

LON/00AN/LSC/2006/0131

LON/00AN/LSC/2006/0245

**DECISION OF THE LEASEHOLD VALUATION TRIBUNAL ON AN
APPLICATION UNDER SECTIONS 27A and 20C OF THE LANDLORD AND
TENANT ACT 1985 AS AMENDED**

Re: St Paul's Court, Colet Gardens, London W14 9YA

Applicant: St Paul's Court Limited

Respondents (appearing): Miss N. Butler LRAD, ARAD, AISTD, UKA Fellow, Churchill Fellow (block 3, 5 More Close)

Mr. K.M. Cartwright JP FRICS (block 3, 63 Lily Close)

Mr. C. Juanette (block 3, 29 More Close)

Mrs. J. Papp (block 7, 42 Lily Close)

Mr. M. Holgate (block 3, 35 Lily Close)

Mr. M. Tungay (block 3, 7 Lily Close)

Mr. P.F. Slevin (block 8, 35 Colet Gardens)

Mr. E.R. Bridges (18 Lily Close) (part in attendance)

Respondents (not appearing): Mr. R. Gunter (block 3, 8 More Close)

Mr. F. McCartney (93 More Close)

Mr. K. Mallinson (77 Lily Close)

Mr. J. Koo (36 Colet Gardens)

Ms L. Jackson (62 Colet Gardens)

Ms. J. Aistrop (47 More Close)

Mrs. C. Piron (79 Lily Close)

Mr. A. Marke (20 Lily Close)

Inspection: Not applicable

Hearing date: Monday 29th January 2007

Appearances: Mr. J. Culhane, director of St. Paul's Court Limited

Respondents identified above as appearing

Members of Tribunal Mr N.M. Gerald

Mr L.Jacobs FRICS

Mr D. Wilson

PRELIMINARY

1. Mr Juanette confirmed that he had withdrawn his application LON/00AN/LSC/2006/0245 so that the Tribunal was only dealing with application LON/00AN/LSC/2006/0131 ("the Application").

INTRODUCTION

2. The Tribunal was dealing only with an application under section 27A of the Landlord and Tenant Act 1985 (“the Act”) 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 and
 - (d) The manner in which it is payable

In respect of the service charge year ending on 24th December 2005.

3. St Paul’s Court, Colet Gardens, London W14 9YA (“the Estate”) comprises six blocks (Blocks 1, 2, 3, 7, 8 and 9¹) comprising a total of 267 flats which were granted on common form leases (“the Leases”) on divers dates in the early to mid-1980s for terms of 135 years from 24th June 1980. The Respondents are each lessees of the flats identified above.
4. The Applicant, St Paul’s Court Limited, owns the freehold to the Estate. Each lessee owns one share in the Applicant and has a right to vote in general meeting to appoint directors and approve the annual accounts of the Applicant which, broadly speaking, mirror the service charge accounts in respect of the Estate.
5. References to page numbers are to those in the Hearing Bundle prepared by the Applicant as directed by the Tribunal. References to clauses are to those comprised within the Leases.

HEARING

6. The hearing took place on Monday 29th January 2007. The Applicant was represented by Mr Culhane, a director of the Applicant. Those Respondents who attended represented themselves, as indicated above. Those Respondents who did not attend were unrepresented. Mr Bridges attended at the beginning of the hearing but left shortly afterwards so he made no representations.
7. On 27th June 2006, the Tribunal directed that whilst it did not have jurisdiction to determine the Application in its then form, it anticipated that it could have jurisdiction if the Application were amended so as to put forward a sample service charge demand or demands which showed in the demand a credit which had been given to the leaseholder’s proportionate share in the reserve funds held on trust.

¹ Blocks 4, 5 and 6 being outside of the Estate service charge regime the subject of the Application.

8. The Applicant has not adopted that approach but has instead issued and sent service charge certificates in respect of and to each of the 267 flats comprised within the Estate for the service charge year ended 24th December 2005 (“the Service Charge Certificates”) with a covering letter (“the Covering Letters”), samples of which can be found in the bundle in respect of Miss Butler (pages 248 and 249) and Mr Slevin (pages 253 and 256).
9. The Service Charge Certificates set out the total expenditure for the Estate for the year ended 24th December 2005 which is then apportioned to the subject flat, none of which is in dispute.
10. The Service Charge Certificates go on to summarise the reserve funds held in respect of the subject flat at the beginning of the year, what has been paid by the lessee on account of service charge during the year, the accrued interest and then deducts the expenditure for the year which then produces a net figure which represents the reserves held at the end of 24th December 2005 (“the 2005 Reserves”) to be carried forward to the next service charge year.
11. The Service Charge Certificates only show the subject flat’s share of the 2005 Reserves, not the total 2005 Reserves. However, there is no dispute as to what the 2005 Reserves total and what they comprise, and it is accepted by all that they include £299,289 of reserves which had accrued up and until the service charge year ended 24th December 1998 (“the 1998 Reserves”). The rest of the 2005 Reserves represent reserves which have accumulated since 24th December 1998, and there is no dispute about them.
12. The Covering Letters explain that there is some doubt as to whether the 1998 Reserves are correctly apportioned within the 2005 Reserves, and shows what the subject flat’s share of the 2005 Reserves would be if the 1998 Reserves were apportioned on a different basis, which will be set out below.
13. The Covering Letters also explain that there is an Application before the Tribunal for determination of the service charge payable for the year ended 24th December 2005, the key and sole figure which is in dispute being the 1998 Reserves. Any lessee who wishes to be joined into the Application may make application to the Tribunal. All of the named Respondents are the lessees who applied to be joined in response to those Letters. Those named as appearing are the only ones who attended the hearing on 29th January 2007.

THE ISSUE

14. Although the Application was not formally amended, all parties present were content for it to be treated as having been amended so that the sole issue for determination by the Tribunal is whether the 1998 Reserves comprised within the 2005 Reserves as shown in the Service Charge Certificates is correct (the “Issue”).

JURISDICTION

15. All parties present indicated that they made no challenge to the Tribunal's jurisdiction to determine the Issue, and accepted that the Tribunal had jurisdiction and were anxious that this long-running dispute be resolved without further expense or delay. Indeed, it was within that context that the Tribunal had suggested a means of vesting the Tribunal with jurisdiction in its decision of 27th June 2006.
16. The Tribunal formally records that it accepts that it does have jurisdiction to resolve the Issue as, at base, it relates to the amount of service charge payable for the service charge year ended on 24th December 2005, the key component of which is the treatment of the 1998 Reserve.
17. Strictly speaking, of course, the 1998 Reserves have been carried forward within the reserves in each service charge year since 1998 so that each service charge year since then is implicitly challenged. However, nothing of any import turns on this point, and all matters relating to the 1998 Reserves will be resolved by the Tribunal determining the Issue.

FACTS

18. It is necessary to set out the pertinent facts, much of which are not in dispute. The Estate was developed by the former Greater London Council ("the GLC") which granted the Leases. For the first two years, the GLC produced service charge accounts which contained what Mr Cartwright (an original lessee and a director of the Applicant from 1983 until 2003) described as "the service charge matrix", which showed service charge sums apportioned by reference to the percentages shown in the Leases.
19. The Leases contain detailed provisions relating to the service charge. They are tolerably clear, and there is no dispute amongst those present as to how they operate. The Leases distinguish between four types of expenditure: (a) Main Block Expenditure, (b) Internal Block Expenditure, (c) Heating Expenditure and (d) Estate Expenditure: see clause 5 and the Sixth Schedule. Each flat bears a Specified Proportion (by percentage) of each of the four heads of expenditure, as stated in Part 6 of the Sixth Schedule.
20. The Main Block Expenditure (which, broadly speaking, comprises external works: see clause 5(1)(A)) and the Internal Block Expenditure (which, broadly speaking, comprises internal works: see clause 5(1)(B)) are to be assessed on a *per* Block basis. That is accepted by all present, and is the clear meaning and effect of the Leases.
21. Works within these two categories are sometimes carried out on an Estate-wide basis, such as window painting; or on a Block-by-Block basis, such as repairs specific to, say Block 3. In any one year, therefore, the actual expenditure in relation to Block 3 could greatly exceed that of Block 8 not

just because Block 3 is bigger than Block 8 but because it may need more work doing to it. Equally, expenditure on Block 8 may exceed that expended in relation to Block 3 owing to works necessary to be carried out to Block 8.

22. The Main and Internal Block Expenditures, therefore, incorporate an element of apportionment of works done “globally” to all Blocks comprised within the Estate and also an element of actual, or Block-specific, expenditure. The Main and Internal Block Expenditures are then apportioned to each flat in accordance with the Specified Proportion, or percentages, as stated in Part 6 of the Sixth Schedule to each of the Leases. In other words, each flat is to bear a share of the costs Main and Internal Block Expenditure related to the Block in which it is situate.
23. It is unfortunate that the Tribunal has not been provided with any details or schedule of the respective Specified Proportions for each of the 267 flats in respect of Main and Internal Block Expenditures. The Tribunal has been told that although Part 6 of the Sixth Schedule separately states Specified Proportion for these heads of Expenditure separately, all percentages are in fact the same. These heads of Expenditure are therefore combined in the various accounts. There is no dispute as to what those percentages are and that they add up to 100%.
24. The Heating Expenditure and Estate Expenditure are provided on an Estate-wide basis (see clause 5(1(C) and (D)) there being, for example, a single boiler serving the whole Estate) and are apportioned in accordance with the appropriate Specified Proportions. The Specified Proportions are different for each of these heads of Expenditures but, unlike the Specified Proportions referred to in the previous paragraph, they do not add up to 100% but to 99.9950% and 100.4208% respectively, as shown at Appendix 1 (pages 78 to 84).
25. Those percentages have therefore been re-cast by the Applicant so that they both total 100% (“the Re-Cast Specified Proportions”), as also shown at Appendix 1 (pages 78 to 84). Whilst that re-casting is not in dispute, it is right to record that there has been no application to vary or otherwise amend the Specified Proportions in respect of Heating and Estate Expenditures as stated in Part 6 of the Sixth Schedule to each of the Leases so that, technically, it is those, not the Re-Cast Specified Proportions, which are legally recoverable.
26. By the 24th December 1998, the reserves which had accumulated since grant of the first lease some 15 or so years previously amounted to £299,289. They are detailed in the audited accounts of the Applicant for the year ended 24th

December 1998 (“the 1998 Accounts”, pages 162 to 187) and are set out in note 12 (page 176) thus²:

	Bal at 24.12.97	Rsvd in year	Interest recvd	Expend- iture	Service chge adj	Bal at 24.12.98
Main + Internal Block Exp						176,144
Block 1	53,868	14,654	2,980	(40,082)	756	32,176
Block 2	27,382	12,207	1,910	(34,307)	1,382	8,574
Block 3	163,065	37,004	7,777	(100,036)	(2,792)	105,018
Block 7	40,292	13,834	1,912	(40,593)	1,240	16,685
Block 8	24,351	14,715	2,000	(40,056)	1,092	2,282
Block 9	14,859	2,751	780	(5,303)	(1,678)	11,409
Heater Exp³	79,666	1,000	3,441			84,107
Estate Exp⁴	59,797			(20,759)		39,038
TOTAL:						299,289

27. The Heating and Estate Expenditures are not allocated in the 1998 Accounts on a *per* Block basis because those services are provided on an Estate-wide basis. Historically, they have been apportioned in accordance with the Specified Proportions but more recently, and in the 2005 Reserves, are apportioned in accordance with the Re-cast Specified Proportions. There is no dispute as to either of the amount of either of these sums or how they should be apportioned between lessees.
28. Thus, it is only the apportionment of the Main and Internal Block Expenditures totalling £176,144 (£299,289 minus (£84,107 and £39,038)) which is in dispute. The actual expenditure of £176,144 is not in dispute. Merely how it has been apportioned across the six Blocks as set out above. The real issue is, on analysis, somewhat narrower than the Issue as set out in paragraph 14 above. (To the extent that the Tribunal’s decision of 27th June 2006 records that the full £299,289 is in dispute, it is inaccurate.)
29. Concerns as to the apportionment of the Main and Internal Block Expenditures comprised within the 1998 Reserves first began to arise during 1999 when queries were raised of the Estate and Applicant’s accountants, Leslie Michael Lipowicz & Co (“Lipowicz”), who were subsequently replaced by new accountants. Questions were raised by Miss Butler, we are

² The £32,578 revaluation reserve relates to the sale of a caretaker’s flat and falls to be deducted from the total £331,867 shown in the reserves as not being (it is agreed by all) relevant, bringing the 1998 Reserves to £299,289.

³ Called “Boiler” expenditure in note 12.

⁴ Called “General fabric and drainage” expenditure in note 12.

told, and also by Mr Slevin who, it appears, wrote various letters asking for explanations of how apportionments had been made.

30. Those concerns were of a more general nature but, it now transpires, were focused, or were intended to be focused, upon apportionment of the Main and Internal Block Expenditures. As is recorded above, there is no dispute in relation to the Heating and Estate Expenditures.
31. Mr Slevin's enquiries elicited a letter dated 15th September 1999 from Lipowicz (page 94 and reproduced at page 255) which certainly gives the impression that, so far as the service charge for the year ended 24th December 1998 is concerned, there were adjustments made to the reserves of individual Blocks which did not strictly accord with actual Block-specific expenditure or the apportionment of Estate-wide expenditure but were designed to ensure that all Blocks' reserves remained in credit.
32. In about 2002, a new bookkeeper, Marie Ellis ("Marie Ellis"), was engaged by the Applicant. She became responsible for maintaining the books and records relating to the Applicant and Estate service charge.
33. Unfortunately, for reasons which are not immediately apparent to the Tribunal (or, indeed, to anyone appearing before the Tribunal today), Marie Ellis destroyed all, or virtually all, of the pre-24th December 1998 source or primary books and records so that it is now impossible to establish precisely what was or should have been comprised within any of the Main and Internal Block Expenditures comprised within the 1998 Reserves or how such Expenditures were or should have been allocated between the Blocks.
34. The factual (and evidential) position, which was accepted (or not challenged) by all, is as follows:
 - (a) The 1998 Reserves are the reserves accumulated since grant of the first of the Leases, thus spanning a period of around 15 years.
 - (b) During that 15 year odd period, each of the Blocks would have different amounts in respect of Main and Internal Block Expenditures spent on them in different years. There would have been Block-specific expenditure, and Estate-wide expenditure.
 - (c) Mr Cartwright, who was involved and a director from inception, explained that many of the invoices for works, such as for painting the interior and exterior of the Blocks, was for the whole of the Estate, in which case the estate manager would annotate the invoices with his assessment of the appropriate apportionment. There were also Block-specific works which were duly invoiced. Those invoices, and

apportionments, would feed their way into the accounts which would then be accepted by the Applicant's Board of Directors who would then levy service charge demands based on the accounts.

- (d) Each year, a service charge demand was served on each lessee together with the audited accounts of the Applicant, which encompass the service charge accounts for the year (both company and service charge financial year ends being the same). The 1998 Accounts are an example, note 12 being crucial for these purposes.
- (e) Within the 1998 Accounts circulated to all lessees is a Note for the annual general meeting to be held on 29th September 1999 regarding the financial statements prepared by Lipowicz.
 - (i) That Note records that service charge certificates confirm the actual expenditure shown in the financial accounts, and that the percentages used in apportioning that expenditure follows those stated in the leases: page 164.
 - (ii) Specific attention is drawn to note 12 in the 1998 Accounts to adjustments brought about by the introduction of service charge certificates, and invited questions at the forthcoming AGM.
- (f) No-one challenged the allocation of any of the apportionments of 1998 Reserves as set out in note 12 to the 1998 Accounts or their predecessors. Equally, no-one challenged the service charge certificates which, it seems, were introduced in 1998 or perhaps the previous year.
- (g) It is now impossible to reconstitute the 1998 Reserves, or any previous years', from source documents.

35. Finally, it should be noted that throughout the papers and the hearing and indeed the previous decision of the Tribunal, there has been reference to apportionment by "the GLC percentages" or such like. This was a catch-all phrase to refer to how the reserves had been apportioned whilst Lipowicz was auditor, which no-one was able to explain what it meant. The Tribunal therefore does not dwell on attempting to work out what it might have meant, save to observe that it did not refer to any specific formula for apportioning Main and Block Expenditure between Blocks.

THE APPLICANT AND MAJORITY OF RESPONDENTS' POSITION

36. The Applicant, by Mr Culhane, said that it was essentially neutral but on balance preferred to accept the advice of its recent auditors Peter Hunt & Co ("Hunt") and adopt the apportionment of the Main and Internal Block Expenditures as recorded in the 1998 Reserves. Hunt's Report is at pages 157 to 161.

37. All of the eight Respondents attending supported the Applicant's stance, save for Mr Slevin and, after some initial hesitation, Miss Butler.

RESPONDENTS MR SLEVIN AND MISS BUTLER'S POSITION

38. Mr Slevin, and Miss Butler, contend that the Main and Internal Block Expenditures should be apportioned in accordance with the appropriate Specified Proportions relating to those heads of Expenditure contained in Part 6 of the Sixth Schedule to the Leases. As we have already noted, those Proportions are not available to the Tribunal but it is known what they are and would not be difficult to apportion the £176,144 accordingly.

DECISIONS AND REASONS

39. The Tribunal rejects Mr Slevin's and Miss Butler's contention for the following reasons and determine that the Main and Internal Block Expenditure of £176,144 be apportioned between Blocks as set out in note 12 of the 1998 Accounts (page 176) as reproduced in the table at paragraph 26 above.
40. First, it must be borne in mind that the 1998 Reserves were audited by Lipowicz and represent the culmination of some 15 years of audited accounts which had been unchallenged and formed the basis of service charge demands and payments throughout that period. They therefore represent *prima facie* evidence of apportionment.
41. The 1998 Accounts were approved by the Board of Directors on 19th May 1999. The Tribunal notes with some surprise that Mr Slevin was himself a director at that point in time, having been appointed on 14th July 1998 and it is understood remains a director to this day. If Mr Slevin believed that the 1998 Reserves were not accurately recorded in the 1998 Accounts so that the audit was defective and the Board of Directors, including himself, were approving inaccurate accounts, it is surprising that he did not there and then resign. As noted in paragraph 34 above, the 1998 Accounts contained clear explanatory notes and invited comment on adjustments to the 1998 Reserves in note 12.
42. Secondly, as Mr Slevin candidly accepted, he has no evidence, and it is now impossible, to demonstrate how Main and Internal Block Expenditures should be apportioned for any of the 15 years prior to 24th December 1998 or for 1998 itself. He did, however, point to four years which he claimed there was evidence that there may have been errors, none of which stand scrutiny:
- (a) 1993: Mr Slevin referred the Tribunal to the statement of reserves contained in note 12 to the audited accounts for the year ended 24th December 1993 (page 280) and commented that the £19,974 Main and Internal Block Expenditure allocated to Block 8 could not be right as it is much smaller than Block 3 which had only £4,403 of such Expenditure allocated against it.

Mr Slevin confirmed that the first time he raised complaint about this figure was when he raised it orally during the hearing before the Tribunal at around 2.15pm on Monday 29th January 2007. Given the absence of time and any evidence, it is not possible for Mr Slevin to make out this complaint. There is no evidence to challenge these audited accounts.

- (b) 1994: On 14th September 2004 the Estate and Applicant's present book-keeper Jennie Gillam wrote an e-mail (page 148) recording that she had investigated the years 1993 to 1998 and concluded that she "cannot see how the reserves expenditure could possibly be re-allocated", except that she noted that 1994 stood out as a year in which expenditure had "quite probably [been] mis-allocated" owing to major expenditure in respect of Block 3 relating to some £89,000.

That is pure speculation on the part of Jennie Gillam, who was not the book-keeper or in any way involved back in 1993 and carried out her investigations in 2004, some 10 years after the event. It would seem astonishing if £89,000 had indeed been mis-allocated in 1994 that no-one noticed. Again, Mr Slevin was unable to produce any source or other material to explain the actual 1994 allocation or what it should have been. There was therefore no evidence which to sufficiently challenge these audited accounts.

- (c) 1995: Mr Slevin referred the Tribunal to the statement of reserves contained in note 12 to the audited accounts for the year ended 24th December 1995 (page 293) and challenged the £11,711 Main and Internal Block Expenditure allocated to Block 8.

Again, Mr Slevin confirmed that the first time he raised complaint about this figure was when he raised it orally during the hearing before the Tribunal at the hearing. Given the absence of time and any evidence, it is not possible for Mr Slevin to make out this complaint. There is no evidence to challenge these audited accounts.

- (d) 1998: Mr Slevin relied on the 15th September 1999 Lipowicz letter (page 94 and reproduced at page 255), which is referred to in paragraph 31 above.

Whilst that letter may raise questions in respect of the 1998 Reserves, or part of them, it does not prove that they can not be relied upon and does not prove what the figures ought to be. What is clear is that there has been disproportionate Main and Internal Block Expenditure in respect of each of the Blocks and that the only evidence of how it should be allocated is contained in the audited 1998 Accounts approved, as noted above, when Mr Slevin was a director.

43. It is of course fundamental that the Tribunal reaches its decision based on evidence. Ultimately, the Tribunal determines that there is no evidence to substantiate any of Mr Slevin's specific allegations because it has been destroyed.


44. Thirdly, and in reality, Mr Slevin's argument boiled down to this: since no source material remains to reconstruct the apportionments up until 24th December 1998 and since there is some evidence that there may have been errors in the audited accounts in some of the 15 years leading up to the 1998 Reserves, it is more equitable to apportion the 1998 Reserves on the basis of the Specified Proportions than the audited 1998 Reserves.
45. This, in our judgment, would be inequitable and fly in the face of the clear and unambiguous wording of the Leases, which require that Main and Internal Block Expenditure be allocated on a Block-by-Block basis and only then apportioned to each lessee in accordance with the Specified Proportions. There is sufficient evidence in the form the audited 1998 Accounts and 1998 Reserves which shows how that Expenditure be allocated between Blocks.
46. Miss Butler adopted the arguments put forward by Mr Slevin and had no material points to add to what he said. She did, however, put a slightly different twist on the argument asserting that because the Main and Internal Block Expenditure should be allocated in accordance with what she described as the lease percentages, by which she meant an across the board application of the Specified Proportions of Main and Internal Block Expenditure irrespective of which Block that Expenditure was in respect of.
47. In the judgment of the Tribunal, this suggestion would be a fundamental breach of the terms of the Leases which, as already explained, require that Main and Internal Block Expenditure be allocated between Blocks and then, and only then, apportioned to lessees as per the Specified Proportions. The Tribunal therefore rejects this argument and finds that the 1998 Reserves as allocated in the 1998 Accounts are reasonable.

SUMMARY DETERMINATION

48. The Main and Internal Block Expenditure of £176,144 is to be apportioned between Blocks as set out in note 12 of the 1998 Accounts (page 176) as reproduced in the table at paragraph 26 above. It is then to be apportioned between lessees in accordance with the Specified Proportions set out in the leases of each flat which, the Tribunal is informed, are not in dispute.
49. Whilst the Tribunal has not had to determine the apportionment of the £123,145 (£299,289 minus £176,144) balance of the 1998 Reserves representing the Heating and Estate Expenditures because they are apparently agreed, the Tribunal points out that technically those elements of the Reserves should be apportioned between lessees in accordance with the Specified Proportions set out in the Leases which are listed in the third and fourth columns of Appendix 1 (pages 79 to 84) and not the Re-Cast Specified Proportions listed in the fifth and sixth columns of that Appendix because the Leases have not been varied to accommodate the latter Proportions.

COSTS

50. No party made any application for the costs the hearing before this Tribunal, so no order for costs has been made.


Chairman

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