

10856



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

Case Reference : **LON/00AZ/LSC/2014/0633**

Property : **20 Greenland Mews Trundleys
Road London SE8 5JN**

Applicant : **Greenland Mews Management Co.
Ltd.**

Representative : **Radcliffes LeBrasseur**

Respondent : **Mr C B and Mrs JL Long**

Representative : **In person**

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

Tribunal Members : **Mrs E Flint DMS FRICS IRRV**

**Date and venue of
determination** : **17 April 2015
10 Alfred Place, London WC1E 7LR**

Date of Decision : **20 April 2015**

DECISION

Decisions of the tribunal

- (1) The tribunal determines that the reserve fund demands are not payable under the terms of the lease.
- (2) Since the tribunal has no jurisdiction over county court costs and fees, this matter should now be referred back to the Lambeth County Court.

The application

1. Proceedings were originally issued in the Northampton County Court on 11 July 2014. The claim was transferred to the Lambeth County Court and then in turn transferred to this tribunal, by order of District Judge Zimmels on 17 November 2014 under claim number A86YM969.
2. The relevant legal provisions are set out in the Appendix to this decision.

The property and the lease

3. The property which is the subject of this application is a first floor flat situated in a purpose built two storey block together with car parking space number 20.
4. Neither party requested an inspection and the tribunal did not consider that one was necessary in view of the nature of the issues in dispute.
5. The lease is dated 2 October 1987 and was made between Barratt East London Ltd, Greenland Mews Management Co. Ltd (the Company) and Christopher Brian Long and Alan Mia. The Respondents are the registered leasehold proprietors of the subject premises.
6. The lease is for a term of 125 years from 25 March 1986 at £50 pa rising to £150pa.
7. Under clause 2 of the lease the Lessee covenants "*with the lessor and as a separate covenant with the Company that the Lessee will throughout the said term:-*
 - (A) *Pay the said yearly rents during the said term at the times and in the manner aforesaid without any deduction.*
 - (B) (i) *Pay all rates taxes assessments charges impositions and outgoing which may at any time during the said term be assessed charged or imposed upon the demised premises or the owner or occupier in respect thereof.*

(ii) In the event of any rates taxes assessments charges impositions and outgoings being assessed charged or imposed in respect of the Estate or the said Building pay the proper proportion of such rates taxes assessments charges impositions and outgoings attributable to the Demised Premises.

- 8.** Under clause 4 (A) the Lessee covenants with both the Lessor and the Company to pay *“such yearly sum as the Company may from time to time in its absolute discretion decide to be a reasonable yearly sum for such purpose (the maintenance charge) as contributions towards the expenditure incurred by the Company in carrying out its obligations under Clause 5”....*
- 9.** The lease provides for the maintenance charge to be paid in advance on 1 January at the commencement of each service charge year. Unpaid amounts are treated as rent in arrears.
- 10.** Under Clause 5 the Company is required to keep in good and substantial repair the reserved areas, boundary walls, fences, street lighting and entry phone gates and *“do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessor of the Company be necessary or advisable for the proper maintenance safety and administration of the Reserved areas.”*
- 11.** All Transferees are required to become members of the Company and enter into a Deed of Covenant whereby the Transferee agrees to pay to the Company *“in every year a one fifty sixth part of the amount estimated by the Company as the costs and expenses which the Company anticipates it will incur in providing securing and performing the Scheduled Services in respect of the Estate.....Provided Always that if any payment made by the Transferee ... falls short or in excess of a one fifty sixth part of the amount actually expended by the Company any such shortfall or excess shall be debited or credited as the case may be against future payments to be made by the Transferee..”*
- 12.** The Schedule to the Deed of Covenant provides for a reserve fund for future expenditure in respect of the repair resurfacing and maintenance of the roadway and footpath and the repair reinstatement and maintenance of any unadopted ducts and drains under the roadway and footpaths on the Estate.

The background

13. Proceedings were issued in The Northampton County Court. The sums claimed were: £461.87 plus statutory interest in respect of reserve funds due for the period August 2011 to July 2014, legal costs of £50 and £50 Court fee.
14. A Case Management hearing was held on 27 January 2015 when it was agreed by/on behalf of the parties that the only issue which required determination by the Tribunal was whether or not the Lease under which Mr and Mrs Long own their property contains provisions which enable the Applicant to recover reserve fund monies. It was agreed that the case should be dealt with on the basis of the papers provided in accordance with the Directions dated 27 January 2015.
15. The sum in dispute is £223.25 made up of reserve fund payments demanded from 1 December 2012 onwards as prior to this date there appears to be a nil balance in the schedule attached to the Particulars of Claim. This sum excludes any interest or Debt fees which may be found due and owing.

The Issues

16. The only issue is whether Clause 4 (A) enables the Company to collect a reserve fund towards future expenditure.
17. Having considered all of the documents provided, the tribunal has made a determination as follows.

The Evidence

18. The Applicant stated that the lease should be construed as a whole and not clause by clause. The service charge provisions should be construed against the purpose of those provisions insofar as they can be ascertained from the lease. A reserve fund can be of advantage to both parties by avoiding occasional large charges for substantial and as yet unfunded works. Any such payments are held on trust and the Respondents are protected by the fact that the sum must be reasonable in accordance with Clause 4(A) of the lease and s19 (2) of the Landlord and Tenant Act 1985.
19. The Applicant stated that a true construction of Clause 4 (A) which gives the Applicant "absolute discretion" to decide what is the reasonable yearly sum in respect of the Respondent's contribution to the services provided allows for the collection of a reserve fund since the costs are not stated to have to be within a specific period of time. The purpose of the Maintenance Charge is to enable the Applicant to

decide on the contribution required to enable it to be financially able to perform its obligations to keep the Estate in good repair.

- 20.** Alternatively since the Maintenance Charge is payable in advance, the Maintenance Charge can only be calculated on expenditure that will be incurred therefore the reference to “expenditure incurred” must refer to “expenditure to be incurred”. Therefore the Lease permits the Applicant to require a contribution from the Respondents in respect of a reserve fund for larger, but less frequently incurred repair costs.
- 21.** Helen Jones of Newton Jones Ltd provided a witness statement in which she pointed out that the lessees are required to be members of the Company by means of a Deed of Covenant. A specimen copy of the Deed was attached to the statement. Ms Jones stated that the Schedule of the Deed of Covenant provides for “*the provision and servicing of any Reserve fund to cover items of future expenditure*” in respect of repair, resurfacing and maintenance of roadways, footpaths on the Estate shall be included in the Applicant’s obligations.
- 22.** Ms Jones stated that the Applicant must retain sufficient funds to comply with its duties under the Lease. The substantial sums paid in relation to the roadway paid for out of the Reserve Fund justifies the need for such funds to be readily available.
- 23.** The Respondents described Greenland Mews as a relatively small development of 56 properties. All owners are subject to a service charge for the maintenance of the small grassed area, a narrow road, 4 main lights and a gate with entry phone system. They state that they have always paid the service charge.
- 24.** As at 31 July 2013 the total amount of shareholders’ funds was £31,935 after deducting £32,265.60 for road repairs. The Respondents state that road repairs were the single largest item of expenditure ever incurred by the Mews. They state that there is an annual surplus in the service charge account of £4,000 - £7,000. The owners of the individual properties are responsible for the maintenance of those properties: it is unclear why there is a need for such a reserve.
- 25.** By Clause 4 (C) of the lease payments of the service charge are payable on the first day of January. The accounting period in the lease is from 1st January to 31st December. The Reserve Fund was established in 2007, Mr and Mrs Long stated that they paid into the fund for 5 years as they thought it was compulsory. They subsequently sought advice from the Leaseholders Advisory Service and have continued to pay their service charge demands bi-annually as demanded by Newton Jones, the managing agents.

26. The Respondents questioned requests for late payment and collection fees plus interest in relation to the Reserve Fund being listed on their service charge account.

The Tribunal's decision

27. The Tribunal determines that the contribution to the reserve fund contributions for 2012, 2013 and 2014 are not payable under the terms of the lease.

Reasons for the Tribunal's decision

28. The Lease does not specifically provide for a Reserve Fund and the Deed of Covenant provides that each member should contribute one fifty sixth of the estimated expenditure and that any shortfall or surplus be dealt with by the usual system of debits and credits. This accounting system clearly relates the final service charge for each year to the actual costs incurred as stated in Clause 4. The service charge accounting period is a calendar year.
29. Whilst the Deed of Covenant does provide for a Reserve Fund for the upkeep of the road, footpath and unadopted ducts and drains; it does not provide for a reserve fund for other items which are covered by the service charge. Notes to the 2013 accounts state that the Reserve Fund has been established to pay for major repairs and that it was used to pay for major works to the roadway and car park gate repairs in 2013. Even after these works there remained a substantial sum in the Reserve Fund. The applicants should regularly review the quantum of the Reserve Fund to ensure that it accords with the requirements of the Schedule since demands can only be justified if there is a properly prepared reasonable estimate of the costs of repairs to be incurred.
30. The Respondent's obligations under the Deed of Covenant relate to their obligations as shareholders of the Company. The provisions regarding the Reserve Fund are only in the Schedule to the Deed of Covenant and not the lease. The demands are therefore not payable under Clause 4 (A) of the lease, but may be payable by the Respondents as shareholders of the Company.

The next steps

31. The tribunal has no jurisdiction over county court costs and statutory interest. This matter should now be returned to the Lambeth County Court.

Name: Evelyn Flint

Date: 20 April 2015

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.

Section 20C

- (1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.
- (2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
 - (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
 - (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the

- proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
 - (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
- (3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

- (1) In this Part of this Schedule “administration charge” means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
 - (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
 - (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
 - (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.
- (2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.
- (3) In this Part of this Schedule “variable administration charge” means an administration charge payable by a tenant which is neither—
- (a) specified in his lease, nor
 - (b) calculated in accordance with a formula specified in his lease.
- (4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

- (1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.
- (3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.
- (4) No application under sub-paragraph (1) 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.
- (6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
 - (a) in a particular manner, or
 - (b) on particular evidence,of any question which may be the subject matter of an application under sub-paragraph (1).