FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	CHI/29UN/LSC/2019/0048
Property	:	71-79 Eaton Road, Margate, Kent CT9 1XB
Applicant	:	Brian Alderson (landlord)
Representative	:	Bamptons Management
Respondents	:	The 24 Long Lessees of the Property
Representative	:	In person
Type of Application	:	Liability to pay service charges: s.27A Landlord and Tenant Act 1985
Tribunal Member	:	Judge M Loveday
Date and venue of hearing	:	Determination on the papers without a hearing
Date of Decision	:	21 October 2019

DETERMINATION

Introduction

1. This is an application under s.27A Landlord and Tenant Act 1985 ("LTA 1985") to determine liability to pay service charges under leases of flats at 71-79 Eaton Road, Margate, Kent CT9 1XB. The Application is dated 1 May 2019. The Applicant landlord seeks a determination in respect of an interim charge for the 2019 service charge year, of which the most contentious issue is a contribution towards the relevant cost of major works. Directions given on 3 June 2019 ordered that the application was to be determined on the papers without a hearing under rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Written submissions have been made by the Applicant's agents Bamptons Management, by Mr Jaskirat Matharu[1] (Flat 24) and by Mr Brian Burke (Flats 8 and 25).

2. Save where otherwise indicated, the Tribunal adopts the definitions of "service charge" and "relevant costs" in ss.18(1) and (2) LTA 1985.

The premises

3. The Tribunal did not carry out an inspection. However, from the papers it is clear they comprise a modern block of 24 purpose-built flats with a flat roof.

The Lease

4. The Tribunal has been provided with a copy of a lease for Flat 10 dated 19 January 2007, which is said to be typical of the Respondents' leases ("the Lease"). The Lease is for a term of 125 years from 19 January 2007. The main service charge obligations are as follows:
   (a) By clause 1, the Tenant must pay by way of further rent such sums of service charge as are payable in accordance with the provisions of the Fourth Schedule.
   (b) By clause 1, the Tenant must further pay by way of insurance rent sums equal to a one-twenty fourth part of the premiums from time to time expended by the Landlord in effecting insurance.

[1] Mr Matharu also represents CKM Property Services Ltd, the lessee of Flat 20.

(c) Sch.4 para 1(ii) states that "Service charge" means a "*one-twenty fourth part of the expenditure on services for the Estate*".

(d) Sch.4 para 1(iii) defines the "'*Interim service charge instalment'* as *"a payment on account of … TWO HUNDRED POUNDS per half year or of one-half of the service charge shown on the service charge statement last served on the Tenant whichever is the greater*".

(e) By Sch.4 para (iv) the Lease provides that "'*Service charge statement' means an itemised statement of:*

   (a) the expenditure on service for the year … ending on the day of the amount of the service charge due in respect thereof (any apportionment necessary at the beginning or end of the term hereby granted shall be made on the assumption that expenditure on services is incurred at a constant daily rate) and.

   (b) Sums to be credited against that service charge being the interim service charge instalments paid by the Tenant for that year or period and any service charge excess from the previous year ort period accompanied by a certificate that in the opinion of the accountant preparing it the statement is a fair summary of the expenditure on services set out in a way which shows how it is or will be reflected in the service charge and is sufficiently supported by accounts receipts and other documents that have been produced to him"

(f) Sch.4 para 4 is central to this matter. It provides that *"[b]y equal half-yearly instalments in advance on the first day pf January and the first day of July in each year of the Term (the first such payment to be made on the date hereof being a proportionate sum) the Tenant shall pay to the Landlord an interim service charge instalment which may if the Landlord so stipulates be applied for the purpose of creating a reserve fund to meet anticipated future expenditure on services for the Estate".*

(g) Sch.4 para 7 provides that every service charge statement shall be conclusive as to the information shown thereon.

(h) By clause 4(2) the Landlord undertook to perform the covenants in Sch.6.

(i) By Sch.6 para 1, the relevant costs included sums expended by the Landlord in repairing the Estate.

(j) Sch.6 contained a list of other obligations on the part of the Landlord to provide various services.

5. It is evident that the apportionments for each flat are the same, namely 1/24th.

The service charges in dispute

6. The Application relates to a service charge demand for payment made on 13 March 2019. That demand seeks payment of an interim service charge of £2,482.12 due on 1 January 2019.

7. The Applicant has submitted a Statement of Case dated 30 July 2019 which deals with the consultation for the major works, preparation of the 2019 service charge budgets etc. Two of the Respondents have submitted written arguments. Mr Matharu (Flats 20 and 24) has prepared a Statement of Case and Scott Schedule dated 17 June 2019 raising two issues in connection with the relevant cost of Major Works. Mr B M Burke (Flats 8 and 25) submitted a Scott Schedule dated 17 June 2019 and a letter to the agents dated 9 July 2019. The latter included more general complaints about the condition of the premises and management.

Is the demand in accordance with the Lease?

8. The relevant chronology is not in dispute and can be taken from the Applicant's Statement of Case. It appears that for some time, there has been a need to carry out major works to the property. In April 2017, the Applicant's previous agents served a Notice of Intention under s.20 LTA 1985 in respect of external decorations. A further Notice of Intention was given in December 2018 in respect of fire safety works, internal repairs, redecorations, external repairs, balconies etc.

9. On 21 December 2018, the Applicant's then agents prepared a budget of their expected relevant costs in the ensuing 2019 service charge year. They set this out in a document entitled "Statement of Anticipated Expenditure" which gave 19 detailed heads of expenditure amounting to £31,550. Although it included a

small element for routine repairs and maintenance there was no mention of the major works then under consideration. The statement applied an apportionment of 4.1666670% (1/24th) to arrive at annual interim charges of £1,314.61 per flat for 2019 (and half-yearly charges of £657.29). It appears that this is (or formed the basis of) a demand for payment of £657.29 on the same date. It is evident from the Service Charge demands for Flat 8 dated 13 March and 5 July 2019, which are included in the bundle, that at least some lessees paid the interim service charges of £657.29 demanded by the Applicant's former agents.

10. The present agents were appointed in February 2019 and they reviewed the proposed major works. The agents concluded that the scope of works should change from the December 2018 notices. They sought instructions, and there is a minute of a telephone conference with the Applicant on 5 March 2019. The Applicant "approved the withdrawal of the budget for the year ended 31 December 2019 and issued by [the former agents] on 21 December 2018 because this budget did not include any provision for major works as had been agreed…". The decision was made to spread the anticipated £90,000 cost of the major works over 2 years. The Applicant therefore approved "the issuing of a new budget to leaseholders for the year ended 31 December 2019 to include a provision of £90,000 for major works" and "the issuing of new interim demands to leaseholders for the six months to 30 June 2019". Following the meeting, the agents served further Notices of Intention on 28 March 2019 and 16 April 2019.

11. The agents then re-issued the interim service charge demands which are the subject of this application and a copy of a revised budget for Flat 1 dated 13 March 2019 has been provided. The document is headed "Statement of Budgeted Service Charge Expenditure" and it is in similar general form to the December version. The budget refers to anticipated relevant costs of £119,142 which were to be incurred in the service charge year ending 31 December 2019 by reference to 20 itemised heads of relevant costs - albeit that these are not in the same categories as the previous budget. The main difference is that the March 2019 version includes an additional item of £90,000 for "Major

Works". The statement applies an apportionment of 4.16666% (i.e. 1/24th) to arrive at a charge of £4,964.25 "payable on account" for the full year. The "Half Yearly Service charge" is given as £2,482.12. It appears that this is (or formed the basis of) a demand for payment of £2,482.12 made on the same date, and it is this sum which is the subject of the application.

12. The Applicant's Statement of Case gives a great deal of other information about its decision-making process, the s.20 consultation and the cost of works. Although the Tribunal is grateful for this background detail, much of it is ultimately not of any direct relevance to the issues raised in the Application.

The arguments of the parties

13. Mr Matharu submits that any additional charges must be accounted for prior to the period that it is accounted for and that any major works must be accounted via a Reserve Fund. He refers to the two service charge demands issued in December 2018 and March 2019, which are for the same accounting period and submits that the latter was in breach of Sch.4 to the Lease. In addition, the cost of £90,000 ought to have been broken down by an accountant. Mr Matharu further observed that no certificate had ever been provided, which also appeared to be a breach of the terms of the Lease.

14. In response, the Applicant's Statement of Case suggests that the December 2018 service charge budget effectively provided for no element of major costs. The Applicant submits this was clear error, and that he is entitled to correct this clear error. There is nothing in the Lease which prevents the landlord from withdrawing a demand for the first half yearly payment and re-issuing another. There is no requirement in Sch.4 for interim service charges to be certified – unlike the requirement to certify the "service charge statement".

Discussion

15. The Tribunal can deal quite briefly with two subsidiary points raised by Mr Matharu:
    (a) Firstly, there is no requirement in the Lease for the relevant costs of major works to be discharged from any reserve fund. The reference to the reserve fund in Sch.4 para 4 makes it clear that a reserve "may" be

established "if the Landlord so stipulates". It is of course good practice to set up a reserve. But failure to do so in itself is not enough to render any part of the interim charge unreasonable under s.19 LTA 1985: see the test in *The London Borough of Hounslow v Waaler* [2017] EWCA Civ 45.

(b) Secondly, the interim charge is not subject to any requirement for certification. This can be contrasted with the requirement in Sch.4 para 1(iv)(a) to certify an element of the "service charge statement": see, for example, *Klosterkotter-Dit-Rawe v Greyclyde* [2018] UKUT 0289(LC). The Tribunal accepts the Applicant's case on this point.

16. The central question raised by the Respondents is whether the Lease permits the Applicant to withdraw his December 2018 demand for half-yearly interim service charges and replace it with another (much higher) one.

17. *Prima facie*, this is a relatively straightforward question of interpretation. The leading modern case on the interpretation of provisions in leases is of course *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 where Lord Neuberger set out the applicable principles at para.14 onwards. When interpreting a written contract, a court or tribunal is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean". It does so by focussing on the meaning of the relevant words of the lease in their documentary, factual and commercial context. That meaning is assessed in the light of:

- The natural and ordinary meaning of the clause;
- Any other relevant provisions of the lease;
- The overall purpose of the clause and the lease;
- The facts and circumstances known or assumed by the parties at the time that the document was executed; and
- Commercial common sense.

One must disregard any subjective evidence of a party's intentions. But it is also the case that no special rules of interpretation apply to service charge provisions in leases.

18. However, in this case there is an immediate difficulty with interpreting para 4 of Sch.4 to the Lease. The difficulty arises because of the way both the December 2018 and the March 2019 interim charges appear to have been computed by the Applicant's agents. Although para 4 of Sch.4 to the Lease permits the landlord to demand an "interim service charge instalment", this is defined by para 1(ii) of Sch.4 as being calculable on two alterative bases, namely:
(a) £200; or
(b) "one-half of the service charge shown on the service charge statement last served on the Tenant".
In this case, the clear evidence is that the agents calculated the interim charges in a conventional way as a proportion of the relevant costs they estimated would be incurred in the relevant service charge year. This conventional approach is supported by the best practice in the RICS *Service Charge Residential Management Code* (3rd ed) at para 7.3. But unfortunately, this is not consistent with either of the two options set out above.

19. This raises a more general point of interpretation than the one identified by the Respondents, namely whether the charge made on 13 March 2019 generally complied with paras 1(iii) and 4 of Sch.4 to the Lease. The more general issue is not one which is specifically raised by either of the Respondents who have participated in this application. However, Mr Matharu has raised several issues relating to payability under the terms of the Lease and the Applicant understood such issues were to be considered by the Tribunal. The Applicant has sought to address the basis on which he claims the service charges in his Statement of Case by reference to specific provisions in the Lease. It cannot therefore have been a surprise to his representatives that the Applicant needed to engage with the more general question about how the interim charges claimed in March 2019 fitted into the contractual machinery. Moreover, this is of course an application brought by the landlord, not the tenants. The Applicant carries the burden of proving his case – including establishing his entitlement to do so under the terms of the Lease. There is also the diffi-

culty in dealing with the points of interpretation raised by Mr Matharu without considering whether paras 1(iii) and 4 of Sch.4 apply at all to the service charges in issue. In the premises, the Tribunal considers it is open to it to determine the more general point of interpretation identified above.

20. Addressing this issue, the Tribunal notes that the ordinary and natural meaning of para 1(iii) permits of only two alternatives. There are no other provisions in the Lease which permit an alternative approach to interim charges. Indeed, the interim service charge provisions can be contrasted with para 1(iv) of Sch.4, which provides that the service charge statement should be based on "an itemised statement of … expenditure". The draftsman could have given an alternative method in para 1(iii) based on an itemised budget but chose not to. As to the purpose of the interim charge, this is plainly to enable the landlord to have some funds in hand to discharge its responsibilities during the service charge year. But it is not intended to provide any kind of assessment based on any estimated charges. Instead, the first method in para 1(iii) provides a threshold or minimum interim service charge payment of £200 per half year throughout the 125 years of the term. The second method is likely to prove the primary method of providing funds to the landlord after the initial years of the term. But neither is based on an estimate of costs to be incurred. Indeed, the Lease itself makes provision for the circumstances where the interim charge does not meet the anticipated cost of expenditure, since the landlord has power to borrow money and claim "interest paid on any money borrowed for that purpose" through the service charges: see para 1(i) of Sch.4. In short, these provisions are clear. They do not permit a computation of interim charges based on anticipated budgeted costs.

21. It follows that the Applicant's demand made on 13 March 2019 is not payable. Without the proper computation permitted under the second limb of para 1(iii) of Sch.4, the interim charge instalment due on 1 January 2019 is limited to £200.

22. The Tribunal will further briefly address the arguments specifically raised by Mr Matharu in his Statement of Case. It does not agree with Mr Matharu that the interim charge must be computed before the start of the service charge

year. Time is not generally of the essence for a time stipulation in a Lease, and there are no relevant contra-indications in the Lease to the effect that the computation must have taken place before 1 January 2019. But the Tribunal does consider it was not open to the Applicant to re-open the interim service charges once that charge was computed. The interim demand provisions of Sch.4 to the Lease are for the mutual protection of both parties – not the landlord alone. They provide funds to the Applicant, but also certainty to the Respondents, enabling the lessees to budget their costs throughout the year. The position can be contrasted with the position with so-called 'balancing' service charges (such as the charge payable under para 5 of Sch.4 to this Lease), where there is no implied restriction on the right of a landlord to "re-open" a charge once made. This view is further reinforced by the computation methodologies permitted by para 1(iii) of Sch.1. Both options provide for fixed sums to be paid based on existing information and neither provides scope for revisions to these figures at a later date. Finally, there is no provision in the Lease permitting supplemental 'in year' charges. Instead, the Landlord's route to recovering any excess expenditure incurred during the service charge year is to make a demand for a 'balancing' charge at the end of the service charge year under para 5 of Sch.4. And (as observed above) he also has the express power to borrow moneys in the meantime and charge interest to the service charge account.

23. It follows that even on the alternative basis argued by Mr Matharu, the demand for payment made on 13 March 2019 is not payable. It was not open to the Applicant to re-open the interim service charge demands made in December 2018.

Mr Burke's arguments

24. Mr Burke's Scott Schedule complains about the £90,000 relevant cost of the major works and suggests the "management charges" (presumably the service charges) have consistently exceeded £1,200pa. For a block which is less than 12 years' old, Mr Burke suggests there has been "clear mismanagement because of the failure to set up a sinking fund". The letter dated 9 July 2019 raises other issues. Cleaners had not been paid. Other tradesmen struggled to be paid, and virtually no works were undertaken since construction. Mr Burke

also complained about the condition of the carpets in the common parts, external decorations and balconies. He suggests that not even 25% of the service charge contributions had been spent on the premises.

25. Mr Burke is not legally represented in the current application. Nevertheless, the allegations appear to raise arguments that the relevant costs were not incurred and/or were not reasonably incurred under s.19(1)(a) LTA 1985. Furthermore, they clearly allege that certain works and services provided are not of a reasonable standard under s.19(1)(b) LTA 1985. Be that as it may, and without pre-judging the substance of these allegations, they cannot really assist the Tribunal in the present application. This is because the present matters concern 'interim' service charges covered by s.19(2) LTA 1985, and not "relevant costs" under s.19(1). It may well be that Mr Burke has arguments which might be material to the payability of service charges in other years, but that cannot help with any liability to pay interim charges for 2019.

Other matters

26. No application has been made under LTA 1985 s.20C.

Conclusions

27. The Respondents are each liable to pay an interim service charge instalment of £200 on 1 January 2019.

28. The Tribunal stresses the above conclusion only applies to the interim service charges for January 2019. It reaches no decision on whether the Applicant can recover the relevant costs of the major works as part of its balancing charges at the end of the 2019 service charge year.

Judge Mark Loveday
22 October 2019

Appeals

1. 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.

2. 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.

3. 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.

4. 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.