FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case reference	:	**LON/OOBE/LSC/2022/0382**
Property	:	**Drake Court** **Glenhurst Court** **Knoll Court** **Lowood Court** **Marlowe Court** **Raleigh Court**
Applicant	:	**The Incorporated Trustees of the Dulwich Estate**
Representative	:	**Tim Hammond of Counsel**
Respondents	:	**Leaseholders of Drake Court, Glenhurst Court, Knoll Court, Lowood Court, Marlowe Court and Raleigh Court.**
Representative	:	**In person**
Type of application	:	**Determination of payability and reasonableness of service charges pursuant to s27A LTA 1985**
Tribunal	:	**Judge Shepherd** **Duncan Jagger FRICS**
Date of Decision	:	**13th June 2023**

Decision

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1. The Tribunal are asked to consider 6 linked applications under s.27A Landlord and Tenant Act 1985 seeking a determination as to the apportionment of the costs of substantial lift refurbishment works in 6 residential blocks that they own. We dealt with a previous application concerning the refurbishment itself. Here we deal with the apportionment issue alone.

2. The Applicants are the freehold owners of Drake Court, Glenhurst Court, Knoll Court, Lowood Court, Marlowe Court and Raleigh Court, which are multi-storey blocks of residential flats in Crystal Palace. The flats in the blocks are held by leaseholders under the terms of long leases.

3. The leases are each in a similar form, albeit some of the original leases have been extended.

4. There is a passenger lift in each of the blocks. Those lifts are old and in need of substantial refurbishment.

5. At the previous proceedings (LON/00BE/LSC/2020/0296) we determined that (i) the lifts were in disrepair (ii) as a matter of lease construction, the costs of refurbishment were recoverable through the service charge and (iii) it was reasonable to undertake the proposed refurbishment works and incur those costs. The apportionment issue was not dealt with because it did not form part of the application.

6. Clause 2(vii) of the leases sets out as follows:

   The Lessee will from time to time during the said term pay to the Lessors a fair and rateable proportion of the cost and expense of…

   (e) keeping the… passenger lift… clean in good condition lighted painted and in complete repair…

Such proportion shall be estimated or calculated by the Surveyor either prior to the commencement of any work in this sub-clause mentioned during the progress or after the completion of any such works and the certificate of the Manager as to the amount payable by the Lessee shall be final and binding on the Lessors and the Lessee.

7. The use of the phrase *fair and rateable* is unusual. Ordinarily *rateable* would be used in the context of rateable value but here there is nothing else to support the use of rateable value in this lease as a means of apportionment. The Applicants suggest that *rateable* means *reasonable* yet if that were the case why was the latter term not used ? On consulting various dictionaries it appears that *rateable* means *able to be calculated*. In which case it takes matters no further forward. In any event it is arguable that *reasonable* adds nothing to *fair*. We read the clause as saying no more than the proportion should be fair.

8. As conceded by the Applicants the Tribunal retains the power to determine the apportionment – it is not , contrary to the lease term, left to the manager to determine.

9. The Applicants commissioned a report by Richard Lewis dated 30th November 2022. He concluded that there was no straightforward answer as to apportionment. He considered relevant statutory provisions and guidance. Ultimately however this is a simple question of lease interpretation. The situation of leaseholders having to pay for services from which they derive no benefit is not unusual. Here some leaseholders derive no obvious personal benefit from the lift but are expected to contribute to its maintenance. As the Applicants' counsel pointed out however they do benefit indirectly because the lifts are used by maintenance operatives and cleaners etc. Indeed, the lifts will be used by anyone acting on behalf of the freeholder carrying out the freeholder's obligations under the lease for the benefit of all leaseholders.

10. Mr Lewis put forward two options:

(a) Option 1:

(i) all leaseholders in a block contribute equally to 10% of the costs (to reflect the use of maintenance operatives/cleaners for the benefit of all leaseholders); and

(ii) the remaining 90% of the costs are apportioned between the leaseholders of the flats in a block on floors above ground level.

(b) Option 2: the costs are apportioned equally between all leaseholders in a block.

11.The Applicants favoured option was option 1 which was a departure from the current situation in which the lift maintenance costs are apportioned equally between all leaseholders in a block. Unsurprisingly, some leaseholders preferred option 1 and some option 2 largely depending on the effect on them financially. Accordingly, the Applicants having found that they could not reach a consensus applied to us to make the decision.

12. In this task we derived considerable assistance from the leaseholders' contributions both in writing and at the hearing. It is not intended to recite each contribution individually but we considered them all. Estoppel by convention was raised as a factor because Option 2 had become the accepted method of apportionment. We acknowledge this argument but consider that it does not assist us in our interpretation of the lease. The suggestion that the apportionment should be based on floor area is also of limited assistance because it would represent a precedent that would likely affect the whole of the service charge mechanism. Some leaseholders suggested a different percentage split for option 1. Mr Lewis accepted that the 10% formula was random in the sense that any percentage could be applied and there was no real justification for 10% rather than say 20%.

Determination

13. We consider that Option 2 should be the method of apportionment. A *fair* proportion means fair to all leaseholders. Option 1 necessarily means some leaseholders will pay more and some less. This is not necessarily fair. If the original parties to the leases had intended to distinguish between those who did and did not derive benefit from the lifts they would have done so with clear wording. This delineation does not exist and it would be artificial for the Tribunal to impose it.

Judge Shepherd

13th June 2023

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.