You pays your money and takes your choice – Tenant's liability for service charge

Q: If a tenant has the right to use part of a building under the terms of his lease but doesn't, is he still required to contribute towards its maintenance? A: In short, 'yes'.

In **Reekie v Oakwood Court Residents Association [2023] UKUT 45 (LC)** the Upper Tribunal (Lands Chamber) (UT) was asked to determine whether a long leaseholder was obliged by the terms of his lease to contribute towards the cost of refurbishing a lift he claimed not to use.

Background: Mr Reekie had long leases of the Flats numbered 1, 2 and 5 Oakwood Court in Eastbourne. The building was a large Victorian House which had been converted in the late 1980s to create eight self-contained flats: two were on the ground floor and three were on each of the upper two floors. Prior to Mr Reekie's acquisition, Flats 1, 2 and 5 were converted to form a single dwelling occupying most of the ground floor and part of the first floor of the building and, as part of those works, an internal staircase was installed between Flat 1 and Flat 5, making access to Flat 5 on the first floor possible without the need to use the communal side entrance, staircase or lift serving the building.

The lease of Flat 5 granted Mr Reekie an express right to use the lift and required the Oakwood Court Residents Association Ltd (**OCRA**) – the management company under the leases – to keep the lift in repair. Each of the tenants in the building were required to pay a specific percentage of the costs OCRA incurred in equal half yearly payments (the service charge) and there was an ad-hoc demand provision allowing OCRA to request contributions towards "any unusual or unexpected expenditure". Flat 5's service charge contribution was 7.338%.

In 2019, OCRA demanded £3,870 from Mr Reekie, one sixth of the estimated costs of refurbishing the lift. No contribution was sought for Flats 1 and 2 which were on the ground floor of the building. Mr Reekie refused to pay, arguing that he did not use the lift so should not be liable to contribute towards its maintenance. OCRA issued proceedings for a determination and, at first instance, the First Tier Tribunal (**FTT**) found Mr Reekie was liable to pay the contribution sought by OCRA. Mr Reekie appealed to the UT.

The issue before the UT: Clause 1 of Part II of the Fifth Schedule of Flat 5's lease said:

"In respect of any parts of the main structure of the Building (for example the lift flat roofs or balconies) and the driveway leading to the garages at the rear which are the responsibility of the Company under Part One of this Schedule but of which only a tenant or certain tenants have the use the Company may charge such tenant or those tenants either the whole or such part as the Company thinks fit of the cost of maintenance of those parts to reflect such use".

The FTT interpreted "*have the use*" in this clause as "able to use" and said Mr Reekie was liable to pay the contribution as he had the option to use the lift to access Flat 5 if he chose to do so. The UT agreed.

Mr Reekie argued the words "*the Company may charge such tenant or those tenants... the cost of maintenance of those parts to* ***reflect such use*** *[emphasis added]*", meant he was not obliged to contribute as he did not use the lift.

The UT's decision: The UT said there is a normal expectation where a building is fully let on long leases that each tenant will contribute towards the cost of keeping the whole building in repair (with the exception of the interior of the individual flats). This is reflected by the service charge.

The UT agreed with the FTT that "*have the use of*" meant there is a right to be able to use. There is a lift at the tenants' disposal and they are entitled to use it (or not). Whether they actually do is irrelevant.

The UT decided the words "*to reflect such use*" did not mean the costs associated with the lift, or any other communal facilities for that matter, should be allocated based on actual usage. If OCRA was to apportion the lift refurbishment costs in this manner: (i) Mr Reekie would never contribute, which would create a continual shortfall (as the tenants of Flats 3, 4, 5, 6, 7 and 8 were all required to meet one sixth of the costs); and (ii) the building would need surveillance or some other way of determining each tenant's actual usage, which is clearly impractical, or there would need to be a high degree of trust amongst the tenants.

Mr Reekie's appeal was dismissed and the UT determined Clause 1 to Part II of the Fifth Schedule allowed OCRA to charge a different proportion to the fixed service charge percentage for certain works, at OCRA's discretion. OCRA decided that Mr Reekie's contribution for Flat 5 should be the same as the other tenants.

The upshot: Queries commonly arise when a building is let to multiple tenants as to liability for the costs relating to repairing or maintaining communal plant and machinery or decorating the internal common parts to which basement or ground floor tenants sometimes have no access. In all cases, their liability to contribute will depend on the terms of their lease. If there is any doubt, seek early advice.