FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/21UC/LSC/2019/0007**
Property	**:**	**Flat 6, 14 Woodcroft Drive, Eastbourne, BN21 2XW**
Applicant	**:**	**Tessa Baker**
Respondent	**:**	**Terrance Investments Limited**
Representative	**:**	**Abraham Reifer**
Type of Application	**:**	**s.27A 1985 Act**
Tribunal Members	**:**	**Judge D Dovar** **Mr K Ridgeway**
Date and venue of Hearing	**:**	**25th September 2019, Eastbourne**
Date of Decision	**:**	**3rd October 2019**

DECISION

Introduction

1. This an application under s.27A of the Landlord and Tenant Act 1985 for the determination of the payability of service charges.

2. Following directions given by the Tribunal the Applicant filed a statement of her case, the Respondent of theirs and then the Applicant submitted a reply.

3. The application had been brought against Mr Reifer rather than the Respondent freehold company. By order of the Tribunal dated 2nd April 2019, Terrace Investments Limited was substituted as Respondent.

4. The Applicant, who is the leaseholder of the Property, raises the following questions for determination:

    a. what is the correct apportionment in respect of insurance between the 18 flat leases and the 16 garage leases;

    b. whether the reserve fund can be used for roof repairs

    c. the status of £6,435 paid in respect of management fees, which has not been paid over to the previous managing agents;

    d. where the reserve fund is being held and whether £4,531.70 is missing.

5. Section 27A is, materially, in the following terms:

    (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.

…

(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,

...

6. It was not obvious at the outset how some of the questions fell within the Tribunal's jurisdiction, which was a point raised both in writing and at the outset by Mr Reifer on behalf of the Respondent. However, the Respondent sensibly recognised that the hearing afforded an opportunity to resolve contentious issues. The Tribunal has approached each issue with caution in terms of whether or not it is a matter that falls within s.27A. Whilst the first, being a matter of apportionment was within its jurisdiction, the second appeared less so, the third even less so and the final question appeared undoubtedly to be outside of our jurisdiction.

Inspection

7. The Tribunal inspected the estate, within which the Property, is set on the morning of the hearing. The Property is a flat in one of two, three storey blocks of nine flats situated off a short cul-de-sac. Both blocks are of similar brick construction, with uPVC windows, under pitched tiled roofs.

8. The surrounding area, within the estate, is comprised mainly of maintained grass and parking areas. Further, to one end are four rows of 15 garages in three blocks. Around half the garages are used, with the remainder in a very dilapidated condition. It was also apparent that some garages had been levelled so that the total had been reduced from 18 to 15.

Background

Lease Terms

9. The Lease of the Property, which is dated 6th November 1962, describes the 18 flats (including the Property) and 18 garages and surrounding gardens as 'the Mansions' and the building containing the property as 'the Building'.

10. By clause 4 (2) the tenant covenants to contribute and pay part of the cost expenses outgoings and matters mentioned in the Fourth Schedule. The Fourth Schedule provides not only for a proportionate part of the cost and expense of keeping in good and substantial repair and condition the common parts, but also a proportionate part of the Landlord's costs in complying with clauses 5 (B)(E)(F)(G) and (H). By clause 5 (E) the Landlord covenants to maintain the roof and foundations of the Building and by clause (H) the Landlord covenants to 'insure and keep insured the Building of which the Flat forms part …'

11. The lease was varied on 25th July 2011. At that time clause 5 (H) was varied so as to provide greater detail as to insurance of the Building. The Fourth Schedule was also replaced to include provision for an interim service charge payable on 24th June and 25th December each year and for a reconciliation at the end of year and at paragraph 4.1 of the varied Schedule 4, for the provision of an account each year with any surplus being carried forward to the next service charge year.

12. Paragraphs 9 and 10 of the varied Schedule 4 provided for a reserve fund for periodically recurring items and for all sums received for the reserve fund to be credited to an account separate from the Lessor's own money and to be indicated on any accounts prepared by the Lessor.

13. There are separate leases of the garages. The Tribunal was provided with one dated 6th November 1962. That has the same definition of the Mansions as the residential lease referred to above. That contains provision for the landlord to insure the building of which the garages form part and for the leaseholder of the garage to pay part of those expenses. That lease was surrendered on 6th June 2014 and a new lease granted. The provision for insurance and contribution to the same are materially the same as with the original lease.

Year end Certification

14. The Tribunal has been provided with a certificate of income and expenditure for the years 2013 to 2018 compiled by Symon Smith & Partners, managing agents, on behalf of the Respondent. For the first, the year end 25th March 2013, that contains the following:

    a. A surplus of £3,656.82 between the sums demanded on account and the actual expenditure;

    b. A reserve balance brought forward of £8,503.96 for Block 14 and the same for Block 15.

    c. Building insurance, which is said to be for Block 14 & 15.

15. The following years certificate shows:

    a. A surplus of £1,298.16;

    b. The same reserve balance brought forward;

    c. Building insurance for both block 14 & 15.

16. The same details appear for the following year, save that the surplus was £936. For the year end 25th March 2016, there was a deficit of £1,054.10; but the reserve fund remained at £8,503.96 per block. There is also a note that there is £6,435 unpaid management fees to the previous managing agent. For the year end March 2017, the deficit has risen to £4,154.34, and the reserve fund has now been labelled a contingency fund but remains at £8,503.96 per block. The same note appears in relation to the managing agent's fees.

17. The Certificate for the year end 25th March 2018, shows a surplus of £5,715.31 but there is no mention of any reserve or contingency fund. There is no reference to £8,503 and it is not clear where that sum has gone. The Building insurance for block 14 & 15 is £5,329.54 and from that is deducted 'Contribution from garages' of £400.

Insurance apportionment

18. Whilst the lease provides for the tenant to pay for insurance for the building containing their flat only, the landlord has for a number of years insured the Mansion (i.e. both blocks and garages together) and then divided that between the flat leaseholders. It is only since 2016 that credit has been given in respect of the garages.

19. At the hearing the parties confirmed their agreement that the appropriate way in which the insurance would be apportioned to take into account the lease terms, was for a credit of £25 to be applied in respect of each of the 15 garages; i.e. £375 per annum.

20. Given that agreement, there is no basis for the Tribunal to determine the issue (see s.27A (4) (a), the dispute having been settled by agreement).

Use of reserve fund for roof repairs

21. As was apparent from the face of the certification up to 2018, there was a reserve fund with around £8,503 per block. The Applicant queried whether this could be used for repair works to the roof, she suggested both for lesser patch repair and more significant major repair / replacement works.

22. The lease, as varied, provides for a reserve fund to be levied. As far as she could recall, there had never been any specific demands, or items on an interim or final demand relating to a reserve fund. She considered that there was a reserve fund given that the lease provided for one and the certification, at least until 2018, had said there was one; which was reflective of the requirement to allocate and state any reserves in the varied lease at paragraph 10 of the Fourth Schedule.

23. The Respondent said that there had never been any specific demands for a reserve fund.

24. More importantly, the Applicant had not received any demand for, nor was there any mention in the certification of major roof works. In this respect, when referring to major works that is a reference to a significant non-annually recurring item of expenditure; compared to relatively minor one off patch repairs that would fall within a heading of annual repairs

and maintenance. To that extent, the Applicant's question was hypothetical and therefore not within our jurisdiction.

25. The Respondent confirmed that there had been no demands for major roof works and although it was likely that they would be needed in the future and a service charge raised for that, no demands had been made to date.

26. It also did not appear that any reserve fund had been collected in accordance with the reserve fund provision in the lease. The Respondent was clear that there had never been any demands for reserves and any surplus was credited to the tenants in the following service charge year. Therefore, if there were any surplus that had not been credited but wrongly labelled reserves or contingency, that should to be credited to the Applicant.

27. The Respondent went further though to contend that the £17,007 (the 2x £8,503.50) identified in the certification as either a reserve or contingency fund until 2018 was an error and that there was no such fund.

28. The Tribunal was unable to follow the Respondent's explanation as to why the £17,007 had disappeared from the certification. At one point it was suggested that this was the interim sum demanded in 2011 which had never been reconciled. However, this is an issue which is outside of our jurisdiction and we make no further comment.

Unpaid Management Fees

29. It was common ground that sums that the leaseholders had paid in respect of managing agent fees had not been paid to the managing agents. The Applicant believed the sum was £6,435, the Respondent contended it was less than that; but unhelpfully was unable to provide an exact figure. The Applicant raised no query with the cost or quality of service provided, it was the Respondent who had withheld the payment because of their concerns over the service provided by the previous managing agents.

30. Again this is an issue that it outside of our jurisdiction as it does not relate directly to the payment of a demand nor to the amount or quality of service (at least not from the Applicant), but as to the handling of the service charge fund by the Respondent.

31. The Respondent stated that it understood that it held these sums on trust for the tenants and that if they were not paid over to the managing agents that it would have to credit the payments to the leaseholders. Worryingly, it caveated that statement by saying that Mr Reifer may consider deducting sums to compensate him for his time and effort in dealing with the old managing agents. Again we make no comment in relation to this matter which is outside of our jurisdiction, save to note that issues with regard to misuse of service charge funds are in effect claims in relation to misuse of trust funds.

Reserve fund balance / manner of holding

32. The final issue related to how much was held on account and how it was held.

33. The Respondent confirmed that all the service charge funds, which it acknowledged it held on trust for the leaseholders, were held in either a Barclay's Bank account in the joint names of itself, Mario Anastasis and Symon Smith & Partners or another Royal Bank of Scotland account in the name of Symon Smith & Partners. Further, it clarified that the sums were held in trust accounts dedicated to each particular block.

34. It repeated the points made above that in fact there was no reserve account and repeated its failed attempt to explain why the £17,007 had gone from the 2018 certification.

35. Neither of these are matters that fall within our jurisdiction as neither related to the payability of any service charge and so we cannot comment further.

Conclusion

36. The one query that the Tribunal was asked to determine that clearly fell within our jurisdiction, being the apportionment of insurance premium between the garage and flat leases, was agreed by the parties.

37. Whilst the landlord has the ability to raise a reserve fund for items such as a replacement roof, it has not done so. There may be issues as to affordability in future years given its failure to do so, but that is not an issue that this Tribunal can determine now.

38. The remaining issues turning as they do on the treatment of the service charge funds are matters that fall outside our jurisdiction and if the

Applicant continues to be concerned over the treatment of sums held on trust, then she will have to take the issue elsewhere.

Judge D Dovar

Appeals

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.

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.

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.

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.