

12801



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

Case reference : LON/00AC/LSC/2018/0084

Property : 50 Lyttelton Court, Lyttelton Road,
London N2 0ED

Applicant : Lyttelton Court 3 49-69A RTM
Company Limited

Respondent : Ms Pamela Dua

Type of application : For the determination of the
reasonableness of and the liability
to pay a service charge

Tribunal members : Judge P Korn
Mr C Gowman BSc MCIEH

Date of decision : 23rd April 2018

DECISION

Decision of the Tribunal

The Applicant is entitled in principle under the Respondent's lease to seek contributions towards a reserve fund. However, it should be noted that this is merely a determination as to the Applicant's right in principle to seek contributions towards a reserve fund. The tribunal has not made any determination as to whether any specific sum is reasonable and/or payable.

The application

1. The Applicant seeks a determination pursuant to section 27A of the Landlord and Tenant Act 1985 ("**the 1985 Act**") in relation to the recoverability of reserve fund contributions under the Respondent's lease.
2. The relevant statutory provisions are set out in the Appendix to this decision.

Paper determination

3. In its directions the Tribunal stated that the application was to be determined without a hearing unless either party requested a hearing prior to the determination. No such request has been made, and accordingly the application is being determined on the papers alone without a hearing.

The background

4. The building of which the Property forms part comprises a purpose-built four-storey residential block containing 23 flats. As a result of a dispute having arisen between the parties on the issue, the Applicant seeks a determination as to "whether a reserve fund contribution is recoverable under the terms of the [Respondent's] lease".

Preliminary question

5. The Applicant states in its application that the application relates to the period 2012 through to 24th March 2018 and yet no figures are specified in the application. Furthermore, its statement of case does not specify any figures either and nor does it contain any arguments or evidence to support the reasonableness or payability of specific reserve fund contributions in any particular year. Equally, the Respondent's response does not seek to challenge or comment on any specific figures and nor does she question why the Applicant's case fails to deal with specific figures. It therefore appears to be common ground between the parties that what is sought is a determination solely as to whether the Applicant can in principle require the Respondent to make a contribution towards a reserve fund under the terms of her lease.

6. Under section 27A(1) of the 1985 Act an application can be made for a determination as to whether a service charge is payable. Under section 27A(3) of the 1985 Act an application can be made for a determination as to whether, if certain costs were incurred, a service charge would be payable for those costs.
7. The current application is not an application in respect of a specific service charge, as envisaged by section 27A(1), but neither does it seem to us to constitute an application under section 27A(3) as – with the possible exception of the current year – it does not appear to relate to particular costs to be incurred in the future. Whilst, of course, a reserve fund by its very nature relates to future costs, requests for contribution towards a reserve fund are requests for payment of specific sums in response to such requests.
8. However, a situation can arise whereby in order to determine whether specific service charges are payable one first has to decide whether the category of charge to which they belong is in principle chargeable. In that sense, the issue before the tribunal is akin to a preliminary issue. Seen in that light, this is not a case where the tribunal simply has no jurisdiction – for example a determination as to the payability of a ground rent – but rather one where the parties have placed before the tribunal a preliminary question in respect of an issue in respect of which it does have jurisdiction. Given that neither party has raised any jurisdictional question and given that therefore it would seem that both parties would like the tribunal to deal with the matter, our view is that it is appropriate for the tribunal to make a determination in principle in relation to this matter.

Applicant's case

9. The Applicant's case is straightforward. It quotes clause 2(2)(a)(B)(b)(v) of the lease and states that an identical clause was considered by the Court of Appeal in *St Mary's Mansions Limited v Limegate Investment Co Limited (2002) EWCA Civ 1491* and that the Court of Appeal determined that such a clause allowed the landlord to establish and maintain a reserve fund.

Respondent's position

10. The Respondent has provided evidence that the previous managing agents regarded her as an exemplary leaseholder. She states that she has owned the Property since 1978 and that originally there was no reserve fund. When one was set up the then managing agents agreed that she did not have to contribute towards it as she was in the habit of paying her service charges promptly.

11. As regards the provision in the lease on which the Applicant relies, she argues that the clause only relates to expenditure for one year and does not authorise the landlord to require the tenant to contribute generally towards a reserve fund. She also states that there is no reference to a reserve fund in clause 5 which sets out details of the landlord's covenants.

Tribunal's analysis

12. The lease clause on which the Applicant relies is clause 2(2)(a)(B)(b)(v) which reads as follows:

“The expression “the expenses and outgoings incurred by the Lessor” as hereinbefore used shall be deemed to include not only those expenses outgoings and other expenditure hereinbefore described which have been actually disbursed incurred or made by the Lessor during the year in question but also such reasonable part of all such expenses and outgoings and other expenditure hereinbefore described which are of a periodically recurring nature (whether recurring by regular or irregular periods) whenever disbursed incurred or made and whether prior to the commencement of the said term or otherwise including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the Lessor or its accountants or managing agents (as the case may be) may in their discretion allocate to the year in question as being fair and reasonable in the circumstances and relates pro rata to the demised premises”.

13. In principle the above clause would seem to permit the recovery of future costs through some form of reserve fund. It makes specific reference to the recovery of reasonable expenditure of a periodically recurring nature, including reasonable provision for anticipated expenditure. A possible concern, as alluded to by the Respondent, is that towards the end of the clause there is reference to the provision for anticipated expenditure being an amount which the Lessor or its accountants or managing agents “may in their discretion allocate to the year in question”, and therefore it would seem that there is at least an argument that contributions can only be sought for the year ahead rather than in respect of expenditure in future years.
14. The Court of Appeal in *St Mary's Mansions Limited v Limegate Investment Co Limited* was faced with a clause which was identical to the clause quoted above. The specific question to be determined in that case in relation to the reserve fund was whether the claimant in that case was entitled to apply any year end service charge surplus to the reserve fund, which is a slightly different question to that in the present case, but the Court of Appeal in *St Mary's Mansions* determined that in order to answer that question it first needed to decide as a matter of construction of the lease whether the lessor was entitled to establish and maintain a reserve fund. Faced with an identical clause to the

relevant clause in our case, the Court of Appeal determined that the lessor was entitled to establish and maintain a reserve fund. The Court of Appeal was not troubled by the use of the phrase “allocate to the year in question” and for the reasons advanced by it considered it clear that such a clause did not give rise to any question as to whether the lessor could establish, maintain and seek contributions towards a reserve fund. The only question was precisely how the lessor should do so, and that question is not one on which a determination has been sought in this case. Nor is it a question on which it would be appropriate for the tribunal to comment, given that a determination has not been sought as to the payability of any specific reserve fund contribution in any one year.

15. There is a possible question as to whether the other service charge provisions in the lease in *St Mary's Mansions* were identical or similar to those in the present case for all relevant purposes. In particular, we note that clause 2(2)(a)(B)(b)(v) sets out a definition of expenses and outgoings but that there is no specific cross-reference to the tenant's service charge payment obligations earlier in clause 2(2). It may well be that this was also the case in *St Mary's Mansions*, and in fact this is quite likely given that the sub-clause quoted above is identical in the two leases. However, even if the link between that sub-clause and the tenant's payment obligations was more explicit in *St Mary's Mansions*, in our view it is appropriate to adopt a purposive rather than a literal approach to interpreting the sub-clause quoted above. The purpose of the references to anticipated expenditure in that sub-clause must have been to clarify the extent of the tenant's payment obligations and therefore we do not consider the absence of a more express link between the two to be a problem.
16. Therefore, in our view we are bound by the decision of the Court of Appeal on this issue, faced as they were with an identical sub-clause. Accordingly, the Applicant is entitled in principle under the Respondent's lease to seek contributions towards a reserve fund.
17. We note the Respondent's evidence that she has been a good tenant, but it is not relevant to the issue before us. As regards any decision by a previous managing agent not to seek contributions towards a reserve fund, on the basis of the information that we have there is no evidence that the Applicant (or any predecessor) has waived its right to seek reserve fund contributions or that it is estopped from relying on that right.
18. It should be noted that this is merely a determination as to the Applicant's right in principle to seek contributions towards a reserve fund. The tribunal has not made any determination as to whether any specific sum is reasonable and/or payable.

Costs

19. No cost applications have been made.

Name: Judge P Korn

Date: 23rd April 2018

RIGHTS OF APPEAL

- A. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) a written application for permission must be made to the First-tier Tribunal at the regional office dealing with the case.
- B. 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.
- C. If the application is not made within the 28 day time limit, such application must include a request for extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.
- D. 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.

APPENDIX

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

- (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 a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

- (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 provisions 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.

Section 27A

- (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.
- (2) Subsection (1) applies whether or not any payment has been made.
- (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.
- (4) No application under subsection (1) or (3) may be made in respect of a matter which -
- (a) has been agreed or admitted by the tenant,
 - (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
 - (c) has been the subject of determination by a court, or
 - (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
- (5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.