



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

Case Reference : **CHI/00ML/LSC/2020/0003**

Property : **Top Floor Flat, 38 Lansdowne Street, Hove, BN3 1FR**

Applicant : **(1) Jong Man Jamie Lau
(2) Elizabeth Alice Lau**

Respondent : **Swanlane Estates Limited**

Representative : **Property Fusion**

Type of Application : **Section 27A Landlord and Tenant Act 1985**

Tribunal Members : **Judge D Dovar**

Date of Decision : **9 April 2020**

DECISION

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1. This an application for the determination of the payability of service charges for the years 2015 to 2018 and for 2019 and all future years.
2. The Tribunal's directions dated 10th January 2020 gave notice to the parties that the Tribunal intended to deal with this matter on the papers unless either objected to that course of action; neither has.
3. The Property is contained within a Victorian mid terrace house which has been converted into four flats.
4. The issues for determination relate to the build up of a reserve fund and additional costs claimed by way of administration charges.

Lease Terms

5. The lease of the Property is dated 14th March 1988. It is for a term of 99 years. The relevant terms are as follows.
6. By clause 4 (4) the lessee covenants to pay the Interim Charge and the Service Charge as provided for in the Fifth Schedule.
7. The Fifth Schedule provides that the Service Charge is the lessees share of the Total Expenditure. The elements of that provision are further defined in the following way:
 - a. The tenants share of expenditure is based on the flat's rateable value in proportion to the other flats in the building. No actual proportion is given in the lease;
 - b. The Total Expenditure is defined as that incurred by the lessor in fulfilling its obligations under Clause 5 (5). Those obligations

include at Clause 5 (5) (q) a requirement that the lessor set aside 'such sums of money as the Lessors shall reasonably require to meet such future costs as the Lessors shall reasonably expect to incur of replacing maintaining and renewing those items which the Lessors have hereby covenanted to replace maintain or renew.' It also provides that this shall be treated as an item of expenditure;

8. The Interim Charge is a sum to be paid on account of the Service Charge and paid in two instalments on 24th June and 25th December.

Demands

9. The Applicants have not provided the actual demands for the years in question. However, the Tribunal has been provided with:
 - a. a reserve fund statement ('the Reserve Fund Statement') from 30th September 2015, which shows demands for contributions from the Applicants of:
 - i. £1,320 from 30 September 2015, for the period to 29th March 2016. The date this sum is said to be due is 30th September 2015;
 - ii. £1,320 for the period from 30 March 2016 to 29 September 2016;
 - iii. £1,296 for 6 monthly periods from 30 September 2016 to 30 September 2018;

- b. a statement of account ('the Statement of Account') from 29 September 2005, showing interim service charges over the years, balancing charges and some ad hoc costs. The impression being that since that date very little by way of major works has been carried out other than some redecoration in 2009 and 2012 (each costing around £3,500);
 - c. the service charge accounts for the year end September 2019, which show a surplus of estimated over actual costs of £122, a total annual expenditure of £5,748 and a reserve fund of £23,721.
10. On 7th October 2019 the Applicants received a letter of claim from the Respondent for £12,713.55 for arrears. That included £198 legal costs, £7.20 land registry fee and £155 administration fee. It seems as if this demand included the sums set out above and is what has prompted this application.

Reserve Fund

- 11. As stated above this application, predominantly, concerns the reserve fund, which is challenged in a variety of different ways.
- 12. As stated above, no actual demands have been provided to the Tribunal, the only demands it has evidence of are those noted in the Reserve Fund Statement, the last being on 30th September 2018. The current managing agent has yet to charge a reserve. In light of that, the Tribunal

can only make a determination in respect of demands that have been made; i.e. up to September 2018.

Any right to build a reserve fund?

13. Firstly, the Applicants query the ability to establish a reserve fund at all.
14. The lease does provide for this through clause 5 (5)(q) which deems the landlord's anticipated future costs as actual expenditure.
15. Therefore, in principle, under the terms of the lease, the Respondent is entitled to charge for, collect and hold a reserve fund for non-annually recurring anticipated expenditure.

Reasonable in amount

16. The next challenge is to the level of the reserve fund charged. There are a few strands to this challenge:

i. Comparison with other properties

17. The Applicants contend that the sums claimed are excessive in comparison with other properties owned by them.
18. Whilst some detail is given as to those properties, the Tribunal cannot take much from these comparisons in that more detailed information would be needed on both the lease terms of the other properties as well as their condition and maintenance over the years. Even then, the determination of the amount of the reserve fund is not an exact science and some margin is permitted to the landlord in ascertaining what the correct amount is.

ii. Failure to identify the work for which the reserve is charged

19. The Applicants contend that as the Respondent has failed to identify the specific work that the reserve fund has been established for, they are not entitled to levy a reserve fund.
20. Further, they refer to correspondence with managing agents in which it was said that a surveyor was being instructed to advise on planned maintenance and that the specification would be available by the end of March 2020.
21. Property Fusion, who are the current managing agents, and represent the Respondent in this application, provided a response to the application dated 6th February 2020, they stated that:

‘The freeholder collects in what is deemed a reasonable reserve fund based on previous works and year end accounts detailing the expenditure requirements for the block. This is reviewed annually’

22. This seemed a potentially reasonable approach, albeit lacking in detail as to how the actual figures had been arrived at. However, in their further statement dated 3rd March 2020, they stated

‘A question is raised regarding the reasonableness of the reserve fund being demanded has been raised. It should be noted that Property Fusion has not demanded the reserve fund in question. This was demanded by Bridgeford Ltd, the appeal

for determination should therefore be taken against Bridgeford not Property Fusion who did not raise the original demands.

We have instructed a surveyor as discussed previously and we will be making our decision on the reserve fund amount based on priced tenders of specification.'

23. This indicated at best a change in approach in that the fund was to be based on an assessment of cost based on specific items after tenders had been priced. Further it also considerably undermined the reliance that could be placed on the earlier statement in that the latest indication was that they did not know how the historical figures had been arrived at.
24. It is possible to levy a service charge to build a reserve fund under the lease terms and it is not a strict requirement to identify the actual works required. Under s.19 of the Landlord and Tenant Act 1985, the sum demanded has to be a reasonable sum to demand in advance.
25. The Tribunal has been given no real assistance by the Respondent in determining how the sums claimed by way of reserve have been calculated over the years. The fact that there has been a change in managing agents does not remove the requirement for the Respondent to provide details of the basis upon which the reserve fund has been based.
26. It is hard to see the justification for the level of reserve demanded and built up or the annual levy. Although it appears from the statement of account that no structural works have been carried out in the past 15

years, there is no evidence as to any future requirement or cost. Whilst the Tribunal does not consider that it is always necessary to identify individual items and the terms of this lease do not specify that that is the case, the Respondent has not put forward any positive evidence as to how the figure has been arrived at. Further, the current charge seeks to claim over 1/5th of the total annual expenditure from one of four flats; an indication that this is too high.

27. At the end of their Statement of Case, the Applicants consider that £500 per annum would be a reasonable amount. Given that concession by the Applicants, and the absence of justification by the Respondent, that is the sum that the Tribunal considers reasonable and will permit as recoverable under the reserve fund.

iii. Pre-Assignment charges

28. The Applicants acquired their lease, by assignment on 15th October 2015. The Respondent has sought to recover service charges for reserves a period prior to that, from 30th September 2015.
29. The Reserve Fund Statement dates the demand as at 30th September 2015. The Applicants dispute they are liable for this demand as they did not have the lease until 15th October.
30. The Respondent states that all outstanding arrears were notified to the Applicants' solicitors during their purchase and suggest that a retention should have been made in respect of these sums.

31. On the basis that the demand was made prior to the assignment and due then, then the Applicants are not liable to pay them, their predecessors are. The Reserve Fund Statement indicates that the sum of £1,320 was due and payable on 30th September 2015, i.e. prior to the assignment to the Applicant. In the absence of any direct covenant between the Applicants and the Respondent to pay this amount, an assignee of the term is not liable for a breach of covenant committed prior to the assignment. In this case, the breach occurred on 30th September 2015, prior to the assignment.
32. Therefore, for this period, the Applicants are not liable to pay the reserve charge, which would have been reduced to £500 in any event in line with the determination above.

iv. Consultation

33. The Applicants also query whether a sinking or reserve fund can be charged without prior consultation. There is a statutory requirement for consultation under s.20 of the Landlord and Tenant Act 1985, but that does not apply to the operation of a sinking or reserve fund. It applies when the landlord wishes to use service charge monies to pay for major works. Therefore there is no requirement for a landlord to consult prior to building up a such a fund. It would apply if it was intended to move money out of the fund to pay contractors.

iv. Conclusion on Reserve Fund

34. The Respondent can establish a reserve fund. The absence of any justification for the sum sought means that the Tribunal allows the amount suggested by the Applicants as reasonable, save for the sum claimed prior to their assignment.
35. The total sum recoverable therefore is £500 per annum, resulting in an amount payable by way of reserves for the years for which the Tribunal has seen evidence of demands is £1,500 (being from 30th September 2015 to 30th September 2018 as per the Reserve Fund Statement).

Apportionment

36. The Applicant has also queried how their share of expenditure has been calculated, but the Respondent rather unhelpfully referred them back to their lease rather than identify how the apportionment had been carried out. As set out above, the lease simply says it is to be relative to the other flats, it does not specify a precise percentage.
37. The Tribunal has sympathy with the Applicants' complaint in this regard, however, given the determination in relation to the reserve fund and the concession by the Applicants, this question does not fall for determination.

Additional Costs

38. The Applicants are concerned about the additional costs set out in the letter of claim of 7th October 2019; £198 and £155. The Respondent's have said in that regard

“The freeholder isn’t charging any legal fees in result of the leaseholder being in arrears. The legal fees are the fees payable by the solicitor’s firm for obtaining your current arrears. These are deemed as an admin fee and payable as per the rights and obligations.”

39. This makes little sense. At best it appears to justify the costs on the basis that they are for collecting current arrears and are an administration charge. No terms of the lease are relied upon for their recovery and on examination of the lease it does not appear that there is any provision allowing their recovery. If these sums have been demanded, then they are not payable.

Ground Rent

40. The final point raised in the Applicants’ statement of case concerns ground rent. This was not included on their application and is not a matter that this Tribunal has jurisdiction over and so no determination can be made in that regard.

Conclusion

41. The amount payable for the reserve fund in respect of the demands of which evidence has been produced, from the date of assignment of the lease to the Applicants is £500 per annum, being £1,500 in total. No sum is payable for legal or administration costs as claimed by the letter of 7th October 2019.

A handwritten signature in black ink, appearing to read "J. Dovar". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping tail.

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.