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

| | | |
|---|---|---|
| **Case Reference** | **:** | **LON/00BK/LSC/2020/0105**<br>HMCTS code: A: BTMMREMOTE |
| **Property** | **:** | **15 St Mary's Terrace, London W2 lSU** |
| **Applicant** | **:** | **15 ST MARY'S TERRACE LIMITED** |
| **Representative** | **:** | **Brooke Lynn** |
| **Respondents** | **:** | **CIPORA STERN** |
| **Representative** | **:** | **In person represented by her son Simon Stern** |
| **Type of Application** | **:** | **Payability of service charge.** |
| **Tribunal Members** | | **Jim Shepherd** |
| | **:** | **Sue Coughlin MCIEH** |

**Date of Decision** **12 October 2020**

---

**DECISION**

---

The sum of £ 2625.18 is payable

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been not objected to by the parties. The form of remote hearing was A:BTMMCOURT. A face-to-face hearing was not held because it was not practicable and no-one requested the same.

**Background**

1. The parties are seeking a determination pursuant to s.27A of the Landlord and Tenant Act 1985 as to the reasonableness and payability of service charges. The dispute was transferred to the Tribunal from the County Court by an order of DJ Hayes at Clerkenwell and Shoreditch County Court on 21st February 2020. There was some delay in hearing the case as a result of the Covid 19 pandemic.

2. The Applicant is a lessee-owned freehold company that owns the premises at 15 St Marys Terrace, London W21SU ("The Premises"). MEPM (JR) Limited are their managing agents. The Respondent is the lessee of the second floor flat within the premises pursuant to a lease dated 31 May 2012 between the Applicant and Respondent for a term of 999 years commencing on 31 May 2012.

3. Under the lease the Respondent is subject to the following covenants:

To pay *by way of additional rent the due proportion of such sum or sums as the Lessor shall pay for keeping the Building insured against fire public liability and such other risks as the Lessor shall deem necessary or expedient such additional rent to be paid on demand and to be recoverable by distress or otherwise as rent in arrear* ( Clause 1 (a)).

*To pay the reserved rents on the days and in the manner aforesaid* ( Clause 2 (a))

*(i) To contribute and pay the due proportion of the costs and expenses of the Service Obligations together with either the reasonable charges of the Managing Agent appointed by the Lessor to carry out its obligations hereunder or (if the Lessor shall undertake the management itself) a management fee of Fifteen per centum of the said costs and expense*

*(ii) The contribution under paragraph (i) of this sub-clause shall be estimated by the Lessor's Managing Agent (or by the Lessor if the Lessor shall undertake the management itself) as soon as possible after the beginning of each year and the Lessee shall pay the estimated contribution by two instalments on the Twenty fifth day of March and the Twenty ninth day of September every year*

*(iii) As soon as practicable after the end of the year mentioned in Part 8 of the Schedule hereto and each succeeding year when the actual amount of the said costs expenses and outgoings has been ascertained the Lessee shall forthwith pay the balance due to the Lessor to be credited to the Lessor's books with any amount overpaid* (Clause 2 (f))

4. Under the lease the Applicant was bound by the following covenants:

*To insure and keep insured the Building against loss or damage by fire public liability and such other risks as the Lessor deems expedient in an insurance office of repute in the full reinstatement value of the Building and to pay all premiums necessary..*

*To maintain repair redecorate and renew the Common Parts and the Service Conduits and the Estate and so far as applicable and practicable to keep the same reasonable lighted and in good condition and cultivation PROVIDED THAT the Lessor shall not be liable for any temporary or accidental breakdown of any service*

*So often as reasonably necessary but in any case within every seventh year of the said term to decorate such part of the external walls (if any) previous so decorated and repaint the exterior ironworks gutter pipes and woodwork of the Building in a proper and workmanlike manner and with suitable materials. (3(a)(i), 3(b)(i) and 3(b)(ii)).*

5. The Respondent fell behind in terms of service charge payments and the Applicant began proceedings seeking unpaid charges for 2018/19 and 2019/20 amounting to £4535.16. The Respondent defended the claim and the matter was transferred by DJ Hayes on 21st February 2020.

**The issues**

6. These were set out clearly in a Scott Schedule. The Respondent through her son challenged the following items:

- Management fees of £1,680 (2018/19) and £1440 (2019/20).
- Directors & Officers insurance of £311.15 (2018/19) and £400 (2019/20).
- Buildings insurance of £1,411.39 (2018/19) and £1500 (2019/20).
- Sundries of £24.50 (2018/19).
- Reserve fund £5,000 (2018/19) and (2019/20).
- Cleaning costs of £1,000 (2019/20)
- Health and safety costs of £800 (2019/20)

- Surveying fees of £500 (2019/20)
- Accountancy fees of £600 (2019/20)

7. Some of the challenges made by the Respondent were on the basis that the charges were not reasonable: management fees; building insurance; cleaning costs; health and safety costs and surveying fees. Others challenged the payability of the charges under the lease in particular the Directors and Officers Insurance and the reserve fund contributions.

*Landlord and Tenant Act 1985*

8. Section 19 of the Act limits service charges recoverable to the extent that they are reasonably incurred and the services and works are of a reasonable standard.

9. Under s27A of the Act an application may be made to a 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.

**Challenges to reasonableness**

10. Mr Stern was clear and cogent in his submissions. He clearly had some personal knowledge of management costings as he works as a managing agent in North London but he failed to present any comparable costings. He cross examined

the Applicant's witness, the managing agent Jo Redway. She said she had visited the building on a couple of occasions. She regarded the sums charged as reasonable. He put it to her that the Health and Safety inspection costs had increased significantly and challenged whether it was necessary to carry out two fire alarm tests a year. She said that precautions were necessary and sensible following the Grenfell fire. He also challenged the cleaning costs however he appeared to be making reference to the comparative costs of larger buildings where economies of scale can be obtained. He sought to emphasise the fact that costs had increased for example the cost of Health and Safety inspections, the management fees, the accountancy fees and the buildings insurance. However he again relied on his own assessment rather than providing comparable evidence for a similar scheme to the present one. He highlighted the failure to consult on the basis that some of the costs represented QLTAs. This was a misguided submission because there was no evidence that any of the agreements fell into the category of QLTAs.

11. For the landlord Ms Lyn maintained the costs were reasonable . She said that Mr Stern's figures were not realistic in the context of a small building in Maida Vale. Different parts of London carried different market values and different costs. She also emphasised that Mr Stern had not provided any alternative quotations. In relation to the buildings insurance she stated that brokers had been used who checked the market. The premiums had increased due to terrorism and subsidence.

12. The Tribunal considered that the costs incurred and projected for 2018/19 and 2019/20 were by and large reasonable and would be expected of a building this size and in Maida Vale. A number of the on account costs for 2019/2020 had increased from the previous year's expenditure. We were told for example that the management company had expected that they would have to find a new accountant and that this was the reason for the higher projected cost, however in fact they had continued with the same accountant so that the actual cost would be similar to the previous year. Mr Stern failed to produce comparables and there was a concern that he was relying on figures for larger buildings which

enjoyed economies of scale. The management fees for 2018/19 are not excessive, neither are the cleaning costs. The Applicant used a broker to source building insurance and the premiums are not unreasonable. The repairs costs for 2018/19 are also reasonable. Similarly the projected costs for 2019/2020 were by and large also reasonable.

**Challenges to payability**

*Directors and Officers Insurance*

13. Mr Stern claimed that there was no provision in the lease to claim Directors and Officers Insurance. He also asked the landlord to provide comparables although he didn't provide any himself. There is a provision in the lease that states the following:

"by way of additional rent the due proportion of such sum or sums as the Lessor shall pay for keeping the Building insured against fire public liability and such other risks as the Lessor shall deem necessary or expedient such additional rent to be paid on demand and to be recoverable by distress or otherwise as rent in arrear"

Clause 1 (.6)

14. This provision would in our judgment encompass Directors and Officers Insurance ("Such other risks as the Lessor shall deem necessary or expedient"). In the present context where the leaseholders have enfranchised it seems entirely necessary and expedient for them to be protected by Directors and Officers Insurance. This is not unusual in the Tribunal's experience. These sums are therefore payable.

**Reserve fund**

15. Mr Stern submitted that the reserve fund contribution was not due because there was no provision in the lease. The landlord had sought a contribution of £5000 per annum for both years in question. The Tribunal allowed written submissions on the point after the hearing because Ms Lyn relied on authority that she had not previously shared: *Leicester v Master* HHJ Huskinson, Lands Tribunal, 29 October 2008, LRX/175/2007.

16. The position of the landlord in relation to the reserve fund was confusing. Their managing agent accepted that there was no fund incorporated in the lease and said that the sums were collected as provision for anticipated expenditure in the coming year. Yet the accounts and demands referred to these sums collected as "reserves". Ms Redway initially said that this reference to a reserve fund was a mistake.

17. In her written submission Ms Lyn repeated that the landlord's primary position was that the sums demanded as "reserves" for the relevant service charge years were sums that the Applicant anticipated spending on works that were expected to be carried out in those years and that there was provision in the lease for on account payments ( clause 2 (f)). It is unclear however why exactly the same sum was charged for the two years in question. Indeed this suggests that it is a regular reserve sum. This interpretation is reinforced by the fact that the previous managing agents Urang collected a reserve fund albeit a smaller amount. Moreover Ms Redway's evidence was unconvincing and confused. She said that the sums were collected to cover forthcoming external works which were carried out pursuant to a s.20 notice served on 6th December 2019. Those works were estimated to cost up to £2264 exc vat. It is not clear therefore why £10000 was collected over the two years in question. Moreover the s.20 notice states: *The cost of the work will be met by way of additional demand. Your proportion of the cost will be in accordance with your prescribed percentage*

*split under your lease*. It seems unlikely that this would be included if the sums had already been collected.

18. The Tribunal is unattracted by the landlord's submissions that the £5000 reserve payments were for anticipated spending. These sums have been collected as a reserve. Mr Stern is right to question where the sums are being retained. Moreover the landlord's alternative position – that the lease could be interpreted to allow for the collection of a reserve fund runs contrary to the managing agent's evidence that there was no fund. It is plainly relevant in a recently drafted lease where both parties were the original parties that they did not see fit to include an express and clear term allowing for the collection of a reserve fund.

19. The clause relied on by Ms Lyn is Clause 2 (f) (iii) which states the following:

*"As soon as practicable after the end of the year mentioned in Part 8 of the Schedule hereto and each succeeding year when the actual amount of the said costs expenses and outgoings has been ascertained the Lessee shall forthwith pay the balance due to the Lessor to be credited in the Lessor's books with any amount overpaid"*

20. In her written submissions Ms Lyn stated that the clause is drafted in *rather unclear terms, but it seems to allow a "credit" to be made to the "Lessor's books" for any overpayment of service charge moneys. There is no provision requiring those overpaid service charges to be returned to lessees. Instead, it is submitted that this provision envisages the Applicant retaining such sums in reserve for future expenditure. It is submitted that such a reading of the Lease is consistent with the Lessor's repairing obligations, which include covenants to carry out decoration works at least every seven years (as per clause 3(b)(ii)), the costs of which ought to be properly distributed across several charge years.*

21. Ms Lyn relies on the case of *Leicester CC v Master* to support the proposition that even in the absence of an express provision in the lease providing for the establishment of a reserve fund, on a proper construction of the lease the landlord may, nonetheless, be entitled to entitled to establish a reserve and states that every lease is to be construed on its own terms and according to the objective intentions of the parties at the time when the lease was granted.

22. All of this is true but it remains perplexing why the Tribunal is being asked to stretch the words in the lease to fit the landlord's current intentions when they don't appear to fit with those of the managing agent or the intention of the parties at the time of the lease. If the parties intended there to be a reserve fund why didn't they include one expressly? The *Master* case can be distinguished. The admissible background used by the Upper Tribunal in construing the relevant clause in that case was largely dominated by the fact that the lease was a Right to Buy Lease that includes requirements under s.125 Housing Act 1985 (see para 35). Ms Lyn submitted that in the present context where there was a lessee owned freehold company the ability to establish and operate a reserve fund, which is essential for the proper and effective management of the Block, was clearly intended. The tribunal does not accept this and repeats that if this had truly been the intention of the parties there would be no need for the alternative submission by the landlord moreover a clear provision would have been included.

23. Clause 2 (f) (iii) is not clear. It merely suggests that the landlord can collect overpaid amounts without making any reference to what those amounts are used for. The sums could for example be used to be credited against the next service charge demands.

24. In summary the Tribunal does not accept that the sums of £5000 for each of the years in question were payable. The following sums however are payable by the Respondent (respondents contribution in brackets):

**1/6/18 – 31/5/19**

- Management fee - £1680 ( £336)
- Directors and Officers Insurance - £311.15 ( £62.23)
- Cleaning - £514.80 ( £102.96)
- Electricity - £208.27 (£41.65) – no dispute
- Building Insurance – £1411.39 ( £282.28)
- Sundries - £24.50 ( £4.90)
- Repairs - £1755.82 (£351.16)

**1/6/19 – 31/5/20**

- Building insurance - £1500 ( £300)
- Directors and Officers Insurance - £400 (£80)
- Cleaning £1000 ( £ 200)
- Electricity - £230 ( £46)

- Health and Safety assessments - £800 ( £160)

- Surveying - £500 ( £100)

- Gardening - £500 ( £100)

- Accountancy Fees - £600 ( £120)

- Repairs - £500 ( £100) – no dispute

- Management fees - £1440 ( £228)

- Bank charges - £50 ( £10) – No dispute

**Total due: £ 2625.18**

**Section 20C Landlord and Tenant Act 1985**

25. Neither party made submissions on s.20C at the hearing. If the parties want the Tribunal to consider this provision they should file and serve their submissions within 14 days of receiving this decision.

Judge Shepherd

12th October 2020

**Rights of appeal**

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case. 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.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit. 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. If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).