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HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL
Case no. CAM/42UF/LSC/2013/0026

Property	:	**12 Walpole House, Auction Street, Bury St. Edmunds, Suffolk IP33 3FE**
Applicant	:	**Ian Mawhinney**
Respondent	:	**Encore Estate Management Ltd.**
Date of Application	:	**19th February 2013**
Type of Application	:	**To determine reasonableness and payability of service charges**
The Tribunal	:	**Bruce Edgington (lawyer chair)** **David Brown FRICS MCIArb**

DECISION

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1. The Tribunal finds that the amount of £474.00 claimed from 'Ms R L and Ms A H Mawhinney' on the 12th June 2012 is payable only by the lessees of Apartment 12.

2. No order is made pursuant to Section 20C of the **Landlord and Tenant Act 1985** ("the 1985 Act") preventing any costs of representation in these proceedings being included within any future service charge.

3. The Tribunal does not order the Respondent to refund the fee paid at the commencement of this application.

Reasons

Introduction

4. The circumstances giving rise to this dispute started with quite a simple occurrence and have finished up with a dispute which is really quite disproportionate to the amount involved.

5. Miss. A Mawhinney is the Applicant's daughter who, on 5th April 2012, was co-owner with her mother of the leasehold interest in the property. Just before midnight, she and 4 friends were leaving the property by using the communal lift. The 5th April was in fact Maundy Thursday although the Applicant says that the following circumstances happened on a Saturday. The evidence seems to point to the 5th April when this happened but the exact date is not relevant because

both parties seem to accept that the circumstances of this case arise from one incident.

6. The lift jammed between floors and the occupants used the internal telephone to call Kone, the lift maintenance company. They were told that there would be a 2 hour wait for an engineer to come and release them. They were not prepared to accept this and were told that the only alternative was to call the Fire Brigade, which they did.

7. The Fire Brigade arrived and freed them. A charge was then levied by Suffolk County Council for £474.00. This invoice reached the management company responsible for maintaining the common parts of this block and they proceeded to send a demand to the then lessees i.e. Miss. Mawhinney and her mother, for the full amount. In fact it seems that Miss. Mawhinney subsequently transferred her part of the title to the Applicant.

8. The Applicant was not present and has not submitted a statement from his daughter which sets out exactly what happened that night. However, the applicant says he understands "*that one of the lads in the lift jumped on another's shoulders when the lift was descending. In hindsight this was a silly thing to do, but it was done in high spirits*". The Kone engineer who subsequently attended is reported to have said that he found an empty bottle of vodka, numerous empty beer cans and a discarded receipt for a crate of the same beer as the cans found. The report of the engineer seems to indicate that he attended at 9.28 am the following morning. As this was many hours after the incident in question, the Tribunal cannot really draw any inferences from this discovery.

9. The dispute is that the Applicant says the cost should be part of the service charge and split between all the residents. The Respondent management company disagrees and says that the cost was incurred because of the behaviour of the people in the lift and should not have to be paid by all the residents.

The Lease

10. The Tribunal was shown a copy of the original lease omitting the plan. It is dated 18th June 2010 and is for a term commencing on the 25th March 2009 and expiring on the 17th November 2160 with an increasing ground rent. The lessee agrees to pay 3.11 per cent of the service charges.

11. There appear to be various blocks within the development and an underground car park. Of relevance to this dispute is clause 5.6 which says:-

> "*To the extent not recovered pursuant to Schedule 5, the Tenant shall pay on demand a due and fair proportion (determined by the Landlord whose decision shall be final and binding) of all expenses incurred in connection with Conduits, walls and other structures, services and facilities used by the Premises in common with other property, and of all Outgoings payable in respect of the property which includes all or part of the premises*"

12. Schedule 5 is the service charge part of the lease which seems to make very little specific reference to the lift or lifts. What does appear clear from the papers is that there is no dispute that the Respondent is responsible for the maintenance and repair of the common parts of the building which includes the lift or lifts.

13. Finally, of relevance to this dispute, is clause 5.10.6 which provides that:-

> "*The Tenant shall not do or knowingly permit any act or thing whereby the Remainder of the Block or the Communal Parts of the Estate or any Conduits may be damaged or obstructed or the lawful use thereof by others may be impeded or hindered in any manner whatsoever*"

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'.

15. Section 19 of the 1985 Act states that 'relevant costs', i.e. service charges, are payable 'only to the extent that they are reasonably incurred'. A Leasehold Valuation Tribunal has jurisdiction to make a determination as to whether such a charge is reasonable and, if so, whether it is payable and by whom.

16. Paragraph 1 of Schedule 11 of the **Commonhold and Leasehold Reform Act 2002** ("the 2002 Act") Act defines an administration charge as being:-

> *"an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable... in connection with a breach (or alleged breach) of a covenant or condition in his lease."*

17. Paragraph 5 provides that an application may be made to this Tribunal for a determination as to whether an administration charge is payable.

Discussion

18. The decision not to have a hearing in this case was that of the parties. In the event, the Tribunal has been concerned about the lack of evidence on the important issues. It did consider whether there should be an inspection and a hearing but decided, on balance, and in the interests of proportionality, that this would be an unnecessary expense to the public purse. There is also no guarantee that the evidence will be any clearer, particularly if the Applicant's daughter is not called to give evidence. Some of the omissions can be described as follows:-

- There was no lease plan in the bundle. The lease plan is an integral part of the lease and gives the Tribunal a sense of the overall plan of the development, the importance of the lift, the number of floors etc.
- There was no statement from anyone in the lift at the time of the problem. Thus, the Tribunal has no idea what was said to and by the Kone representative or the fire department. Such person could not be cross examined, or questioned by the Tribunal about why people were jumping

onto other peoples' backs and whether anyone was under the influence of alcohol

- Nothing has been produced from the Fire Brigade to suggest that they gave any warning of a charge in the event that they came out to release Ms. Mawhinney and her friends. Equally there is no evidence to the contrary i.e. a warning could have been given.

19. In the papers supplied, at pages 61-63, is a copy of a document described as 'Budget Meeting Minutes' which is said to be a minute of a meeting of the residents in this development held on the 7th July 2010. Under the heading 'Lift Maintenance Contract', it is said that the Kone silver contract, which is what they had, cost £4,700 whereas the bronze contract "*which does not include the cost of call outs & minor repairs*" costs £2,500. There is then the following comment which makes no sense but from which one can, perhaps, presume that the cheaper option was taken up. The comment is "*The leaseholders voted unanimously*".

20. In the Applicant's statement he refers to this document by saying "*I understand the emergency callout contract with Kone was actually cancelled the previous year to save costs (ref AGM minutes)*" and this does not seem to be denied by the Respondent.

21. The various papers from Kone and others in the bundle suggest that the lift in question is regularly checked, as one would expect, and appears to be reliable. The 2011 Kone contract in the bundle states that the callout response time out of office hours is 8 hours. What precise change there was about callout times in this contract as opposed to the previous 'silver' contract is not known.

22. There is also a record of the callout at page 24A which says that the Kone engineer was there from 9.28 am to 10.22 am on the 6th April. A letter from Kone at page 19 which is described as having been originally sent on the 28th May 2012 says "*Unfortunately the entrapped passengers very quickly became hysterical and were advised that if they were unwilling to wait for the lift engineer....that they should call the fire brigade....Please note that the cause of the lift failure was the safety gear being tripped. This is commonly caused by passengers bouncing/jumping/messing around in a moving lift car.*"

Conclusions

23. The Tribunal concludes, from the evidence before it, that the lift stopped working because one of Miss. Mawhinney's party jumped onto the shoulders of another whilst the lift was descending. It must have been clear to anyone that sudden movement or jumping in a lift could have caused problems and that a lift will have safety trips. A lift is obviously potentially dangerous if its mechanism does not work properly. All lifts are restricted in terms of weight and sudden jumping movements mean that weight is transferred quickly which is likely to cause any safety mechanism to engage.

24. A call out late at night by the Fire Brigade was bound to have a fairly expensive cost. It would have involved the use of expensive capital equipment and the time of several people out of working hours. It is not attending a fire and the Tribunal concludes that it would be reasonably anticipated that a public body, in these

straightened times, would charge for this sort of service – whether a warning was given at the time or not.

25. Therefore, and whilst the Tribunal has no comparative cost to consider, it does take the view that a charge of £474 including VAT is a reasonable cost in the circumstances. Therefore, the next thing to determine is who should pay this amount?

26. It is the Tribunal's view that the Applicant's daughter should bear this cost, being one of the lessees at the time who, as a matter of law, knowingly permitted what went on in that lift. Apart from anything else, the Respondent or the landlord has a right of action against her for breach of the terms of the lease in that she "*knowingly permit*(ed) *any act or thing whereby...the Communal Parts of the Estate...may be...obstructed or the lawful use thereof by others may be impeded or hindered in any manner whatsoever*".

27. In simple terms, she permitted an act i.e. the jumping on the shoulders which, according to the evidence, caused the lift to stop which, in turn, would have obstructed the lawful use of the lift by others. She may not have encouraged this behaviour but she has not felt it appropriate to file a statement of evidence describing what actually went on. The Tribunal can only conclude from the evidence provided that Miss. Mawhinney accepts some responsibility for what went on that night.

28. As to the law, the Tribunal concludes that the only relevant service charge is the contractual amount paid to Kone. The residents and the Respondent appear to have taken the positive decision to remove call outs from the contract with Kone. The natural inference which any reasonable lessee must draw from this is that this sort of call out would not, henceforth, be covered by the service charge regime.

29. In the event, the people in this lift only wanted to escape. The lessee knew or ought to have known that the cost incurred would not be part of the Kone contract and would have to be paid for separately. The cost of escaping from a lift is not within the definition of a service charge. It is possibly within the definition of an administration charge as being '*in connection with a breach... of a covenant or condition in his lease'*. The breach in this case would be permitting the person involved to jump in the lift triggering the safety mechanism which, without the intervention of the Fire Brigade, would have impeded or hindered other lessees from using the lift in question. The cost of the Fire Brigade would therefore be the administration charge arising from the breach.

30. If the Tribunal is wrong in that interpretation, then the Respondent or the landlord has a clear right of action against Miss. Mawhinney in the County Court for breach of contract either under Clause 5.6 or Clause 5.10.6 of the lease. Whatever the true legal position, the Tribunal's conclusion is that the lessee of the property is liable for this amount. As the Respondent appears to have discharged the claim by Suffolk County Council, the Applicant or his daughter must refund that amount to the Respondent.

31. As to the Respondent's costs of representation, the Applicant has asked for an

order that this not form part of any future service charge demand. As there has been no hearing, it is hoped that there will be no cost to charge to the service charge account. The Applicant has not succeeded and it is not just or equitable for an order to be made. Having said that, the Tribunal hopes that the other leaseholders will not have to pay any extra arising from this case.

32. The Tribunal does not consider it just or equitable for an order to be made that the Respondent refund any fees incurred by the Applicant in this application.

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Bruce Edgington
President
23rd April 2013