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

Case Reference : **MAN/00EW/LSC/2018/0023**

Property : **West Woodlands, The Lydiate, Birkenhead
Road, Neston CH64 1RU**

Applicants : **The Lydiate management Company No2
Limited
And
Mr P Dodd**

Respondents : **Mr M and Mrs D Smith**

**Type of
Application** : **Payability of Service Charges
Section 27A Landlord and Tenant Act 1985**

Tribunal Members : **Mr J R Rimmer
Mr J Faulkner**

Date of Determination: **19th November 2018**

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Order

The costs of replacement of the boundary fence which are the subject of this application fall within the service charges for the estate element of the charges in respect of The Lydiate and fall to be paid in the proportions set out in the respective leases of properties comprising that development.

A. Application and background

- 1 The Applicants are, respectively, the management company having responsibility for the provision of services to the development at The Lydiate, Birkenhead Road, Neston and one of the leaseholders of a property likely to be affected by any decision the Tribunal makes in respect of the Application. The Respondents are the leaseholders of one of the properties on the development, West Woodlands where work has been done.
- 2 A further leaseholder, Mr A Gilchrist, was originally a further Applicant in the proceedings, but has now indicated that he has withdrawn from them. This is formally acknowledged by the Tribunal, if it has not been noted previously.
- 3 The Lydiate is a development within the grounds of a large mansion house set in extensive grounds on the outskirts of Neston, known as being on "The Wirral" but within the Borough of Ellesmere Port and Neston. There are 16 dwellings in total, 9 flats within the main house and 7 further properties within the immediate grounds. West Woodlands is a semi-detached house comprising one of those seven.
- 4 Service charges are apportioned into two heads. An estate charge is divided equally between the 16 properties, whilst a further building charge is divided equally between the apartment owners.
- 5 Service charges are managed through the management company and its agents, West Kirby Property Management, whose managing director, Mr Mayhew, is the prime mover in the Application as it now stands.
- 6 Matters have reached the current state of affairs in this way:
 - (1) Immediately to the Northern boundary of West Woodlands there is a pathway. This is private to the occupiers of the development and its use is shared in common between them.
 - (2) That boundary was marked by a fence, latterly a post and hurdle fence, but there is some disagreement as to its original nature.

- (3) In early years minor repairs appear to have been carried out funded by the service charges.
 - (4) By 2017 the original fence was in such a poor condition that a decision was eventually made to replace it with a more sturdy structure, although still of post and hurdle design.
 - (5) One of the concerns of Mr Dodd was how and when this decision was reached, in relation to the provision of the budget for 2018 services and an apparent lack of notification of this extra work until sometime later.
 - (6) After the work was carried out a further perusal of the lease suggested there might be some lack of clarity as to how the cost of the work should be apportioned between the common services and the owner of West Woodlands, given some considerable apparent ambiguity in the lease.
- 7 The Application is therefore one to clarify the payability of the charges for the fence, and hence for any works of a similar nature in the future to this, or other, property on the development.

Inspection

- 8 On the morning of 12th November 2018 the Tribunal inspected the development at The Lydiate, Neston insofar as it was necessary to do so in order to acquaint itself with the layout of the area, the nature of the common grounds to the properties and the variety of different boundary structures between them and the individual dwellings:

Submissions and hearing

- 9 Submissions were made by both of the Applicants and the Respondent to the Tribunal and it was quite clear from what was provided that the issue substantive issue for the determination of the Tribunal was the allocation of the responsibility to meet the cost of the fencing works at West Woodlands, some £2,484.16, so as to satisfy, so far as possible the somewhat conflicting terms of the lease. They are set out below. It was the view of the parties that 3 options were available
- (1) The obligation fell solely upon the management company to meet the cost from the service charge budget
 - (2) The obligation fell solely upon the Respondents
 - (3) One half of the cost should be met through the service charge and the other half by the Respondents
- 10 Whilst having a common view of the options there were different views as which was correct and why.
- 11 All parties had expressed their respective views, but it is fair to say that none were entirely convinced that theirs prevailed over others. A further

complicating issue was that as to whether the fence as now reconstructed provided an element of betterment compared with what went before; there being conflicting views as to what was originally provided, possibly a post and rail fence only, and then enhanced, by the addition of hurdling, if that had not been present from the outset. In any event what was now in place was recognised as being better than what had been replaced.

- 12 The Tribunal engaged in lengthy discussion with all parties present as to the meaning and intention of the various clauses of the lease set out below set out below without the parties still being unable to determine a clear picture as to responsibility for the fence at West Woodlands and being resigned to the Tribunal making a determination as to its own view, likely to affect the future treatment of other similar structures, as and when attention was required.
- 13 The parties acknowledged that they were not in any way seeking to rely upon what had happened previously in relation to more minor attention in the past to this, or similar structures. This application was to set the pattern for the future.

The Law

- 14 Further section 27A landlord and Tenant Act 1985 provides:
 - (1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –
 - (a) the person by whom it is payable
 - (b) the person to whom it is payable
 - (c) the amount which is payable
 - (d) the date at or by which it is payable, and
 - (e) the manner in which it is payable

and the application may cover the costs incurred providing the services etc and may be made irrespective of whether or not the Applicant has yet made any full or partial payment for those services (subsections 2 and 3)

Subsection 4 provides for certain situations in which an application may not be made but none of them apply to the situation in this case.

The Lease

- 15 It is necessary to examine the lease with some particularity in order to see

the difficulties it presented to the parties in determining the proper nature of the cost for the fence, and indeed the Tribunal in coming to a conclusion upon that point. The Tribunal has taken the liberty of removing wording that in its opinion does not relate to what is in issue.

- 16 The lease for West Woodlands was entered into on 28th October 2005 between Flame Estates Wirral LLP (the landlord and developer), The Lydiate Management Company Limited (the original management company) and Pauline Powell (the original leaseholder) for 999 years at a premium and rent. It is understood that the developer went in to liquidation and the management company reconstituted into its present, No2, form.
- 17 "The Property", meaning the house and grounds now purchased by the Respondents, is defined in the lease in the Third Schedule.
" All that part of land and dwellinghouse erected thereon forming part of the development...together with all landlords fixtures and fittings which are now or may from time to time during the term be in the unit all which unit is delineated on the plan thereon edged red together with one half of the width of the walls which divide the unit from adjoining units which walls are hereby declared to be party walls..."
- 18 It is the view of the Tribunal that this is not of assistance in determining any issue in relation to the allocation of responsibility for the fence.
- 19 "The Maintained Property" is defined as "those parts of the Development which are more particularly described in the Second Schedule...and the maintenance of which is the responsibility of the management company
- 20 The Second Schedule refers to
"firstly the accessways footpaths ramps and access areas forming part of the development secondly the parking spaces thirdly the...boundary walls fences and hedges including party structures... which are used or intended to be used in common by the tenant and the owners and occupiers of the units... and fifthly all other parts of the development not demised or intended to be demised by leases of the Units but excluding the building"
- 21 This would appear to indicate that the responsibility may fall on the management company. It refers particularly to boundary fences between what is used by the tenant in common with the owners and occupiers of the other units and it is certainly not clear that the fence now being considered is demised to the tenant according to the Third Schedule.
- 22 The Fifth Schedule refers to rights granted to others that the demise of West Woodlands is subject to. Paragraph 3 of that Schedule refers to:
"The right of the landlord at any time or times hereafter without obtaining the consent of or paying compensation to the tenant:

3.1 to build or re-build or alter or permit or suffer to be built or rebuilt or altered any buildings or erections upon the Development (other than the units) according to such plans and to such height extent or otherwise and in such manner as the landlord shall think fit notwithstanding that such buildings as so built rebuilt or altered may obstruct any lights windows or other openings in or on the property

3.2 to make such alterations as it may think fit in the position or extent of the gardens or grounds as currently laid out shown on the Plan and also to alter the route of any accessways footpaths and service media from time to time.

- 23 This might assist the Tribunal in that it raises the following potential views:
- (a) It is within the contemplation of the parties entering the lease that issues relating to the grounds remain fluid and in the landlord's control
 - (b) It would not be unreasonable to assume that if the footpath adjoining West Woodlands is removeable/alterable the fence may be similarly dealt with
 - (c) It would be reasonable to include responsibility for maintenance of the fence(s) relating to it to be with the management company in that circumstance, rather than the leaseholder
 - (d) This may further explain why the fences are not mentioned within the description of the demise for west woodland.
- 24 The Sixth Schedule sets out what expenses are such as to fall within the definition of maintenance expenses in Clause 1.13 of the lease so as to form part of the service charges.
- 25 Include within its scope are:
- 1 "Inspecting maintaining cleaning altering renewing repairing rebuilding repointing improving or otherwise treating as necessary and keeping the Maintained Property and every part thereof in good and substantial repair order and condition and renewing and replacing all worn and damaged parts thereof.
 - 3 ...maintaining and repairing and where necessary reinstating any boundary wall hedge or fence (if any) and any other walls fences or hedges within the development...
- 26 This may well be an indication that any boundary fence within the development should be subject to the management company having the ability expend money on those items to the extent envisaged by those two sub paragraphs.
- 27 Part Two of the Eighth Schedule sets out the covenants on the part of the leaseholder that are enforceable against him by both the landlord and the management company. Those that may be of some significance to the tribunal's consideration are:

"8 To repair and keep the Property (but excluding such parts of the property as are included in the Maintained Property) and every part thereof in good and substantial repair order and condition."

"41 To maintain and keep in good repair and condition the walls and fences within and surrounding the Property (other than those which are herein declared to be party walls and fences in respect of which the responsibility for maintenance and repair shall be shared with the adjoining owner) to the reasonable satisfaction of the landlord."

"42 Not to alter or heighten any wall or fence whether or not it is on the boundary of the property or to paint any wall."

- 28 These paragraphs in the Eighth Schedule would, firstly appear to contradict others, set out above, as to the responsibility for the repair etc. of fences and, secondly, impose a liability notwithstanding an absence of control by the tenant of how the fence should appear.

Tribunal's conclusions and reasons

- 29 Without doubt, the lease could have been far more helpful to the parties in indicating responsibility for the boundary structures to either the whole development, between the various properties on it, or between the individual plots and the common parts.
- 30 There is a provision in the lease to deal with party structures. Party structures are not just shared structures, they are ones that are shared for a common purpose, that of assisting in the support maintenance, improvement or development of those who are parties to it. They do more than simply mark a boundary. This will probably be the reason that the only defined party structure in the respondents' lease is the wall shared with the semi-detached property to the South. That wall fulfils one, or more, of those functions set out above.
- 31 How then is this boundary fence to be viewed? The Eighth Schedule appears to put the responsibility for it upon the Leaseholder. Paragraph 27 above sets out an apparently clear obligation to repair and maintain fences over which the leaseholder has only limited control. Even these paragraphs in the lease may not be as clear as they seem. Paragraph 8 in the Schedule is unnecessarily ambiguous. In the lease there are supposed definitions provided for both "the Property" (Clause 1.9 and the Third Schedule) and "the Maintained Property" (Clause 1.12 and the Second Schedule). They should be mutually exclusive. The Eighth Schedule should not need to refer to the Property, but excluding the Maintained Property.

- 32 There are other provisions of the lease, again set out above that would suggest the responsibility for the fence falls on the management company, to be included in the chargeable services.
- (1) The definition of the maintained property in the Second Schedule refers to the inclusion of the boundary fence(s) used by the tenant in common with the owners and occupiers of the units. The subject fence is used by the tenant and the other owners who share the pathway.
 - (2) Paragraph 25, above, sets out two of the matters set out in the Sixth Schedule of the lease upon which expenditure may be incurred and then recovered in the service charge. To the Tribunal's mind they expressly, or impliedly include the boundary fences.
- 33 The Tribunal also identifies, above, certain provisions that would impinge on the leaseholders' ability to deal freely in exercising control over the fence, even though he were to have responsibility for repair and maintenance. They are set out in paragraphs 22 and 27, above. To the Tribunal's mind that contained in paragraph 42, of the Eighth Schedule, not to alter and heighten any fence, is consistent with an obligation to repair and is intended to preserve the amenity for all with little detriment to individual leaseholders. Those contained in the Fifth Schedule being rights retained by the landlord are far more draconian and far more consistent with those fences being outwith not only the control, but also the finances, of a leaseholder, so more likely to be a responsibility of the management company through service charges.
- 34 If the Tribunal pulls all these threads together in an attempt to put a true construction and meaning to the obligations in the lease it comes to the conclusion that the fence in question is the responsibility of the management company and the costs associated with it are recoverable in the service charge:
- (1) It is not a party structure.
 - (2) Any supposed obligation in relation to it for the leaseholder is ambiguous in view of the difficulty in reconciling the references in the Eighth Schedule to the Property and the Maintained Property.
 - (3) The leases appear to be more explicit in more places that the responsibility for boundary fences (and with no clear explanations to what boundary structures are contemplated) falls on the management company as being within the maintained property.
 - (4) The overarching theme within the lease is that a boundary fence is not within the control, or management, of any leaseholder and should therefore fall within the service charge obligation.
- 35 There are then two matters upon which the Tribunal might pass further comment:
- (1) There may be an element of betterment arising from the nature of the new fence. The Tribunal is satisfied that this should not cause difficulty as to the cost being included in the services. There is no clear and

definitive evidence available as to how the original post and hurdle fence came into existence. This is a replacement that may be better. Paragraph 1 of the Sixth Schedule contemplates improving any part of the Maintained property. Although paragraph 3 then omits reference to improvement the Tribunal is of the view that if it does not exclude improvement then clause 1 still permits it.

- (2) Mr Dodd has concerns about the openness of the process relating to the work being agreed and carried out. The Tribunal would offer no overt criticism in this respect and content itself with the observation that in the modern world transparency is all and the more, the better.

J R RIMMER (CHAIRMAN)
27 November 2018

