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**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case References : **LON/00AG/LSC/2016/0227**

Property : **9 Leinster Mansions, Langland Gardens, London NW3 6QB**

Applicant : **Fainchoice Limited**

Representative : **Brady, solicitors**

Respondent : **Mr Oren Wolf**

Representative : **In person**

Appearances for Applicant : **(1) Ms N Roberts, counsel
(2) Ms L Banfield, director of Fainchoice Limited**

Appearances for Respondent : **(1) Mr Oren Wolf
(2) Mr D Salt, friend**

Type of Application : **For the determination of the reasonableness of and the liability to pay service charge
Judge Amran Vance**

Tribunal Member :

Date of hearing and venue : **24 August 2016 at 10 Alfred Place, London, WC1E 7LR**

Date of Decision : **24 August 2016**

DECISION

Decisions of the tribunal

1. The tribunal determines that the respondent is liable to pay the sum of £10,523.00 in respect of the costs of lift works demanded by the applicant on 11 May 2015.

Background

2. The applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 (“the 1985 Act”) as to whether or not the respondent is liable to pay the sum of £10,523 by way of service charge in respect of 9 Leinster Mansions, Langland Gardens, London NW3 6QB (“the Flat”) demanded on 11 May 2015.
3. The Flat is a basement flat located in a converted mansion block containing 14 flats (“the Property”). The applicant is the freehold owner of the Property. The respondent is the lessee of the Flat and holds his interest under the terms of a lease dated 21 July 1982 granted for a term of 125 years from 24 June 1982 and entered into between (1) Sir Bernard Nathaniel Waley-Cohen and Matthew Henry Waley-Cohen and (2) Sidney James Saunders (the “**Lease**”).
4. This application raises a short point regarding the construction of the Lease and whether or not the respondent is liable to pay towards the costs of maintaining and repairing the lift servicing the Property which does not extend to the basement Flat
5. The application is dated 24 May 2016. Directions were issued by the tribunal to both parties on 2 June 2016 allocating the application to be dealt with on the papers unless either party requested an oral hearing. The respondent subsequently requested an oral hearing which took place on 24 August 2016. At the start of the hearing the tribunal admitted in evidence: (a) an email dated 23 August 2016 setting out a breakdown of the service charge apportionment for the 2016/17 budget; and (b) copies of the invoices for the lift replacement works as sent to the lessees in the Property. The respondent did not object to reliance on these documents.
6. Numbers appearing in square brackets and bold below refer to pages in the hearing bundle supplied by the applicant.

The Lease

7. The respondent’s case was that all the leases for the flats in the Property were in identical terms although individual lessee’s service charge

contributions varied according to the size of each flat. The respondent's Service Charge proportion is stated in the lease to be three thirty-fifths.

8. Clause 1(2)(c) provides that the tenant shall pay

“By way of further and additional rent within twenty-one days of the issue of a demand and in accordance with the provisions of Clause 5(2) hereof the Service Charge proportion of the costs and expenses incurred or to be incurred by the Landlord in carrying out or in considering the necessity of the works referred to in Clause 4(2) hereof hereof which expenses shall include any Managing Agents fees or proper expenses of the Landlord or its other agents or servants in carrying out such works”

9. Under clause 4(2) the landlord covenants, subject to payment of the contribution referred to in Clause 1(2)(c) :

“(a) To carry out such works as may be reasonable and necessary for the proper maintenance repair and redecoration of the exterior of the Property and of the roof structure joists and foundations thereof and of any building erected in connection therewith and the sewers drains watercourses cables pipes wires and other services machinery and equipment including boilers entryphone lift and things the use of which is common to the Flat and the other flats in the Property and for the avoidance of doubt the Landlord shall be obliged to maintain and repair all parts of the Building not hereby demised or demised on like terms to other flats in the Building.

(b) To procure that the front entrance the entrance hall and the staircase and landings leading to the Flat are properly maintained and painted and decorated and cleaned and lit from time to time as may be necessary

(c) To pay all charges incurred by the operation and maintenance of all machinery and equipment and other apparatus”.

10. The First Schedule sets out easements, rights and privileges granted to the tenant. Paragraph one to that schedule grants the following:

“ The right for the Tenant his servants and invitees in common with others having the like right to pass and repass on foot only for the purpose of gaining access to and egress from the Flat but not for any other purpose over the common parts passages entranceways and lifts”.

11. The lease does not contain a specific definition for what amounts to the common parts of the Property. Nor is there a definition as to what constitutes “the Building” which appears to have been used interchangeably with “the Property” in clause 4(2)(a). The Property is defined as Leinster Mansions, Langland Gardens, London N.W.3.
12. The tribunal bundle also included a copy of the lease for the ground floor flat in the Property which is in identical terms to the lease of the Flat.

The Respondent’s Case

13. The respondent’s position, as I understand it, is that clause 4(2)(a) only imposes an obligation on the landlord, enforceable by him, to maintain and repair the lift where its use “is common to the Flat and the other flats in the Property”. He says that the lift is not common to his Flat and the other Flats because it does not serve the basement floor.
14. Further, he says that he is expressly excluded from using the lift by virtue of the First Schedule which only grants him a right of way over the common parts, passageways, entranceways and lifts in the Property for the purpose of accessing his Flat. His position is that as he cannot gain access to his Flat by using the lift he is not entitled to use it.
15. It follows, he says, that as he is not entitled to require the landlord to maintain and repair the lift which he does not use, and as is not entitled to use, that he is not obliged to pay for any works actually carried out.

The Applicant’s Case

16. Ms Roberts submitted that the words “and things the use of which is common to the Flat and the other flats in the Property” should be read disjunctively from the words immediately preceding it in clause 4(2)(a). This means that that there is a standalone obligation on the landlord to repair and maintain the lift independent of the question as to whether or not it also had an obligation to do so on the basis that use of the lift was common to the Flat and the other flats in the Property. As to the meaning to be attributed to the landlord’s obligation to repair and maintain “things the use of which is common to the Flat and the other flats in the Property” she suggested that this did not require use to by

all of the flats together, use by one of the flats was sufficient to invoke the obligation.

17. She contended that when interpreting the Lease this tribunal should seek to identify the parties' intentions by reference to what a reasonable person would have understood them to be from the language used in the Lease. Here, if the parties had intended that the tenant had no obligation to pay towards the costs of repair and maintenance of the lift then they would have made express provision for this.
18. She also submitted that the contents of the First Schedule to the lease had no bearing on the respondent's liability to pay service charge costs as it was just the grant of a right of way or easement. The fact that he does not use the lift does not, she said, obviate him from contributing towards its costs of repair and maintenance which was the obvious intention of the contracting parties to the Lease.
19. By way of an alternative submission, Ms Roberts suggested that respondent was, in any event, liable to pay the costs in dispute because they fell within the landlord's obligation in clause 49(2)(c) to "pay all charges incurred by the operation and maintenance of all machinery and equipment and other apparatus". This must, she argued, include the lift.
20. Finally, she contended that the words "for the avoidance of doubt the Landlord shall be obliged to maintain and repair all parts of the Building not hereby demised or demised on like terms to other flats in the Building" operated as a sweep up clause obliging the landlord to repair and maintain the common parts of the Property, including the lift, in addition to the obligations set out in the preceding part of that sub-clause.

The tribunal's decision and reasons

21. The tribunal determines that costs in dispute are payable by the respondent.
22. There is some attraction in Ms Roberts submission that the words "and things the use of which is common to the Flat and the other flats in the Property" should be read disjunctively from the words immediately preceding it in clause 4(2)(a). However, the consequence of such an interpretation is that the landlord would be obliged to maintain and repair the sewers, drains, watercourses, cables, pipes and services wherever located in the Property. In our view that cannot have been the parties intention given that the demise of the Flat to the tenant includes "all walls cisterns sewers drains pipes wires ducts and conduits used solely in connection therewith" with responsibility for the maintenance

and repair of these matters lying with the tenant to the extent provided for in the tenant's covenant at clause 3 of the Lease.

23. Clause 4(2)(a) is not well drafted. However, in our view, having regard to the construction of clause 4(2) as a whole and the whole of the Lease, the intention of the parties must have been that in addition to the exterior and structure of the Property the landlord was obliged to maintain and repair the sewers, drains.....machinery and equipment including [the] lift and [other] things used in common by the Flat and the other flats in the Property. If clause 4(2)(a) said no more than this then the wording of the sub-clause may not have been sufficient to give effect to this intention given that the Flat is a basement flat with no right to use the lift.
24. However, it does say more. It goes on to say that "for the avoidance of doubt the Landlord shall be obliged to maintain and repair all parts of the Building not hereby demised or demised on like terms to other flats in the Building". We agree with Ms Roberts that this clause obliges the landlord to repair and maintain all of the common parts of the Property, including the lift, regardless of whether or not the lessees of the basement flat, and indeed the ground floor flat, use or have the right to use the lift.
25. If that is wrong we also agree with Ms Robert's submission that the landlord would be obliged, under clause 4(2)(c), to pay charges incurred in maintaining all machinery and equipment and other apparatus in the Property, including the lift. Mr Wolf argued that this obligation should not be read as including the lift because the obligation to maintain the lift was expressly dealt with in clause 4(2)(a). However, as stated above, in our view the intention of the parties was to oblige the landlord to maintain and repair the lift and that the lessees should all contribute towards those costs irrespective of whether or not they had the right to use the lift. The wording of clause 4(2)(a) cannot, in our view be regarded as an express statement of the parties intentions to exclude the landlord from such an obligation. We accept that the clause is badly drafted. However, there is no ambiguity in the wording of clause 4(2)(c).
26. For these reasons we accept that the costs of repairing and maintaining the lift fell within the landlord's obligations in clause 4(2)(a) and (c) and that the costs in dispute are therefore payable by the respondent by virtue of clause 1(2)(c).

Name: Amran Vance

Date: 24 August 2016

ANNEX 1 - 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 Tribunal 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 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.
4. 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.