FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**MAN/00CB/LSC/2020/0083**
HMCTS code (audio,video,paper)	**:**	**P:PAPERREMOTE**
Property	**:**	**Flats 1 to 30 Swan Court, Woodchurch Road, Prenton CH43 0RX**
Applicant	**:**	**Birkenhead Swan Court Estate Management Company Limited**
The Respondents	**:**	**Various Leaseholders (See Annex)**
Type of Application	**:**	**Landlord and Tenant Act 1985 – s 27A**
Tribunal Members	**:**	**Judge J.M. Going** **J.Faulkner FRICS**
Date of Deliberations	**:**	**14 July 2021**
Date of decision	**:**	**15 July 2021**
Date of Determination	**:**	**27 July 2021**

DECISION

Covid -19 pandemic: description of hearing:

This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face to face hearing was not held because no one requested the same, it was not necessary nor practicable, and all the issues could be determined on the basis of the papers. The documents that the Tribunal was referred to were in the Application, those supplied with it, the Applicant's bundle and its responses, all of which the Tribunal noted and considered.

The Decision made by the Tribunal is set out below.

THE DECISION

The Tribunal found that:-

(1) each front door is owned by and the responsibility of the flat owner,
(2) the Lease wording is not sufficient to include the costs of modifying or replacing such doors within the service charge provisions, and therefore
(3) the costs of any replacement of the front doors of the flats are not payable as part of the service charges.

Preliminary

1. The Applicant ("the Management Company") applied on 16 November 2020 to the First-Tier Tribunal Property Chamber (Residential Property) ("the Tribunal") under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for a determination as to whether, if costs were incurred for replacing all 30 flat entrance doors, a service charge would be payable. The Management Company estimated the overall cost to be in the region of £48,000, i.e £1,600 per flat.

2. The Tribunal issued Directions on 27 January 2021, stating that the matter would be dealt with on the basis of the papers provided by the parties without holding a hearing, unless any of the parties requested a hearing. None did so.

3. To help clarify the issues a Case Management Conference was held on 5 March 2021 before Regional Judge Bennett, following which the Management Company was asked to reconsider the application and provide a position statement, which it did.

4. The Tribunal convened on 14 July 2021 to decide the application.

The factual background

5. None of the following matters, which are referred to in the papers have been disputed.

6. Swan Court is a 3-storey building of 30 purpose-built flats constructed in the mid-1960s.

7. The Management Company now owns the freehold, and each flat owner is a shareholder. It is stated that all but one of the Leases have had their terms extended from 99 to 999 years.

8. The Management Company have, following a fire risk assessment, identified that the entrance doors to the individual flats, which open onto internal corridors, do not provide sufficient fire and smoke protection.

9. Over the years, 28 out of the 30 front doors have been replaced by the individual flat owners. 23 of the replacement doors are glazed UPVC, 4 are glazed composite doors and 1 is a glazed wooden door. The remaining 2 doors with Georgian glazing are as originally constructed, and do not have self-closing mechanisms.

10. The Management Company has stated in its position statement "solicitors acting for the Management Company have been unable to give a confident interpretation of the Lease on whether the Management Company or Leaseholders have responsibility for the flat entrance door set. Their view was that as the Lease demises the internal structure it could be argued that Leaseholders are responsible, however as doors are not specifically mentioned there was uncertainty regarding whether doors were internal or external to the structure".

The relevant terms of the Lease

11. A sample Lease ("the Lease") was provided to the Tribunal and it is understood that all the Leases contain comparable provisions.

12. Individual flats are described in the Schedule to the Lease as

"ALL THOSE several rooms kitchen bathroom and adjuncts (comprising flat number….) on the… floor of that portion of the building now standing upon the piece of land particularly shown on the plan annexed hereto…. and thereon edged red including the ceilings and floors thereof and the joists and beams on which the floors are laid the internal walls dividing the rooms the internal faces of the external walls and one half (severed vertically) of the internal walls of the Flat dividing the Flat from any other flat or common part of the said building and all glass in the windows and all cisterns tanks drains pipes wires ducts and conduits used solely for the purpose of the Flat but excluding the roof foundations external and main structural parts of the building all which said Flat is known as Number.. Swan Court…TOGETHER with the garage…."

13. As well as paying a ground rent Clause 1 states that each flat owner is to pay by way of "further rent… a fair proportion… of the monies expended by the Lessor in effecting and maintaining an insurance policy or policies on the building…. and also a fair proportion of the cost and expense of keeping clean and lighting the entrance hall and staircases…"

14. Clause 4 setting out covenants by and obligations of the individual flat owner states : –
" (3) the Lessee will from time to time and at all times during the said term well and substantially repair … maintain amend … and keep such parts of the demised premises…and all additions made to the demised premises and the fixtures therein and the walls… and appurtenances thereof as are exclusively used or enjoyed by the owner or occupier of the time being of the demised premises with all necessary reparations cleansings and amendments whatsoever"…
(6) at all times during the said term to pay and contribute a rateable or due proportion of the expenses (including expenses for administration and supervision) of making repairing maintaining rebuilding and cleansing and lighting the exterior of the flat and the building …. and including the roof walls timbers sewers drains pipes watercourses systems gutters gas water and electric pipes or installations and entrances passages staircases pavements manholes roads party walls party structures dustbin enclosures fences and pathways lying within Swan Court aforesaid and other conveniences (including the expenses and cultivation of land and garden and the erection and maintenance of any communal aerial) which shall belong to or serve or be used exclusively or partially for the demised premises hereby demised and the said building such proportion in the case of difference to be settled by the surveyor for the time being of the Lessor whose decision shall be final….

15. Clause 5 setting out covenants by and obligations of the Lessor (now the Management Company) states that: –
" (iv)…. Subject to the payment by the Lessee of a rateable or due proportion in accordance with the aforementioned provisions to keep and maintain the exterior of the flat and the building of which it forms part and the garage including the roof walls timbers sewers drains pipes watercourses cisterns gas water and electric pipes or installations entrances passageways staircases roads ways paths pavements forecourts party walls manholes garden structures and fences and the tank in the loft or other conveniences which shall belong to or serve or be used for the flat and the building which it forms part and the garage in good repair in condition and properly maintained and similarly to paint all outside woodwork ironwork and other outside parts of the demised premises which ought to be painted…"

The Parties submissions

16. Following the Case Management Conference, the Management Company issued its position statement confirming that it had considered the suggestion that it apply to the Tribunal for a variation of the Lease under section 35 of the Landlord and Tenant Act 1987, but had decided against that for various reasons and wanted to continue with the subject application.

17. The Management Company confirmed that before making the application it had explained to the various leaseholders that the application was made solely because had not been able to get a definitive interpretation of the Lease regarding the responsibility for the doors. "In this respect the Management Company is acting neutrally in that it would be bound by the judgement… To avoid further complication and delay the Management Company would like to continue with the existing Section 27 application in the hope that the court can give a definitive ruling on the Lease… It is the Management Company's opinion that such a ruling is likely to be accepted by leaseholders."

18. None of the Respondent leaseholders have sought to make any additional representations to Tribunal.

The relevant legislation

19. Section 27A of the 1985 Act provides that:-
"(3) An application may also be made to the appropriate Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance improvements, insurance or management of any specified description, a service charge would 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) the date at or by which it would be payable, and
(e) the manner in which it would be payable.
.....
(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment."

20. Section 18 states that: –
"(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent –
(a) which is payable, directly or indirectly for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.
(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.
(3) For this purpose –
(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to the service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or an earlier or later period."

21. Section 19 of the 1985 Act confirms that :-
"(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.
(2) where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable, is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

The Tribunal's Reasons and Conclusions

22. The Tribunal began with a general review of the papers, in order to decide whether the case could be dealt with properly without holding an oral hearing. Rule 31 of the Tribunal's procedural rules permits case to be dealt with in this manner provided that the parties give their consent (or do not object when a paper determination is proposed).

23. None of the parties requested an oral hearing and, having reviewed the papers, the Tribunal was satisfied that this matter is suitable to be determined without a hearing, and that the issues to be decided have been clearly identified in the papers enabling conclusions to be properly reached in respect of the issues to be determined, including any incidental issues of fact.

24. The documentation is persuasive in that it is clear and obvious evidence of its contents. Except where referred to, it has not been challenged and the Tribunal finds no reason to doubt the detail contained.

25. The Tribunal also considered carefully whether an inspection was necessary. Having carefully considered the papers the Tribunal decided that an inspection is not necessary and will have done little, if anything, to assist with its decision-making.

26. The statutory definition of what is a service charge as set out in Section 18 of the 1985 Act begins and limits the list of the potential items by the words "which is payable". Therefore, the first task for the Tribunal is to identify whether there is sufficient authority from the Lease or otherwise for any proposed expenditure to be payable. Section 19 thereafter imposes the further limitation that any relevant expenditure must also be reasonable i.e. reasonably incurred, and for works or services which have already taken place, of a reasonable standard.

27. The Tribunal turned to a detailed analysis of the Lease provisions.

28. The following principles, derived from decided cases, were helpful to the Tribunal in construing those provisions :-

- as the leading textbook Woodfall confirms in 11.007 "the object… in construing any contract is to ascertain what the mutual intentions of the parties were as to the legal obligations which each assumed by the contractual words in which they sought to express them… The intention of the parties is to be discovered from the words used in the document. Where ordinary words have been used they must be taken to and used according to the ordinary meaning of those words… If their meaning is clear and unambiguous, effect must be given to them because that is what the parties are taken to have agreed by their contract. Various rules may be invoked to assist interpretation in the event that there is an ambiguity…"
- service charge clauses are not subject to any special rule of interpretation. As the Supreme Court confirmed in the leading case of *Arnold v Britton (2015) UKSC 36* when interpreting a written contract, the court has to identify the parties intentions by reference to what a reasonable person having all the relevant background knowledge would understand the terms to mean. It has to focus on the meaning of the words in their documentary, factual, and commercial context and in the light of the natural meaning of the clause; and any other relevant provisions of the lease; the overall purpose of the clause and the lease; the facts and circumstances known by the parties at the time; and commercial common sense, but disregarding subjective evidence of any party's intentions.
- where there is doubt about the meaning of a grant the doubt will be resolved against the Grantor. In the case of a lease, this usually means that ambiguities are resolved against the landlord. See for example the case of *Spring House (Freehold) Ltd v Mount Cook Land Ltd (2001) EWCA Civ 1833*
- further, if a tenant's liability is uncertain from the wording of the Lease, even read as a whole, the construction of the service charge clause will be against the landlord. This approach was explained by Lord Justice Laws in *Gilje v Charlegrove Securities Ltd (2001) EWCA Civ 1777* where he stated "The Landlord seeks to recover money from the tenant. On ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so. The Lease, moreover, was drafted or proffered by the landlord. It falls to be construed contra proferentum".
- The Court of Appeal earlier this month in *Marlborough Knightsbridge Management Ltd v Fivaz (2021) EWCA Civ 989* had to decide whether a front entrance door to a leasehold flat was a "landlord's fixture" or something else, in a case where a breach of covenant had been alleged. In the case, the lease was, for the most part, silent about the entrance doors – they were neither expressly referred to in the definition of the demised premises nor reserved to the freehold (although there was reference in the repairing covenants to the tenant having to maintain the entrance door "so far as the same form part of or are within the demised premises"). The Court of Appeal confirmed that the entrance door was part of the demise under the lease, and not a landlord's fixture. It found that the entrance door was part of the structure of the flat stating "It is important to

remember that the demised premises are not the building (the block of flats) but the tenant's individual flat. Each lease is a demise of one flat only, albeit with ancillary rights granted over the building as a whole. In that context, the entrance door to the flat assumes a far greater significance, and while the door may still not be a part of the structure of the flat, the absence of the door would derogate significantly from the grant of the flat. ..... The entrance doors in the present case were part of the original structure of the flat. Moreover, they were an essential part of the structure, since they afforded privacy and security to the tenant(s)..... No one would say that the construction of a flat was complete if the entrance door had not yet been hung."

- Express clauses within a lease will nevertheless override any presumptions which apply when a lease is silent. Thus if a lease clearly says that a door belongs to the freeholder, it does.

29. However in this case the Lease does not explicitly refer to doors, either in the description of the demised premises nor, and possibly more importantly, anywhere within its definitions of those parts of the building and structure retained by or within the responsibility of the freeholder Management Company.

30. The Tribunal, when considering the description of the demised premises, and in particular having regard to the red edging on the Lease plan, the ordinary and normal meaning of the words used, and applying the principle which dictates that if the landlord had intended to exclude the front door or a part of it the onus was on the landlord to have made that explicit, concluded the draughtsman of the lease intended to include the front door within each individual lease and flat, and that it was intended by the original parties to the Lease that the entrance doors should be so included.

31. The Tribunal was bolstered in its view that, without there being explicit words to indicate the contrary, one would naturally assume that a flat's front door forms part of the flat, not only by the *Marlborough Knightsbridge Management* case but by the actions of previous owners and occupiers. 28 out of 30 separate flat owners had clearly assumed responsibility for their individual front doors by replacing them.

32. The Management Company referred to such replacement works as having been undertaken without evidence of formal written consent. The Tribunal did not find this to be necessarily relevant. It was equally and possibly even more significant that the Management Company had not provided any evidence, or suggestion, that such works, undertaken by the vast majority of flat owners, had been objected to.

33. The closest reference to the possibility of the doors being the responsibility of the Management Company comes within clause 5(iv) of the Lease where it refers to the "exterior of the flat" but those words should not be seen in isolation and are immediately followed by what can be construed as qualifying words "and the building of which it forms part". The sentence is also further qualified after specifying various matters which are specifically included

by the later words "which shall belong to or serve or be used for the flat and the building of which it forms part….".

34. The Tribunal is of the view that, read as a whole, and applying the ordinary and natural meaning of the words used, clause 5(iv) relates to shared facilities or structures. Care was taken to list various items where there might be ambiguity. There is however no mention of doors. Without any such explicit reference to indicate otherwise the Tribunal has concluded that the front door is not to be regarded as a shared facility, but for the exclusive use of the flat owner, and as an integral part of the demise.

35. Having carefully considered both the clauses describing the extent of the demised property, and those detailing the obligation to contribute to shared costs, the Tribunal was therefore drawn to the same conclusions i.e.

- that the whole of the front door of each individual flat comes within the demised property and is thus the responsibility of the individual flat owner, and
- such entrance doors are not shared facilities for which the Management Company is responsible, and nor it can resort to the leaseholders' service charges to pay for changes.

36. It is acknowledged that wording in the Lease could have been clearer, but the Tribunal by applying established principles has concluded that any ambiguity is to be resolved by applying the contra proferentum rule, meaning that, without any explicit indications to the contrary, each flat includes its own front door, and nor can there be an implied obligation on the part of the flat owners to pay for any modification or replacement of individual front doors within the service charge provisions established by the Lease.

37. Having concluded that the proposed service charge is not payable under the terms of the Lease, the Tribunal had no further need to consider the reasonableness of the amount.

38. This Decision does not however mean that individual leaseholders can always do what they like with the entrance doors, particularly if there are safety problems. The Tribunal notes in passing that the Fire Safety Act 2021 expressly extends the scope of the 2005 Regulatory Reform (Fire Safety) Order to, at a date to be appointed, "all doors between the domestic premises and common parts" which will then be subject to the inspection and enforcement regime under that Order. The Building Safety Bill as introduced, would also enable powers for the accountable person to compel a leaseholder to address safety issues arising from their doors.

Tribunal Judge J Going
15 July 2021

Annex

Leaseholders

Flat 1 Swan Court – Prs of Mrs Elaine York Decd
Flat 2 Swan Court – Mrs Eileen Bell
Flat 3 Swan Court – Miss Gillian Merry
Flat 4 Swan Court – Mrs Patricia Kendall
Flat 5 Swan Court – Ms Michelle Segar
Flat 6 Swan Court – Miss Kathleen Manning
Flat 7 Swan Court – Mr Brian Ross
Flat 8 Swan Court – Mr Harold Scholes
Flat 9 Swan Court – Mr Philip Wise
Flat 10 Swan Court – Mr Colin Garner
Flat 11 Swan Court – Mr Ian Rodgers
Flat 12 Swan Court – Mr Thomas & Mrs Margaret Frodsham
Flat 13 Swan Court – Mr Steven Brick
Flat 14 Swan Court – Mrs Doreen Smith
Flat 15 Swan Court – Miss Hannah Leyland
Flat 16 Swan Court – Mr James Whalley
Flat 17 Swan Court – Mr Ernest Dickinson & Mrs Victoria Houghton
Flat 18 Swan Court – Mrs Gillian McGeachin
Flat 19 Swan Court – Mr & Mrs Lowry
Flat 20 Swan Court – Mr & Mrs Dodd
Flat 21 Swan Court – PRs of Mr Thomas Barrow Decd
Flat 22 Swan Court – Miss Linda Ostle
Flat 23 Swan Court – Mr Anthony Peters
Flat 24 Swan Court – Mrs Joan Royston
Flat 25 Swan Court – Mr Jonathan Adams
Flat 26 Swan Court – Mr & Mrs Sutherland
Flat 27 Swan Court – PRs of Miss Marilyn Rowe Decd
Flat 28 Swan Court – Mr Paul Davies
Flat 29 Swan Court – Mrs Brabander & Mr Christopher Lunt
Flat 30 Swan Court – Mrs Margaret Lee