FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AY/LVT/2019/0005**
Property	**:**	**1 – 48 Crown Lane Gardens, Crown Lane, London SW16 3HZ**
Applicant	**:**	**Crown Lane (Streatham) Residents Association Limited**
Representative	**:**	**Miss Katrina Mather, Counsel instructed by Debenham Ottaway Solicitors**
Respondent	**:**	**The long leaseholders of 1 – 48 Crown Lane Gardens**
Representative	**:**	**Dr R Burns accompanied by Mr Payne and Mr Bell attended representing themselves**
Type of Application	**:**	**Application for variation of a lease under section 35 of the Landlord and Tenant Act 1987**
Tribunal Members	**:**	**Tribunal Judge Dutton** **Mr W R Shaw FRICS**
Date and venue of Hearing	**:**	**10 Alfred Place, London WC1E 7LR on 25th September 2019**
Date of Decision	**:**	**11th October 2019**

DECISION

DECISION

The Tribunal determines that variation sought by the Applicants are approved in the wording shown on the attached annex.

BACKGROUND

1. This is an application by Crown Lane (Streatham) Residents Association Limited (Crown) under section 35 of the Landlord and Tenant Act 1987 (the Act), seeking a variation of the leases to Flats 1 to 48 Crown Lane Gardens, Crown Lane, London SW16 3HZ (the Property) in the form shown on the appendix hereto.

2. This matter has been before the Tribunal previously on 16th November 2018. At that time an application had been made under section 37 of the Act based on a majority of leaseholders agreeing to the proposed alteration in terms. At that hearing the only active opposition was from Dr Burns although he did not attend the hearing.

3. The Tribunal's decision is recorded in a document dated 5th December 2018. The application was dismissed because the Tribunal was not satisfied on the evidence before it, that the Respondents who completed the voting slips had consented to the lease variations that were being sought.

4. The Applicants re-issued the application under section 35 of the Act. It appears that notices were sent to each leaseholder, which included the proposed wording, and we were provided with a schedule that indicated in respect of this application only five people objected and seven or perhaps eight failed to return the voting papers. The vast majority therefore were in support.

5. At the hearing Mr Payne and Mr Bell, who had not indicated an objection to the application when first sent out, indicated they now wished to oppose but their concerns were directed more at the management of the Property and their dissatisfaction with a former director of the Applicant company.

6. It should be pointed out that the Applicant is a residents association of which each leaseholder is a member. It is the freehold proprietor of the Property out of which leases were granted in various dates in the 1960s for terms of 1,000 years running from 29th September 1966.

7. Some time it seems during 2018 HML PM Limited were appointed managing agents and it was after that appointment that the first application to vary the lease was made.

8. We had before us a bundle of papers which included a report from HML Technical Services which was aimed at fire issues but there was also a report from Stiles Harold Williams dated May of 2017 which included tender analysis in respect of substantial works to the roof.

9. The basis upon which the Applicants make this application is that the lease, on their case, only provides for funds to be collected once they have been expended and that there is no provision in the lease for a reserve fund.

10. The application is under section 35(2)(e). This is part of sub-section (2) which sets out the grounds upon which an application may be made to vary a lease if it fails to make satisfactory provisions in respect of matters set out. One of those matters is set out at sub-section (e) as follows: *"The recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or a number of persons who include that party;"* It is the Applicant's case that the variations they seek fall squarely within this provision.

11. The 'deficient' wording is to be found at clause 2(14) of the lease, as set out in the specimen lease for Flat 1 which is dated 19th August 1969 for a term of 1,000 years from 29th September 1966. We were told that the leases were all on the same terms. Clause 2(14) says as follows:

"To pay to the landlord one forty eighth part of all monies expended by the Landlord in complying with the covenants on the part of the Landlord contained in sub-clauses of clause 3(i) and 3(ii) of these presents within 28 days of the demand therefor by the Landlord at such intervals as the Landlord shall consider expedient and such part if not so paid shall be forthwith recoverable by action and shall carry interest at a rate equal to 2% per annum above the base rate from time to time until payment. Any demand served on the Tenant by the Landlord pursuant to the provisions of the sub-clause shall be conclusive as to the sum due to the Landlord."

12. At clause 3 of the lease the landlord covenants with the tenant to maintain the main structure and roofs, roads, paths, gardens and other structural elements. It includes also an obligation to keep the gardens and grounds tidy to carry out external decorations and to employ such persons as are considered necessary for the due performance of the covenants which would clearly include the retention of HML as the managing agents in this case. The lease makes no provision for any form of reserve fund.

13. In a skeleton argument prepared by Miss Mather and produced at the hearing, the background is recited as is the basis upon which the Applicants sought to make the variation. We were referred to the case of *Shellpoint Trustees Limited v Barnet [2012]UKUT375(LC)* where the Upper Tribunal set out a five stage test indicating that the jurisdictions between section 37 of the Act, that is to say those changes made by consent, and section 35 of the Act, which is the application before us overlap.

14. The five stage test set out in the Shellpoint case includes a determination of the objective in respect of the change, whether it is satisfactory and achieves the object, whether there is any prejudice caused to parties, whether it is reasonable and whether the Tribunal should exercise its discretion.

15. Miss Mather' skeleton argument goes on to set out the objections which we have from Dr Burns, which we will move on to in due course. Miss Mather in her skeleton argument takes issue with Dr Burns' assessment of the impact of the word 'expended' but we will deal with that in more detail in due course.

HEARING

16. At the start of the hearing Dr Burns indicated a wish to record the proceedings but that was refused. He told us that he had been prejudiced in that he had only received papers in the last few days and that he had not had the opportunity of considering the proposed amendments at the time of the previous hearing, which was nearly a year ago and had only received the skeleton argument that morning. Apparently he had spent the last few days seeking to produce a statement detailing the issues.

17. He told us that in his view there was no need for the variation of the lease because his interpretation indicated that it allowed the raising of maintenance charges, as they were called, in any event. He also raised issues concerning the appointment of HML of which it appears he was not informed of, and the running of the Property by the Board of the residents association. He asked whether the Applicant had proper authority to make the application and told us that in 1977 he was the Director of the Applicant and had arranged for re-roofing works to be undertaken and funds collected from lessees without any difficulty. We were also told that leaseholders had apparently been paying monies on account over a number of years without difficulty.

18. Reference was made to the Supreme Court case of Arnold v Britton and recited by both Miss Mather and Dr Burns.

19. After hearing further argument from Dr Burns concerning the original term of the lease, that the leaseholders had historically paid monies on account and that he would be making applications to review the manager's position, we considered whether or not an adjournment should be allowed.

20. We concluded that an adjournment was not appropriate. The wording proposed by the Applicants was the same as was before the Tribunal in 2018 and Dr Burns has been fully aware of the proposed changes. The bundle which he complains about having been delivered to him late in the day appeared to have nothing of any significance which had not been produced to him previously and of course he had chosen not to attend the previous hearing. He indicated that he would wish this hearing to be adjourned so that he could make an application for the appointment of a Tribunal Manager but no application is before us and he was told that if he wished to proceed along those lines he would need to make the relevant application and pay the fee.

21. Our view was that Dr Burns had had ample time to prepare for this application as it had been in contemplation for some considerable time.

22. Dr Burns at this point also gave further reasons for objections to the variations. One was that the tenants should save money so that they could pay for future costs and therefore no reserve was necessary. He did not trust HML to handle the money and therefore there should be no variation and that in any event, the lease already allows for the recovery of monies. He did indicate that if the words, *'or to be expended'* were inserted after the word '*expended'* that this might be acceptable.

23. Having decided we would not adjourn as there was no benefit in taking that course, given the submissions already made by Dr Burns, we heard from Miss Mather who took us through her skeleton argument. It appears that the majority of leaseholders other than Dr Burns have been paying their service charges when claimed, although to be fair to Dr Burns it appears that he has stopped making payments because of his objections to this Application and the running of the Property. Miss Mather went on to say that a leaseholder owned company could not be expected to pay for the substantial works which could be in excess of £400,000 without being able to raise funds. The lease did not allow them to do so. There was no reserve fund and there was no commercial company with backing that might have been able to have assisted.

24. As far as the Arnold v Britton case was concerned, the wording in the lease she said was plain. Dr Burns was not a party to the original lease and the word 'expended' meant just that. The costs could only be recovered when they had been spent.

25. Dr Burns has produced a number of documents. The one that is perhaps most relevant is dated 25th September 219 and comprises five pages of closely typed small font submissions aimed at the grammar of the lease. It is the word 'expended' which seems to create such an argument and Dr Burns who is clearly a man of knowledge insofar as the English language is concerned, has gone into great detail to seek to explain the meaning of the word “expended” making reference in particular to a skeleton argument by Counsel at the previous hearing, which was not before us.

26. We have noted all that was said by Dr Burns in his letter of 25th September 2019 but with respect to him the discourse on the meaning of the word 'expended' and other grammatical matters does not really help us.

27. At the end of his submission he does tell us, again, of the time in 1977 that he was the Chairman of the Board of Directors and that funds were raised to carry out extensive roofing works. This of course was made some time before the introduction of the Landlord and Tenant Act 1985 and the provisions of section 20 and other sections relevant to residential property management.

28. In his submission to us at the hearing, he indicated that there was no natural “meaning” to words, these only developed over the years from usage. In his view the drafters of the lease could not possibly have meant that the Applicant would pay in advance as it had no money to do so. He accepted it was a penniless company. He also pointed out that the leases had changed hands a number of times over the years and that this was not a matter which had been raised previously. He accepted that some ambiguity could be removed by including the words “to be expended” or “will be expended” in the clause but he was particularly unhappy at the possibility if the managing agents, on behalf of the Applicant, seeking to recover estimated service charges in advance of expenditure.

29. He did seem to indicate that he accepted that the Applicant had the right to collect money, to comply with the requirements under the lease but he was concerned that he could not “trust the people” who were running the

development and who were in his words 'in it for the money'. It appears there had been no managing agent until 2013 and that the deterioration had started since then. "They mismanage things" he says and that they were "corrupt".

FINDINGS

30. Mr Payne and Mr Bell seemed to be of the view that the real problems in this case rested with the Board of Directors of the Applicant and with the managing agent. It is not clear from their limited submissions to us that they have any particular disagreement in principle with the alterations of the lease.

31. Dr Burns' submissions are based on somewhat misplaced arguments as to the import of the word expended. In the natural, ordinary meaning of the word (which Dr Burns would seek to challenge) incurred means, we find, a past event. We find that it is almost impossible in this day and age for an Applicant company run in effect by the leaseholders, to be able to fund large items of expenditure without receiving funds in advance.

32. The proposed variation seems to us to be wholly appropriate and in our finding falls within the provisions of section 32(2)(e). The object is to enable the Applicant to have funds available to undertake general maintenance works and also to set aside funds to cover major items of expenditure.

33. Dr Burns admitted that his flat was suffering from water ingress and that it is not a situation which is going to improve with the passage of time. The reports that we have seen clearly indicate the need for works to be undertaken and this has been the position now for a couple of years. It may well be that some leaseholders are aware of these matters and have put money aside to cover these eventual costs. However, we are satisfied that in a modern lease provision would be made to enable the landlord to recover monies on account and in advance of items of expenditure. The use of interim service charges is common in modern leases and we can see no reason why there should be any concerns on the part of Dr Burns as to the safety of these funds given the provisions contained in the 1987 Landlord and Tenant Act as to the depositing of funds into trust accounts.

34. A reserve fund we find is nothing more than common sense and good management and ameliorates the impact on the tenants of the costs of major items of work, which will inevitably arise over a period of years. The reserve fund is not intended to be used to meet day to day items of expenditure, but the interim payments, in effect on account payments, will give the landlord funds to be able to meet those day to day items and to ensure that the Property is maintained in good order. This of course has the benefit to the leaseholders in that it will ensure the capital value of their flats are maintained.

35. We are therefore satisfied that if one considers the five points to be reviewed under the Shellpoint case that the applications meets all of those. We are therefore content to approve the proposed wording as set out in the appendix to be inserted into each lease at the Property. We bear in mind also that there are 48 leaseholders and it would seem initially at least that only five had originally objected and that may now perhaps have risen to seven. That clearly shows that

the vast majority of leaseholders are content with the proposed changes which will bring clarity to the situation.

36. We reject Dr Burns' submissions in that whilst they were strongly held by him and strongly argued in front of us, they do not go to the merits of the application.

37. No other applications were made to us at the hearing.

Judge: Andrew Dutton

A A Dutton

Date: 11th October 2019

ANNEX – RIGHTS OF APPEAL

1. 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 at the Regional Office which has been dealing with the case.
2. 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.
3. If the application is not made within the 28-day time limit, such application must include a request to 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.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates (ie 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.

Appendix to 1 - 48 Crown Lane Gardens

1. Clause 2 (14) as currently stated is deleted.

2. The following wording is substituted:-

2 (14)(i) In this sub-clause the following definitions apply:-

a. Service Charge Year: is the annual accounting period relating to the Service Costs beginning on 1 April in 2019 and each subsequent year during the Term provided that the landlord may from time to time (but no more that once in any calendar year) change the date on which the annual accounting period starts and shall give written notice of that change to the tenant as soon as reasonably practicable.

b. Service Charge: is one forty-eighth cost of the Service Costs.

c. Service Costs: all monies expended or to be expended by the Landlord in complying with the covenants on the part of the Landlord contained in Clause 3(i)-(ii) of the Lease.

d. Reserve Fund Contribution: one forty-eighth part of the reasonable cost to the Landlord of setting up and maintaining, in accordance with the principles of good estate management, a reserve/sinking fund for the provision of anticipated future expenditure in complying with the covenants aforesaid.

(ii) To pay the Landlord the estimated Service Charge for each Service Charge Year (to be estimated by the Landlord by the preparation and service of a budget and demand for payment at least 28 days prior to the start of the Service Charge Year) and the Reserve Fund Contribution by two equal instalments in advance on the first day of the Service Charge Year and the day six months thereafter.

(iii) To pay the difference within 28 days of any demand if in any Service Charge Year the estimated Service Charge is less than the Service Charge actually expended. If the estimated Service Charge is more than the actual Service Charge in any Service Charge Year the Landlord shall return the difference to the Tenant on request or otherwise shall credit the difference towards the following instalment due from the Tenant in respect of the estimated Service Charge Year.

(iv) In the event that the Landlord makes a claim on the Insurance policy taken out by the Landlord in accordance with Clause 3(i) (c), which results in the Landlord recovering funds from insurers, the Landlord shall give credit for 1/48th part of the sum recovered against the next Service Charge demand from the Tenant.

(v) Save as expressly modified by this variation the terms of the Lease shall continue with the same effect as prior to this variation.