FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AW/LSC/2019/0301**
Property	**:**	**Flat 1 Palace Gate, London W85LS**
Applicant	**:**	**Michael Maunder Taylor FIRPM AssocRICS as FTT Appointed Manager**
Representative	**:**	**In person**
Respondent	**:**	**Eperstein S.A.R.L (Incorporated in Luxembourg)**
Representative	**:**	**Howard Lederman of Counsel**
Type of application	**:**	**Liability to pay service charges**
Tribunal member(s)	**:**	**Judge Shepherd** **Michael Taylor FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**10 January 2020**

DETERMINATION

DECISION OF THE TRIBUNAL

The Tribunal finds that the reserve funds payable for the year to 31st May 2019 and 31st May 2020 are £22500 respectively. The application under Landlord and Tenant Act 1985, s.20C is allowed.

Background

1. Michael Maunder Taylor ("The Applicant") made an application to the tribunal dated 9th August 2019 (Page 1 of the application bundle). He is an FTT Appointed Manager of the premises at Palace Gate, London W85LS pursuant to orders dated 26/6/17 and 26/7/18 (Page 22). In his application he seeks a determination as to liability to pay and reasonableness of service charges for the years to 31st May 2019 and 31st May 2020. The value of the dispute if £177200. He provided oral and written evidence (379). He also called expert evidence from Steven Day MRICS of Ingleton Wood whose witness statement is at page 397.

2. The Respondent, "Eperstein" is the leaseholder of Flat 1, Palace Gate. They are a company incorporated in Luxemburg. They are resisting the application on various bases which are detailed below.

3. Palace Gate is a block of five flats and three commercial units. The Respondent's lease began on 29th May 1997 (35). They acquired their interest in 2016. Alexandra Zetterberg is a beneficiary of Eperstein and gave written evidence to the Tribunal (94). She was unable to attend the hearing as she has recently given birth and she works and lives in Monaco. Alon Mahpud a Director of Eperstein also gave written evidence (369).

The issues

4. The parties helpfully prepared a Scott Schedule of issues for the Tribunal. The primary issue was whether the Applicant was entitled

under the lease to demand sums for a "reserve fund" to meet the costs of internal redecoration; external repairs and decorations and lift replacement for both years in issue. It was also argued by the Respondent that the sums claimed were too high, were not reasonably incurred under s.19 LTA 1985 and that there should have been a consultation exercise pursuant to ss 20 and 20ZA of the LTA 1985. The Respondents also sought costs dispensation pursuant to LTA 1985, s.20C

The Applicant's case

5. The Applicant claims that the reserve fund contributions sought are payable and reasonable. He was appointed by the Tribunal and amongst other things was tasked with creating a reserve fund (33/4). The sums claimed for both of the years in issue consist of:

   Internal redecoration reserve fund contribution - £8300

   External repairs and redecoration reserve fund contribution - £75000

   Lift replacement and reserve fund - £5300.

6. The Applicant says he is entitled to recover these reserve sums pursuant to Clause 13 of Part II of the Third Schedule ("Clause 13") of the lease which allows the landlord to recover sums to pay for:

   The setting aside by the Lessor of such sums by way of reasonable provision for anticipated future expenditure in respect of the management and upkeep of the Building as the Lessor's auditors accountants or Surveyors(as so nominated) acting as experts and not as arbitrators shall decide should be allocated to the year in question as being prudent and reasonable in the circumstances (Such decision to be final and binding on the Lessor and Lessee).

7. In any event the Applicant submitted that even if the lease did not provide for a reserve fund the order appointing him as manager took precedence and the order had required him to create a reserve fund.

8. A budget certificate was prepared for 1st June 2018-31st May 2019 on 12th September 2018 (83). This sought reserve funds of £8400 for external decoration; £2500 for lift replacement and £16275 for general reserve. These sums had been obtained from the original manager Mr Maloney who the Applicant replaced. Comments were received from leaseholders. Thereafter the Applicant commissioned a report on Planned Preventative Maintenance by Mr Day. The final report was dated 18th November 2019 (397) but it's clear that there was input by Mr Day before this date. There is a PPM Schedule at page 408. Mr Day's findings fed a long Term Maintenance Plan prepared by the Applicant (429). In short it was clear from Mr Day's findings that the need for external maintenance particularly was both more pressing and more expensive than originally thought. This led the Applicant to prepare a further certificate dated 13th November 2018 under which External decoration costs had increased to £75000; lift replacement had increased to £5300 and internal decoration was £8300 (153).

9. In his statement the Applicant concedes that the sums in relation to external repairs and redecorations are high but states that the last major works were carried out in 2011 and 2014. He had programmed the external works for 2021. There were no reserve sums when he took over management. In support of the sums sought in relation to the lift replacement the Applicant relied on a report by Cooke & Associates (126) which had been commissioned by his predecessor. The lifts had been installed in 2002 and had a life cycle of 15-20 years. Cook and Co were recommending replacement but the Applicant had prioritised the external works in accordance with Mr Day's report. The budget certificate for the current financial year is at page 81-82.

10. The Applicant called evidence from Mr Day. He'd undertaken a visual inspection in September 2018 looking at the external facades and fabric and the roof, windows and common parts. He said the budget costs he had formulated were based on a combination of published rates, recent tender comparables and experience. He said that although his report said that external works were due now he was not duly concerned if they were deferred for a year or two.

The respondent's case

11. Mr Lederman produced an extremely useful outline opening with supporting authorities. He submitted that the recent *Northwood Hall* decision (Claim No D10CL409) confirmed that a tribunal appointed manager must manage in accordance with the lease. The Schedule of Functions and Services in the management order refer at paragraph 1 to the service charge accounts being administered in accordance with the terms of the lease. The parties were at odds on the question of whether the Management Order could stand independent of the lease in relation to the creation of a reserve fund (33/4). Certainly the case of *Maunder Taylor v Blaquiere* [2003] 1 WLR 379, confirms that a manager may be given powers which are not present in the lease. There were further submissions made by the parties on the point subsequent to the hearing in particular in relation to the application of the recent decision of the Upper Tribunal in *Chan Hui et al v K Group Holdings* [2019] UKUT 371. In the event the tribunal did not need to resolve the issue in the present case for reasons that will become clear.

12. Mr Lederman said there was a concern that if substantial sums are collected in advance of particular works they could be used for different works in the future. The Applicant's appointment was due to end in 2020. A new manager may take a different view. Alternatively the sums collected for particular works in the future may be difficult to challenge.

13. Mr Lederman's principal submission was that there was no reserve fund allowed for in the lease. He did concede however that the wording in Clause 13 was similar to the clause in *St Mary's Mansions Limited v Limegate Investment Company Ltd* [2002] EWCA Civ 1491 where the clause was read as a reserve fund. Nevertheless he said it was significant that Clause 13 did not refer to a reserve fund as such. The clause had been drafted by experienced solicitors one would have expected them to refer to a reserve fund he said. He also questioned what was meant by setting aside in the clause. He would have expected a provision for creating a fund. Also he questioned what *upkeep* and *management* mean? He fairly conceded however that these could be simply "catch all" phrases.

14. In relation to the question of the lifts Mr Lederman submitted that the words management or upkeep in Clause 13 would not encompass the replacement of the lift. He said that s.42 (3) (a) of the Landlord and Tenant Act 1987 was clear that if sums are collected for a particular purpose they must be used for that purpose.

15. Mr Lederman also submitted that there was a condition precedent in the lease requiring budget certificates to be prepared and signed off by a surveyor (see page 130/2(a)). This had not happened in the present case and this meant the sums were not due. Clause 2 (a) of the Third Schedule states:

The Lessors auditors accountants or surveyors(as the Lessor shall from time to time nominate) acting as experts and not as arbitrators shall prior to each accounting period prepare and supply the Lessee with a copy of an estimate...

16. Mr Lederman further submitted that there was no provision in the lease for revising a budget certificate as the Applicant had done. Therefore the revised budget certificate was of no effect.

17. In reply the Applicant said that his firm was a multi-faceted firm of Chartered Surveyors and they had been appointed and had signed off the budget certificates.

Law

18. Section 19 of the Landlord and Tenant Act 1985 deals with the reasonableness of service charges:

19.— Limitation of service charges: reasonableness.
(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 provision 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.

Decision

a) Is clause 13 a reserve fund?

19. The Tribunal are aware of the guidance in *Arnold v Britton* [2015] 2 WLR 1593 as to the interpretation of the leases. In that case Lord

Neuberger summarised the principles of contractual interpretation beginning at para.14 onwards:

> *Interpretation of contractual provisions*
>
> *14 Over the past 45 years, the House of Lords and Supreme Court have discussed the correct approach to be adopted to the interpretation, or construction, of contracts in a number of cases starting with Prenn v Simmonds [1971] 1 WLR 1381and culminating in Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900.*
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> *15 When interpreting a written contract, the court 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", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn [1971] 1 WLR 1381, 1384-1386; Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989,*

995-997, per Lord Wilberforce; Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in Rainy Sky [2011] 1 WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.

16 For present purposes, I think it is important to emphasise seven factors.

17 First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18 Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify

departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19 The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

20 Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the

court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21 The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22 Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd 2012 SC (UKSC) 240, where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract: see paras 21 and 22.

> *23 Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] HLR 412, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". However, that does not help resolve the sort of issue of interpretation raised in this case.*

20. The Tribunal intends to apply the guidance given in *Arnold v Brittan* as follows. The first four criteria are particularly important here:

(a) Whilst initially drawn to the detailed arguments of Mr Lederman the Tribunal is of the view that the natural and ordinary intended meaning of Clause 13 is to create a provision for a reserve fund. The Tribunal accepts that the meaning would have been clearer if the actual words had been used but in spite of this it appears clear that the aim of the draftsman of the lease was to allow the lessor to collect reasonable sums from the lessee for future expenditure for the management and upkeep of the building. The terms *management* and *upkeep* although not defined in the lease would appear to reference the general maintenance of the building as catch all phrases. The sums collected for

the future expenditure in the particular year are to be ascertained by the Lessor's auditors, accountants or surveyors subject to the requirement of prudence and reasonableness. The Tribunal does not read the provision as confining "future expenditure" to the present accounting period. The reference to allocation to the year is merely reference to the sums collected in that year.

(b) There is no apparent error in drafting in the present case save perhaps that the reserve fund was not clearly defined as such or the draftsman could have better defined what *management and upkeep* in this context was intended to mean. This does not negate the obvious meaning. Indeed it is difficult to interpret the clause is any other way. If collecting sums for anticipated future expenditure is not a reserve fund what is it?

(c) Mr Lederman may well be right that the consequences of the Tribunal's interpretation of the clause may have rendered it an imprudent clause (particularly for the lessee) at the time that the lease was granted (see paras 21- 24 of his opening submissions) - a point he did not expand upon in his oral submissions - this does not deflect from the ordinary and natural reading of the clause.

21. Accordingly there is a reserve fund which the lessor can rely upon and there is no need for the Applicant to invoke his powers under the Management Order. The reference to creating a reserve fund in the Schedule of Functions and Services must be read as collecting sums pursuant to the reserve fund in the lease. This is not something that previously happened as the Tribunal understands it (see 382/16).

Has the contractual machinery been followed?

22. Mr Lederman makes two points here. Firstly he challenges the right of Maunder Taylor to act as expert surveyors when signing off certificates under the lease. Secondly he challenges the right of the Applicant to serve two budget certificates and argues that the result is that they are bound by the first. The Tribunal rejects the first argument but accepts the second.

23. The Applicant was clear in his evidence that there is a separation of functions in that he personally is the manager of the premises but Maunder Taylor, his firm, are the appointed surveyors. The budget certificates on pages 137, 153 and 81-82 are all signed by Maunder Taylor. The Management Order gives him the power to delegate to other employees of Maunder Taylor as well as appointing surveyors (29/1 (d)). Accordingly there does not seem to be any obstacle to Maunder Taylor being appointed as the surveyors in this context.

24. The Tribunal does however consider that the service charge mechanism described in paragraphs 2 and 4 of part 1 of the Third Schedule does allow for only one budget certificate. There is no mechanism for the type of variation that took place here (see the change from the budget certificate at 83 and that at 152). Therefore the former budget certificate is the valid one at least with reference to the calculation for 2018-2019.Whilst this has the effect of rendering the accountant's certificate incorrect in so far as the figures at page 89 are concerned it does not mean that no sums are due. Neither does the Tribunal accept Mr Lederman's contention that the description of the general fund as meeting the *cost of large non- regular repairs and maintenance work* does not meet the requirements of Section 42 of the Landlord and Tenant Act 1987. The description is clear enough to meet the requirements of subsection (3) of Section 42.

Are the sums claimed reasonable?

25. Even if the Tribunal is wrong about the fact that the first budget certificate is the operative one under the lease it considers that for various reasons the sums claimed by the lessor for the two years in issue are not reasonable pursuant to Section 19(2) of the Landlord and Tenant Act 1985 or indeed *prudent in the circumstances (Clause 13 of the lease)*. Clause 13 must be interpreted as a provision which allows the lessor to build up a reserve fund over a period of time collecting reasonable amounts each year in order to deal with future expenditure. It would not have been envisaged that the clause could be used to demand substantial sums in order to fund imminent works without having consulted pursuant to the provisions in Landlord and Tenant Act 1985, s.20. The sums claimed by the Applicant fall into the latter category.

26. The Tribunal has some sympathy for the Applicant who is clearly seeking to carry out his functions properly particularly in seeking to carry out the essential works outlined in Mr Day's report but it is not reasonable to demand these substantial sums without proper consultation.

27. The Applicant has, in accordance with the guidance and recommendations set out in the RICS Residential Management Code in respect of Planned and Cyclical Works, engaged the services of a qualified building consultant to inspect the building and prepare a Planned Maintenance Programme. In preparing such a Programme and arriving at reasonable estimated costs for the works required the surveyor will have had to take account of the building's location within a Conservation Area in a very desirable location close to Kensington Gardens with significant security and health and safety requirements as it fronts onto a very busy road.

28. For any works to be carried out detailed specifications will have to be prepared and tenders sought from appropriate contractors but in our

view there is nothing precluding the Claimant from commencing the consultation process based on the figures contained in Mr Day's Planned Maintenance Programme.

29. The Tribunal does consider that the Applicant is entitled to collect reasonable sums for future expenditure. Doing the best it can the Tribunal considers that reasonable amounts for both years would be:

External works: £16000

Lift Replacement: £2500

Interior decoration: £4000

Total £22500

30. These figures for individual works differ from the original budget certificate but the total sum is less than in that certificate.

31. In summary the Tribunal finds that the reserve funds payable for the year to 31st May 2019 and 31st May 2020 are £22500.

Section 20C Landlord and Tenant Act 1985

32. For the reasons given above the Tribunal considers that although the Respondent was entitled to challenge the service charge payable and in doing so put forward cogent arguments their position was that there was no reserve fund provision in the lease and that no sums were due. The tribunal found that this was not the case and that the Applicant had behaved reasonably in all matters save for the amount of the reserve fund sought. In these circumstances it would be reasonable for the Applicant's costs to be added to the service charge. Therefore the application under s.20C is dismissed.

Rights of appeal

33. 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.

34. 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).

Judge Shepherd

10 January 2020