12341

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Property	: Flat 3, 1 Holmesdale Terrace, Folkestone, Kent CT20 2AJ
Case Reference	: CHI/29UL/LSC/2017/0021
Applicant	: Joy Hampshire
Representative	: None
Respondent	: Francis Dumbrell Limited
Representative	: Embassy Management
Type of Application	: Payability of service charges under s.27A and limitation of service charges under s.20C, Landlord and Tenant Act 1985
Tribunal Member	: Judge A Johns QC
Date of Decision	: 14 July 2017

DECISION WITHOUT A HEARING

Introduction

1. Mrs Joy Hampshire ("the Tenant") applies for a determination as to the payability of service charges demanded in advance under her long lease dated 6 April 1981 ("the Lease") of Flat 3 at 1 Holmesdale Terrace, Folkestone, Kent CT20 2AJ ("the Building"). The application raises two important questions of interpretation of the Lease: a) whether service charge is payable in advance, and b) whether the service charge demanded can include provision for a reserve against future expenditure.

Factual background

2. Historically, service charge for the Building, which includes three flats and a ground floor office, has been demanded in arrears. That practice continued under the current landlord, Francis Dumbrell Limited ("the Company"), from the time of its acquisition of the Building in 2012.

3. That changed in June 2016 when the Company appointed managing agents, namely Embassy Management ("Embassy"). Embassy advised the Tenant of their appointment by letter of 20 June 2016. They signalled the intention to change to demands for service charge in advance of expenditure being incurred and indicated that "*An objective provided for in the budget too will be to establish a reserve fund over time to ensure we have cover for periodic and unforeseen costs*".

4. That was followed by a demand dated 6 July 2016 for service charge for the period 1 January 2016 to 31 December 2016 in the sum of £1100. The demand was accompanied by a budget for the year which included, amongst other things, the sum of £1500 (in addition to £300 already spent) towards "*Safety Matters/Fire etc*" and £300 (in addition to £120 already spent) towards "R&M Minor". The latter label refers presumably to repairs and maintenance. It is apparent from the papers before me that the sum of £1500 represents part of the estimated cost of an automated fire detection system. Such was planned for installation in 2017 at a cost of £4500. It was in fact installed in April 2017 at a reduced cost of £2580.

5. There has since been a further service charge demand in the sum of £1080. That was dated 12 January 2017 and was for the period 1 January 2017 to 31 December 2017. The budget which appears to have accompanied that invoice includes a total sum for "R&M Minor" of £600 as well as further sums of £580

and £2264 for "*Safety Matters/Fire etc*". It is not obvious to me how those further safety/fire sums are arrived at. I also note that the sum demanded is significantly less than the quarter of the total budgeted sum, being £5871.54.

6. The Tenant has paid the first demand and £600 towards the second but has made clear she disputes payability.

The Lease

7. The service charge provisions are found in clause 7 of the Lease. Given the questions of interpretation which arise, it is necessary to set out sub-clauses (1) – (3) in full:

"(1) On the 25th day of December the Lessee shall pay to the Lessor the sum of £100 or such other sum the Lessor shall at its reasonable discretion notify to the Lessee on account of the monies expended or to be expended by the Lessor maintaining and managing the building and on the execution of this Lease the Lessee shall pay a proportionate of part of the said sum in advance for the period up to the twenty fourth day of December 1981

(2) On or before the 24th day of June in each year commencing 24th June 1982 the Lessor shall send to the Lessee an account (hereinafter called "the annual account") showing the amount actually spent on maintaining and managing the building during the year ending on the previous 25th day of December and the amounts actually received in that period from the Lessees of any of the flats and the Lessee shall pay to the Lessor one quarter of the deficiency so far as the annual account relates to the common parts used in common by the owners and occupiers of the flats with the Lessor as occupier of the ground floor of the building and one third of deficiency so far as the annual account relates to the common parts used only by the owners and occupiers of the flats within the Building such proportion in the case of dispute to be fixed by the Lessor In the event of the annual account showing a surplus such surplus shall be carried forward as a reserve fund and used to make good any deficiency arising in subsequent years

(3) In the event of any expenditure of a substantial nature being incurred the Lessor may prepare an interim account and the proportionate part (calculated in accordance with the preceding sub-clause) of any deficiency thereby shown shall be paid by the Lessee (in addition to the said sum of

£100) on the expiration of fourteen days from the service of the interim account".

8. Sub-clause (5) sets out those items which may be included in the annual account. In summary, they are the costs of performing the lessor's obligations as to insurance, repair and lighting of the Building, of complying with statutory notices, and of employing managing and other agents such as solicitors.

Law and procedure

9. This application is made under s.27A of the Landlord and Tenant Act 1985. As amended by the Transfer of Tribunal Functions Order 2013, such section provides that the Tribunal may determine whether service charge is payable and in what amount. In accordance with directions made on 3 March 2017 and there having been no objection, the application is to be determined without a hearing.

Parties' cases

10. The Tenant's case is set out in a statement dated 22 April 2017 and a schedule of the disputed service charges. She puts in issue both the July 2016 and the January 2017 demands. The principal basis of that dispute is her disagreement with the interpretation of the Lease on which those demands rely. She says that the Lease does not permit service charge to be demanded in advance. Nor does it permit service charge demands to include provision for a reserve against future expenditure.

11. Two additional points emerge with which I will need to deal. First, that there was no consultation before the sum towards the fire detection system was demanded. I should add that while the statement of case also referred to a failure to consult in relation to the appointment of Embassy, the evidence was that this was by a 12 month agreement which would therefore not be a qualifying long term agreement triggering the consultation requirements under s.20 of the Act. Second, she questions whether it was reasonable of the Company to make such demands in the year following major works; lessees having in the previous year been required to contribute to the costs of external redecoration.

12. The Company asserts in response that clause 7 of the Lease allows for charges to be levied in respect of future expenditure. As to the two further points, on

the first the Company relies on the fact that consultation was carried out before the works relating to the fire detection system were carried out. On the second, the Company simply says that such is a question for the Tribunal to consider.

Discussion and conclusions on interpretation

13. I start with the questions of interpretation. Interpretation of the Lease is, like the interpretation of any contractual document, a matter of identifying the intention of the parties from the words used having regard to the context.

14. First, does the Lease enable the Company to demand service charge in advance?

15. In my judgment, it is clear that it does. Sub-clause (1) provides for payment of a sum "*on account*" of expenditure including amounts "*to be expended*". That language indicates clearly to my mind that the Company is not limited to demanding service charge only after costs have been incurred. That is underlined by the scheme of sub-clauses (1) and (2). Such scheme is for there to be a service charge year running to 25 December with the annual account for each such year being prepared by the following June and with a payment on account of such year being made on the previous 25 December.

16. The second question, being whether the demand for the on account payment can include not only the costs anticipated to be incurred in the coming year but also provision for a reserve against future expenditure, is a more difficult one. It is a question on which the statements of case give little help. That is simply the product of neither side having any legal representation in these proceedings.

17. In favour of an interpretation that provision for a reserve is permitted, the following can be said:

17.1 Sub-clause (1) allows for a contribution to costs "*to be expended*" and does not mention any limit of time as to when costs can be expended.

17.2 Sub-clause (2) expressly contemplates there being a reserve fund.

17.3 It is generally desirable that provision can be made for future expenditure. It spreads the cost to lessees of less frequently occurring and often expensive works. And it helps ensure that money is available for such works to be carried out when they become necessary.

18. However, I have reached the conclusion that the Lease does not, on its proper interpretation, allow sums to be demanded for the purpose of creating a reserve. The following factors have led me to that view:

18.1 There may be no limit of time mentioned in sub-clause (1), but sub-clause (1) must be read with sub-clause (2). The payment provided for by sub-clause (1) is on account of the service charge shown in the annual account for the coming year prepared under sub-clause (2).

18.2 The annual account under sub-clause (2) cannot include amounts for future expenditure. It is an account of the amount "*actually spent on maintaining and managing the building during the year*".

18.3 There is nothing in sub-clause (5) to displace the natural meaning of the words "*actually spent*" in sub-clause (2). The list of items which may form part of the annual account does not include any mention of provision for future expenditure.

18.4 While there is a reference to a reserve fund in sub-clause (2) it is to deal with the situation where there happens to be a surplus; the sums received having in the event been greater than the amount actually spent. I note too that it must, according to the concluding words of sub-clause (2), be spent in making good any subsequent deficiency. That does not speak of it being retained for future projected expenditure.

18.5 Sub-clause (3) may also point, if perhaps more weakly, in favour of a view that a reserve cannot be demanded. It provides for a special interim demand where substantial expenditure is being incurred. Such a provision could be viewed as the more important where there is no ability to make service charge demands designed to build up a reserve for substantial items of infrequently incurred expenditure.

19. I do not ignore that the Lease is not particularly well drafted. Nor that it may be desirable for a lease to allow for provision to be made for anticipated future expenditure by way of a reserve fund. But the desirability of such a model and the presence of the words "*to be expended*" in sub-clause (1) are, in my judgment, an insufficient basis for holding that this Lease does so provide.

20. There is a limit to the assistance which can be gained from other decisions on other leases. But it does seem to me that the conclusion I have reached on interpretation is consistent with two decisions of the Lands Tribunal in which

this question arose of whether the lease permitted demands for sums to provide a reserve or sinking fund, namely *Southall Court (Residents) Limited v Buy Your Freehold Limited* LRX/124/2007 and *Leicester City Council v Master* LRX/175/2007.

21. The lease considered by HHJ Reid QC in *Southall Court (Residents) Limited v Buy Your Freehold Limited* made express reference to a sinking fund. But that did not lead to an interpretation under which demands for the purpose of building up such a fund were permitted. Rather it was regarded as a reference to a fund which would simply grow up where the maintenance charges recovered from the lessees in previous years exceeded the amount actually expended (see para.17 of the decision).

22. The following wording was considered wide enough in *Leicester City Council v Master* to include provision for a reserve fund: "*to pay on demand to the Lessor at such times and in such manner as the Lessor shall direct a fair proportion (to be determined from time to time by the Lessor's Director of Housing) of the reasonable costs or estimated costs (including overheads) of any services incurred or to be incurred by the Lessor in observing and performing the provisions of sub-clauses (1) (2) (3) and (4) of Clause 4 hereof or as from time to time varied under the power in that behalf contained in sub-clauses (g) and (h) of Clause 6 hereof so far as such costs are chargeable to the Lessee by the Lessor under the provisions of Part III of Schedule 6 of the Act ...*". But, importantly to my mind, there was nothing in that lease to indicate that the estimated costs were to be incurred in any particular year as there were no accounting years under the lease.

Other points

23. I turn then to the other two points before considering the effect of my conclusions on interpretation.

24. As to the complaint that there was no consultation in connection with the carrying out of the fire detection system works, that is not an answer to the demands. These demands were for on account payments. There is no requirement for consultation before on account payments can be demanded – see *Woodfall, Landlord and Tenant* at 7.194.

22. On account demands must, however, be reasonable. That is by virtue of s.19(2) of the Act which provides that "*Where a service charge is payable*

before the relevant costs are incurred, no greater amount than is reasonable is so payable ...". The Tenant's complaint as to reasonableness relies on the fact of these demands, which included significant sums toward works to the fire detection system, coming the year after the lessees were obliged to pay for the costs of external redecoration. That fact does not, in my judgment, make these demands unreasonable. The demands were at least made in the following year, not the same year as the demands for the redecoration costs. The demands also sought to spread the cost to lessees by not including the whole of the cost of the fire detection system works in the 2016 demand. Further, the works are in the nature of fire safety works. They are not, for example, merely aesthetic improvements which might be more readily postponed for financial reasons. Finally, while I do not underestimate the difficulty for this Tenant of being able to meet the demands, the total sums demanded are not, in the scheme of leasehold service charges for a flat, particularly high, being around £1100 per year.

Effect of conclusions on interpretation

23. My conclusions on interpretation mean that the sums sought by the on account demands relating to the service charge years 2016 and 2017 are not payable insofar as those sums are referable to works beyond the service charge year. But they are otherwise payable, because demand can be made in advance of expenditure being incurred.

24. The effect of that on the demand of 6 July 2016 is that there must be deducted the Tenant's one quarter share of the sum of £1800 referable to the 2017 fire detection system works, so £450. That would leave £650 payable by way of on account service charge under that demand.

25. It is not apparent from the papers submitted to the Tribunal what, if any, other sums forming part of that demand were designed to create a reserve fund. The approach the Tribunal intends to take is to invite the parties to identify and agree any such sums and the consequent further deductions, with permission to apply back to the Tribunal in writing if agreement cannot be reached. It is greatly to be hoped that agreement can be reached.

26. Turning to the 12 January 2017 demand, no deduction is to be made for the sum included in the 2017 budget for the fire detection system works. Those works were planned for and carried out in that service charge year so this sum

was not for the purpose of building a reserve. Again, it is not apparent from the papers submitted to the Tribunal what, if any, sums forming part of this 2017 demand were designed to do so. There should therefore be the same permission to apply to determine such sums in the absence of agreement.

Costs

27. The Tenant has applied under s.20C of the Act for an order that the Company's costs of these proceedings are not to be take into account in determining the amount of service charge payable by her.

28. The Tribunal may make such order as it considers just and equitable in the circumstances – see s.20C(3) of the Act.

29. The Tenant has had some measure of success in these proceedings; succeeding on one of the two principal questions, being the questions of interpretation of the Lease. In those circumstances, the right order in my judgment is that one half of the Company's costs of the proceedings be excluded from any recovery by way of service charge.

Summary of decision

30. From the above, the Tribunal determines as follows:

30.1 That the 6 July 2016 demand is payable only as to £650, being the £1100 demanded by way of service charge less the deduction of £450 for the sum referable to the future fire detection system works.

30.2 That the 12 January 2017 demand in the sum of £1080 is payable in full.

30.3 The above is subject to a deduction for any sum demanded for the purposes of providing for a reserve against future expenditure. The parties have permission to apply back to the Tribunal only in the event that they are unable to reach agreement as to such sums if any.

30.4 That one half of the Company's costs of these proceedings is not to be taken into account in determining the amount of service charge payable by the Tenant.

Appeal

31. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

32. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

33. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit. The Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

34. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

Judge A Johns QC
Dated 14 July 2017