Respondent's alternative to the primary argument was that if the ground floor flats are liable under the lease, this should be reduced to nil.

37. He made the point that the Applicant recognised on some level the merits of the "use and benefit" argument, as the Applicant did not charge flats 2, 3, and 17 for lift costs, in light of the absence of access to the communal areas (each having their own front door); further, the flats at Centennial Court did not pay for the lift, as there were none in

their block and they did not have access to Millennium Wharf. It naturally followed that as one "half" of Millennium Wharf did not have access to the lift in the other "half", they should be responsible only for the lift in their own "half".

Jurisdiction

38. The jurisdiction of the Tribunal is set out in section 27A of the 1985 Act:

"An application may also be made to the Leasehold Valuation Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge will be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable
(d) date at all by which it would be payable, and
(e) the manner in which it would be payable".

39. The following statutory provisions also have relevance to this case:

Section 19(1) of the 1985 Act, which provides:

"Relevant cost should be taken into account in determining the amount of the service charge payable for period –

(a) only to the extent that they are reasonably incurred ....

and the amount payable shall be limited accordingly".

Findings

40. The Tribunal has carefully considered the evidence filed and submissions made by both parties, and is satisfied that the lease requires that the Respondent contribute to the costs of maintaining the lifts in both halves of Millennium Wharf.

41. The first question posed by Rich HHJ in the 27/29 Sloane Gardens case was whether the landlord could show that a reasonable tenant would perceive that his lease required him to make the payment sought ? If so, liability arises.

42. The Tribunal preferred the argument made by the Applicant: namely, that the extent of the obligation to pay service charges was defined by the Applicant's wide liability to maintain the estate, and not by reference to individual use/benefit/enjoyment of the Respondent.

43. Clause 3.2 imposed on the tenant a covenant "with the tenants of all the other apartments in the building to observe and perform the obligations set out in Part II of Schedule 4 and in Schedule 9". Schedule 4 Part II by paragraph 1.1 required the lessee to "pay to the Company the maintenance charge being the amount specified in paragraph 16 of the Particulars of the expenses which the Company shall in relation to the estate reasonably and properly incur in each maintenance year in complying with the covenants on its part contained in Schedule 7 hereto". Schedule 7 part I required the company to keep in good repair and decoration and to renew and improve a list of items, including the common access. The "common access" was defined in particular 11 as the "shared entrance hall landing and lift and stairs (if any) serving the demised premises and shown coloured yellow on the plan". The areas coloured yellow on the plan included all areas in which lifts and stairs were located.

44. In short, the Respondent's liability to contribute was defined by the company's liability to maintain.

45. The Respondent argues for a narrow interpretation of "common access", in light of the word "serving" the demised premises, which he says acts as a limitation. If that were right then the company's repairing obligation to all lessees would only extend to the common area to the Respondent's flat, and no other flat in the building. The Tribunal do not consider that a reasonable tenant could interpret the lease so narrowly.

46. Further, the lease plan is specifically incorporated as part of the lease under the definition of common access area, which is further defined by reference to the areas shown yellow on the plan, which show all hallways, landings, stairs, and corridors on every one of the floors in every building.

47. The Respondent sought to rely on a use and benefit argument, though the lease did not define his obligation to pay dependant on his use and benefit of certain parts of the premises. The case law to which the Respondent referred largely referred to leases where such a term was incorporated. Whilst the right of way in the subject lease refers to benefit and use, that clause was not used to define the obligation to pay.

48. The Respondent did not seek to argue that he was not liable to pay a contribution for the cleaning/heating of the stairs, landings, corridors, or the carpeting and decoration thereof which he did not use, which was most of the building, being that he was on the ground floor. That argument would be available to him as a natural extension of the argument he seeks to make in respect of the lifts. However, in the Tribunal's view any reasonable tenant reading the lease would expect to contribute to all of it. An argument for excluding the lift but including the stairs as part of an obligation to pay, then becomes unmaintainable.

49. The Tribunal is not satisfied that the correspondence with Hazelvine undermines the Tribunal's jurisdiction to determine the matter, or its interpretation of the lease. Whilst the Tribunal accepts the Respondent's evidence that he was advised differently by a Solicitor and the developer, when read as a whole the lease and when carefully considered its meaning is clear and unambiguous.

50. In short, the Tribunal finds that the landlord has shown that a reasonable tenant of flat 18 would perceive that he is liable to contribute to the maintenance costs of both lifts, and that this emerges plainly from the words used.

Variation by discretion

51. The Tribunal finds that the company can vary the maintenance contributions, by virtue of Part 1 Schedule 6. The lease provides that this is limited by reference to what is appropriate and equitable.

52. The Tribunal retains jurisdiction to consider the matter by reference to the test of reasonableness under section 27A.

53. The Tribunal accepts that there are powerful arguments made by the Respondent: if Centennial Court and flats 2, 3, and 17 are excluded from making a contribution to the lifts on the basis that they do not benefit of use them, why then should the flats in one half of Millennium Wharf contribute to lift costs in the other half. An answer to meet this is that both halves are likely to have been installed at the same time, have roughly the same amount of user of them, and there are usually economies of scale at having two serviced at once, and perhaps a discount for holding two contracts with the same company. There is an argument that it is not equitable for the lessee of the ground floor to pay for a lift, which he will never use; however, that would not apply where friends/family members live on different floors and so visit one another using the lifts; it is not realistic then to change proportions on the basis of personal user. There is a strong counter argument to be made that all of the flats in the building benefit by having a lift because when occupants change, the furniture and goods and effects are not carried up and down the stairs, but by the lift.

54. It can therefore be seen that there is a wide range of what is appropriate and equitable, which is reflected in the sensible and pragmatic view that the Respondent takes in paying for stairs cleaning/carpeting, lighting and heating of the same.

55. The Tribunal finds that the company's apportionment is within the band of what is appropriate and equitable, and so reasonable within the meaning of section 27A of the 1985 Act.

Costs

56. Ms. Zannelli said that the Applicant would not seek to recover the Applicant's costs from the Respondent personally, but as an administration charge recoverable from all lessees under Part 1. Schedule 7 paragraphs 5 and 8, and 8.3. Mr. Lees submitted that the Applicant should not get its costs, as the claim could have been brought 10 years ago. Further, that Hazelvine's correspondence informed the matter.

57. It was open to either party to bring the application, and so that point is a silent one. The Tribunal has preferred the Applicant's interpretation of the lease over the Respondent's, and so the Tribunal finds that costs recovered as an administration charge from the service charge funds is permitted under the terms of the lease. The correspondence from Hazelvine does not in our view preclude recovery.

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Joanne Oxlade
(Chairman)

24th April 2013