THE RESIDENTIAL PROPERTY TRIBUNAL SERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property
TRIBUNAL SERVICE

S.27A & S20C Landlord & Tenant Act 1985(as amended)("the Act")

Case Number:	**CHI/29UN/LSC/2009/0016**
Property:	**78 Homefern House Cobbs Place Margate Kent CT9 1JF**
Applicant/Leaseholders:	**Mr S W Dudley**
Respondent/Landlord:	**Peveral Management Services Limited**
Appearances for the Applicants:	**The Applicant appeared in person**
Appearances for the Respondent:	**Sandra Barton Legal Services Manager Barry Everitt Expert Witness**
Date of Inspection /Hearing	**3rd June 2009**
Tribunal:	**Mr R T A Wilson LLB (Lawyer Chairman) Mr R Athow FRICS MIRPM (Valuer Member) Mr T J Wakelin**
Date of the Tribunal's Decision:	**17th June 2009**

THE APPLICATIONS

The applications made in this matter by the Applicant are as follows: -

1. for a determination pursuant to Section 27A of the Landlord and Tenant Act 1985 of his liability (if any) to contribute towards a contingency fund for the service charge year 2008/2009 and

2. for an order pursuant to Section 20C of the Act that the Respondent's costs incurred in these proceedings are not relevant costs to be included in the service charge for the building in future years.

3. The Tribunal is also required to consider, pursuant to regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 whether the Respondent should be required to reimburse the fees incurred by the Applicant in these proceedings.

DECISION IN SUMMARY

4. The Tribunal determines for the reasons set out below that the lease does enable the Respondent to build up a reserve fund and that the reasonable amount payable for the service charge year 2008/2009 is a sum not exceeding £ 11,500.

5. An order is made under section 20C of the Act.

6. No order is made in relation to the repayment of Tribunal fees incurred by the Applicants in these proceedings.

JURISDICTION

Section 27A of the 1985 Act

7. The Tribunal has power under Section 27A of the Landlord and Tenant Act 1985 to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The Tribunal can decide by whom, to whom, how much and when service charge is payable. A service charge is only payable in so far as it is reasonably incurred, or the works to which it related are of a reasonable standard. The Tribunal therefore also determines the reasonableness of the charges.

8. By section 19 of the Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

THE LEASE

9. The Tribunal had a copy of the lease relating to flat 78 Homefern House, Cobbs Place, Margate which is dated the 11th July 1986 and is for a term of 99 years from the 1st September 1985 at an initial annual rental of £225 per annum rising.

10. The Tribunal was informed that all the leases of the flats in the building were in similar form and the relevant service charge provision to be considered was clause 3 (2)(f) which read as follows:-

> *the expression "the expenses and outgoings incurred by the Lessor" as hereinbefore used shall be deemed to include not only those expenses and 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 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.*

INSPECTION

11. The Tribunal inspected the property before the hearing. The subject property is in a development by McCarthy Stone in two phases. The first being built about 25 years ago and the second a year later. The subject flat was in the second phase. The construction is in the standard McCarthy Stone style with brick elevations under a slate roof, all windows in UPVC and most of them now double-glazed and now has 96 flats, the former manager's flat having been sold off some while ago. The development is over three floors in some parts and four in others with communal common room facilities, guest suite, laundry and a manager's office. There are gardens surrounding the property which are maintained through the service charge account and there are several visitors' parking spaces. In addition to this, there are some undercover car park areas which are rented by residents separately from their leases. Within the development, there are two communal lifts which are maintained through the service charge account.

PRELIMINARYS / ISSUES IN DISPUTE

12. The Tribunal had two discrete and narrow issues before it. The first was if the lease enables the Respondent to build up a contingency fund for future work and if it does the second issue was whether the amount demanded by the Respondent for the service charge year 2008/2009 was a reasonable amount.

13. Both parties had set out their respective positions in their statements of case and both parties had prepared and submitted a bundle of evidence.

THE APPLICANT'S CASE

14. Mr Dudley contended that there were no clauses in his lease which enabled the landlord to build up a contingency fund for future work. His lease was over 24 years old and the leaseholders had only introduced contingency fund collection some fifteen years ago.

When they introduced this they also amended their standard form of lease for new developments to include specific clauses, which enabled them to build up such a fund. His lease had no such clauses and therefore he did not have to contribute towards future expenditure, which extended beyond the budget forecast, which was prepared and sent to leaseholders annually.

15. If he were wrong in this assertion then he still considered that the amounts demanded were too high and that the methodology deployed by the Respondent for determining the amount to be collected was flawed.

16. He considered that a fair approach was to take an initial figure of £11,400 and then increase this by 3.5% per annum. He had calculated that over twenty years this would produce a fund of £345,000 more than enough to cover the estimated expenditure as calculated by the Respondent. He invited the Tribunal to accept this approach.

THE RESPONDENT'S CASE

17. Miss Barton contended that the lease provisions were wide enough to enable the Respondent to build up a contingency fund. She drew the Tribunal's attention to clause 3(2)(f) which she considered provided the authority for the collection of such a fund. She accepted that the clause was not worded well but it was her view that the intention of the draughtsman was clear namely that a fund should accrue from which to defray the cost of future maintenance, repairs and renewals.

18. She told the Tribunal that the Respondent had managed this development since its original construction and at that time the Respondent was part of the McCarthy and Stone group. From the commencement of management a re-decoration fund was set up and lessees had contributed to that fund since that time and there had been no problems. Approximately 15 years ago the Respondent introduced contingency funds for all developments it managed. This was because the need for major repairs on some developments was becoming more imminent as the buildings got older. She asserted that clause 3(2)(f) of the lease authorized such provision and there was no differentiation between a re-decoration fund and a contingency fund.

19. As to the amount demanded for the service charge year 2008/2009 the figure was £18,050.

20. Members of staff had calculated the figure following two inspections of the property. More recently Mr Everitt had given his projected cyclical costs covering an 80 year period and his data had been fed into a spreadsheet. The replacement costs had been calculated by reference to a previous actual cost for an item and in other cases on a best guess basis. Miss Barton conceded that budgeting was not a precise exercise but she stressed that her company had gathered considerable statistical evidence as to the appropriate figures over a period of time.

21. Miss Barton pointed to the ARMA and RICS codes of practice both of which advised managing agents to draw up and implement a program of planned or cyclical maintenance for communal parts of the scheme together with all plant and services that required regular maintenance. The Respondent had carried out a great deal of research in relation to this building which had included inspections by two experts. In these circumstances she was

satisfied that the methodology employed was a reasonable methodology to apply and the amounts requested for this and future years were also reasonable.

THE TRIBUNAL'S DELIBERATIONS

22. The first issue for the Tribunal to decide was whether the lease enables a reserve fund to be set up. The relevant clause of the lease is clause 3(2).

23. Clause 3(2) places an obligation on the leaseholder to pay a 3/63rd part of the *'expenses and outgoings'* incurred in the repair maintenance renewal and management of the building.

24. Clause 3(2)(b) provides that the service charge shall be ascertained and certified by an annual certificate signed by the managing agents and served on the leaseholders annually.

25. Clause 3(2)(e) states that the certificate shall contain a summary of the *'expenses and outgoings'* actually incurred by the lessor in the financial year in question. It is clear that clause 3(2)(e) deals with expenses which have been incurred in the previous year.

26. Clause 3(2)(f) states that the *expenses and outgoings* incurred by the lessor shall be deemed to include *not only those expenses and outgoings which have been actually disbursed but also such reasonable part of all such expenses and outgoings and other expenditure which are of a periodically recurring nature ..... whenever disbursed incurred or made .....including a sum or sums of money by way of reasonable provision for anticipated expenditure in respect thereof as the lessor may in their discretion allocate to the year in question as being fair and reasonable in the circumstances.*

27. In the Tribunals judgment clause 3(2)(f) is intended to cover future expenditure as opposed to past expenditure. Whilst the Tribunal agrees with the Respondent that the wording is not clear the Tribunal does consider that the inclusion of this clause shows an intention on the part of draughtsman that the certificate covering expenses and outgoings is to include not only actual expenditure as set out in clause 3(2)(b) but also future expenditure or in other words a reserve or contingency fund. As actual expenditure has already been covered in clause 3(2)(e) there would be no need for clause 3(2)(f) if this clause was only intended to cover actual expenditure and not future expenditure.

28. Therefore although not as clear as it could have been the Tribunal concludes that the lease is clear enough to enable a contingency fund to be built up which is now a matter of best practice.

29. The Tribunal then considered the second question namely if the amount demanded by the Respondent in the current year namely £18,000 is a reasonable amount. We do not consider this figure to be reasonable. The lease is silent on the approach to be taken in funding a reserve fund. All it does is state that the amount allocated must be fair and reasonable in the circumstances. We have concluded that the methodology adopted by the Respondent, namely the costing of specific items over an eighty year life span is not a reasonable costing method for this development. We think that a time scale of 80 years for a retirement block is too long. The longer the timescale looking forward the larger the annual contribution to any reserve fund will be. The Respondent accepts that the budgeting is not a precise exercise and that their approach is already subject to review in the light of new statistical evidence becoming available. In this particular case it was accepted that the life

cycle of some items had already been reached and instead of replacement, the Respondent was still carrying out patch repairs. It was also admitted that in some cases figures had been included in the model which were not supported by any estimates and were simply based on their own judgment, which they accepted, might prove to be flawed.

30. Bearing all this in mind and having regard to the nature and use of the building we do not consider the 80 year approach adopted by the Respondent to be a reasonable one. Similarly we consider that the approach of the Applicant, namely that there should be a straight line 3.5% increase over the arbitrary figure for a reserve fund allocated in 2007 is not likely to stand the test of time. Instead we consider that the amount to be allocated by way of a reserve fund in each year must be considered annually in the light of the state of repair and decoration of the building at that time, having regard to the funds already held in reserve and having regard to the known data on current replacement costs It is not for the Tribunal to set down guidelines on timescales or amounts and this must be decided on a case by case basis.

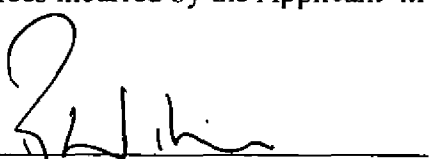
31. Having regard to the above factors and doing the best it can with the evidence put to it the Tribunal considers that a fair and reasonable reserve contribution for the service charge year 2008/2009 is a sum not exceeding £11,500.

SECTION 20C AND REIMBURSEMENT OF FEES

32. Both of these matters can be taken together as the Tribunal's considerations in relation to both are largely the same. The legislation gives the tribunal discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it. The tribunal has a very wide discretion to make an order that is, 'just and equitable' in all the circumstances.

33. It is common ground that the lease provisions are not as clear as they could have been in relation to the establishment and maintenance a reserve fund. Bearing in mind the high sums claimed by the Respondent for a contingency fund we are not surprised that the amounts requested have been challenged. We are also not surprised that the in principle entitlement to raise a contingency fund has been challenged. In the circumstances the principle has been accepted but not the amounts demanded. Having regard to all the circumstances of the case including the conduct of the parties the Tribunal considers that it is just and equitable to make an order under section 20C of the Act to the effect that both parties must bear their own costs and that the Respondent's costs are not to form part of a future service charge account.

34. The Tribunal makes no order under regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 as it would not be just and equitable for the Respondent to have to repay the fees incurred by the Applicant in this matter.

Chairman 
R.T.A.Wilson

Dated 17th June 2009