FIRST - TIER TRIBUNAL

PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case References	**:**	**BIR/37UG/LIS/2020/0033**
Property	**:**	**Brisbane Court, Balderton, Newark Nottinghamshire, NG24 3PS**
Applicant	**:**	**Margaret Hope Keeley**
Applicant's Representative	**:**	**Mr Richard Alford. Counsel**
Respondent	**:**	**Chasia Rivka Orgel**
Respondent's Representative	**:**	**Mr Martin Reifer, Fairview Management Limited.**
Applications	**:**	**Application for a determination of liability to pay and reasonableness of service charges pursuant to s27A Landlord and Tenant Act 1985**
Date of Hearing	**:**	**12 January 2021**
Tribunal	**:**	**Tribunal Judge P.J.Ellis**
		Mr N. Wint BSc FRICS
Date of Decision	**:**	**17 February 2021**

DECISION

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1. ***The Tribunal has jurisdiction in relation to management charges and insurance for years 2005 to 2016***

2. ***Effective Curative demands have been served for years 2012-2016***

3. ***The amounts payable for service charge years 2012-2016 including the amount determined in the first decision (subject to reduction in insurance premium of 6.9%) are:***

Year	*Award*
2012	***£4171.38***
2013	***£4330.19***
2014	***£4344.82***
2015	***£2193.91***
2016	***£4571.09***

4. ***The parties to file and serve statements of case with any supporting evidence within 28 days of the date of this Decision. They are also to state whether they are content with a paper determination. If not, they are to give dates when they are not available in March and April 2021***

Introduction

1. This is a Decision on three preliminary points which have arisen in an application for determination of the reasonableness of and payability of service charges. The application was issued on 5 October, 2020 by Margaret Hope Keeley seeking determination of the payability of service charges for the period 2004 to 2020. The Respondent is Chasia Rivka Orgel.

2. This is the second time the matter has been before the Tribunal. The 2017 matter BIR/37UG/2017/0035 (the 2017 Decision) was determined by a Decision of this Tribunal of 2 March, 2018. On 14 March, 2018 the Tribunal corrected paragraphs 84 and 103 under rule 50 Tribunal Procedure (2017-tier

Tribunal)(Property Chamber) Rules 2013 (the Tribunal Procedure Rules) and on 18 April, 2018 further amended the Decision to correct paragraph 85 under rule 50.

3. Notwithstanding the amendments the Respondent by her representative asked for a further "correction" in relation to paragraphs 85 and 103. In addition, further directions were sought in relation to the clarification to enhance the Decision which in its form offered the Parties' "no finality". By his direction of 27 June, 2019 Regional Judge David Jackson refused further amendments on the grounds that the Tribunal had determined the amount payable as it was required to do under section 27 A of the Landlord and Tenant Act 1985 (the 1985 Act) for all service charge years in dispute between 2004 and 2017.

4. By this new application the Applicant contends that the Tribunal in its 2017 Decision left open the issue of what management charges and insurance payments are still due from the Respondent and that it has jurisdiction to determine two unresolved matters namely insurance and management charges.

5. Directions were issued on 13 October, 2020 for a paper hearing. Following receipt of a submission from the Applicant dated 4 November, 2020 and by the Respondent of 24 November, 2020 the Tribunal gave further directions under Rule 6(3)(g) for an oral hearing for determination of the following preliminary issues:
    1. Does the Tribunal have jurisdiction in relation to management charges and insurance for years 2005 to 2016?
    2. Have curative demands been served for years 2012 to 2016 and if so, are those demands ineffective by reason of either s20B or s21B the 1985 Act?
    3. In the event that the Tribunal does have jurisdiction the Parties' must make submissions on the amount payable for insurance and management charges for years 2005 to 2016.

6. In accordance with the Tribunals Directions both sides had prepared submissions relating to the period between 2005 and 2016. Neither side had prepared evidence relating to service charge years 2017 to 2020. Accordingly, this Decision determines the preliminary issue decided by the Tribunal. Any dispute relating to service charge years 2017 to 2020 is a matter for a future hearing.

7. The hearing was held by video conference on 12 January, 2021. The Applicant was represented by Mr. Richard Alford of Counsel, he was unaccompanied. The Respondent was represented by Mr. Martin Reifer of Fairview Management limited. Mr. Reifer represented the Respondent in the earlier hearing.

The Property and Lease

8. There was no inspection of the property for this hearing, but a full description of the property is given in the 2017 Decision. The Tribunal does not intend to repeat that description.

9. The relevant terms of the lease are set out in the 2017 Decision at paragraphs 23 to 26. They are not repeated here but the relevant parts of clause 2 of the lease (relating to payment of service charges) are:

    a. *"2(2)(a) to pay and contribute to the lessor ½ of*
        i. *2/3 cost of insuring and keeping insured throughout the term hereby created the Buildings (including the demised premises) against a loss or damage by fire storm and tempest and if possible and aircraft and explosion and such other risks normally covered under a comprehensive insurance as the lessor shall reasonably determine….*
        ii. *Not relevant……*
        iii. *Not relevant……*
        iv. *Not relevant……*
        v. *Not relevant……*

vi. *The proper and reasonable fees of the lessors and managing agents for the general management of the property (including the Buildings)*

b. *2(2)(b) the amount of such contribution shall be ascertained and certified by the Lessors Managing Agents (whose certificate shall be final and binding on both parties hereto) once a year on the 31st of December in each year commencing on the 31st day of December 1988…….. And thereafter shall on the first day of January and the first day of July in each year pay a sum equal to one half of the amount payable by the lessee for the preceding year under the provisions of this clause on account of such contribution and shall also pay on demand such further sum or sums as the Lessors Managing Agents shall reasonably require on account of such contribution and shall on demand pay the balance (if any) ascertained and certified as aforesaid or be credited with any amount by which the payments on account fall short of the actual expenditure for the year……*

The Parties' submissions

Preliminary Point 1: Jurisdiction

Applicant

10. Mr. Alford, who was not present at the earlier hearing, submitted that from a proper reading of the Decision it is apparent some matters were left open for further Decision namely the management charges and insurance for the subject years and that the effects of the admitted failure of the managing agent to serve demands without the information prescribed by s21B of the 1985 Act all in accordance with the preliminary issues determined by the Tribunal.

11. He referred the Tribunal to *Penman v Uphaven Enterprises Limited [2001]EWCA Civ 956* in which the Court of Appeal held that *a Leasehold Valuation Tribunal may find it convenient to decide issues in stages, …by making provisional or preliminary rulings followed by one final Decision.* Although the case related to a Leasehold Valuation Tribunal under rules of procedure in force for the time being Mr. Alford asserted he could find

nothing in the Tribunal procedure rules to prevent this Tribunal from proceeding at the same way.

12. He stated the reason why the matters of management charges and insurance were left open at the earlier hearing was because the Tribunal had not been given information upon which to make a Decision. It had left those matters to the Parties' to agree between themselves. In the event that the Parties' were not able to agree those amounts section 27 A Landlord and Tenant Act 1985 is available for them. For this reason, the Tribunal had jurisdiction to determine the issue now.

13. He also said that the effect of a curative demand was left open because at the time of the 2017 Decision the Tribunal found that no valid demands had been served and therefore there was no reason to decide the point.

14. In August 2019 the Applicant re-served the original demands albeit with a manuscript correction of the name of the landlord for the years 2005 to 2015. The correction was required because the name of the landlord at the time of service was this Applicant. The original landlord was George Bernard Keeley. He died in April 2015 whereupon his widow, Mrs. Keeley, the Applicant and the successor by survivorship, became the landlord. The new demands were computer generated giving the name of this Applicant as landlord. Somebody made a manuscript amendment to the name of the landlord by crossing out "Margaret" and re-writing "Mr G" so that the name of the landlord appeared as Mr. G Keeley for those re-served demands relating to the period before April 2015. Apart from this alteration, Mr Alford asserted, the demands were the same as the original demands but this time they were accompanied by the requisite prescribed information.

15. Mr Alford then referred the Tribunal to *Brent London Borough Council v Shulem B Association [2011]EWHC 1663 (Ch)* and *Johnson v County Bideford limited [2012]UKUT457 (LC)*. He distinguished this case from the facts found in the *Shulem B* case by asserting that the original demands served by the landlord were valid. The demand itself is not a nullity or invalid

because prescribed information was not served. The effect of section 21 B is suspensory. The tenant is given a right not to pay the demand. Once the non-compliance is cured, then the demand is payable. He likened the situation in this case to that found in the *Johnson* case.

16. The validity of a demand must be assessed by reference to the terms of the lease. Although it was not possible to calculate accurately the sum due, the demands were on account in the Applicant's discretion as provided for in the lease at paragraph 2(2) b. A precise calculation was not required. An on-account demand was a valid demand. Each demand was expressed as a demand on account of service charges without giving any other information apart, in some cases, from a demand for ground rent. He agreed the demands were submitted quarterly.

17. The manuscript amendments to the fresh demands did not affect the validity of the demand. Section 47 Landlord and Tenant Act 1987 requiring information relating to the name and address of the landlord does not require the notice to be typed.

18. In relation to the sums due for insurance Mr. Alford agreed deductions are required from the global premium which includes cover relevant only to the commercial premises on the ground floor of the building. He explained the Applicant had deducted 6.9% from the total demand as a fair evaluation of the required allowance. The deduction was calculated by omitting the additional premium of 3.9% for loss of rent and making a further deduction 3% as appropriate portion of the finance charge levied by the broker.

19. The Applicant applying the principles outlined maintains the Tribunal has jurisdiction to resolve the outstanding issues.

Respondent

20. In response Mr. Reifer stated that the Tribunal left open only the need for the Parties' to file agreed schedules which quantified the value of the charges in accordance with principles determined by the Tribunal. He had tried to agree

schedules in accordance with the direction but there was no co-operation from the Applicant's representatives. Mr Reifer asserted the delay in re-serving the demands and in making the application is inexcusable. He relied on the direction Regional Judge David Jackson that the Tribunal had discharged its statutory duty.

Preliminary Point 2: Have Curative Demands been Served. Effect of ss20B & 21B

Applicant

21. Mr. Alford repeated that the demands were properly served in the name of the landlord for each year in question. They were sent by email to an appointed representative of the tenant. The lease did not prescribe a particular method of serving demands. It was not necessary to type the name of the landlord although a summary of rights must be typed in the font and size as prescribed. The Applicant's case is that they were validly served in accordance with the contractual duties imposed by the lease. He referred to the Decision of Shulem B where at paragraph 53 Mr. Justice Morgan said "*the reference to a demand in section 20 B(1) presupposes that there has been a valid demand for payment of the service charge under the relevant contractual provisions".* He also referred to the Decision of *Johnson vs. County Bideford [2012]UKUT 457(LC)* which held that service of statutory demands for service charges by a lessor had the effect of validating the earlier invalid demands.

22. He went on to assert that section 21 B is in effect suspensory in its terms because it distinguishes between the demand and what must be served. Subsection (3) sets out the consequences of failure to serve namely that the tenant may withhold payment which has been demanded of him if subsection (1) is not complied with in relation to the demand.

23. He referred to the statement of case of the Respondent which contended a finding that the Respondent was liable for the service charges would prejudice her. In answer Mr. Alford asserted that section 20 B should not be read as meaning that any demand is incomplete until statutory requirements are

satisfied as doing so operates harshly on the landlord. The tenant has had fore knowledge of the sum due because the service charge demands were validly served in accordance with the lease at clause 2(2)(b). The re-issued demands in the same sum but now with the right information ends the tenant's right to withhold payments from 2005 to 2016. The demands are not ineffective because now the cure has been given and the right to withhold is at its end.

Respondent

24. In his submission Mr. Reifer challenged the proposition that the demands were valid and that they were validly served. As far as the validity of service was concerned, he contended that sending them by e-mail was not valid service.

25. Mr Reifer also stated the demands themselves were invalid because they were inaccurate. The demands had consisted of three elements all of which were wrong and therefore invalid. The first element was an insurance charge. The required policy cover was easily identified and calculated. The Applicant had consistently failed to make the correct apportionment. The second element was the management charge which was incurably wrong because the sum claimed was not consistent with the management agreement described in the 2017 Decision. The third element included a gardening charge which was made pursuant to a qualifying long-term agreement which had been made without consultation. Therefore, the maximum allowable was £250 pa but the full amount was wrongly charged.

26. He referred to the terms of the lease which provide for service charges to be served bi-annually but that the relevant demands were served quarterly.

27. He asserted that the purpose of section 20 B was to avoid a stale demand and it was therefore relevant to look at the prejudice that would be caused by serving late curative demands.

28. Mr. Reifer referred to *No1 West India Quai (Residential)Ltd v East Tower Apartments Ltd [UKUT] 2020 163 (LC)* which he said, established that for a demand to be valid, it had to be accurate.

Preliminary Point 3: Parties' submissions on the amount payable for insurance and management charges for years 2005 to 2016

Applicant

29. Mr Alford's submissions were quite short. He relied upon the Tribunals earlier finding that the management charge is 5% of rent collected. The lease provides that management charges are 50% of 5% of the rent collected from the premises. The insurance charge was determined in the earlier hearing subject to deductions for unnecessary cover. He asserted that the reduction admitted should be reduced by applying a broad-brush approach. There is no additional charge for plate glass relevant to the commercial premises, but loss of rent insurance is 3.9% of the premium. There is a finance charge in procuring insurance which can be passed on as it is for the benefit of the Respondent. The Applicant has taken a further 3% of that charge and together the total deduction for insurance is 6.9%. He concluded by inviting the Tribunal to use its own experience and expertise to determine the appropriate reduction from the insurance premium.

Respondent

30. Mr. Reifer suggested there had been a number of changes to the management agreement between the Applicant and the managing agent for the time being. It appeared to him that there had been different bases for charge. He objected to the approach of the current managing agent which appeared to add additional charges without justification. He referred to the Tribunals 2017 Decision and his attempts to agree a suitable charge for the management structure as directed by the Tribunal which he claimed were without success.

31. As far as insurance was concerned, he objected to the allocation of any element of the finance charge which he said was not provided for by the lease. A finance charge is not part of the insurance premium. He was not satisfied

that the insurance demands described the relevant elements that enabled the Respondent to properly understand the claims. He asserted the finance fee was not benefiting the Respondent. Further the insurance premium could be calculated accurately as the elements relevant to the commercial premises could be identified and removed from the insurance claim.

32. The Tribunal asked both sides to explain their position in relation to the years 2005-2011 having regard to the previous Decision and that the Respondent had made and the Applicant had accepted payments for those years. Mr Alford accepted that those payments might be determinative of the position for those years. Mr Reifer contended the payments were made under duress because county court proceedings had been issued for them and default judgment obtained.

33. Mr Reifer did not advance a positive case for determination of the management fee. His expressed doubt that 50% of 5% was the correct approach.

Decision

34. The Application, issued on 5 October 2020 sought a determination of the payability of service charges for the years 2004-2020. The unresolved issues arose because of the way in which the Applicant's managing agent had calculated management charges and the failure to apportion (if required) the insurance payments between the residential and commercial parts of the entire estate.

35. The hearing on 12 January was a preliminary hearing to dispose of issues identified by the Tribunal as:

    a. The Tribunal's jurisdiction in relation to management charges and insurance for years 2005 to 2016
    b. Whether curative demands were served for years 2012 to 2016 and if so whether those demands are ineffective by reason of either s20B or s21B the landlord and tenant act 1985

c. If the Tribunal has jurisdiction the Parties' were to make submissions on the amount payable for insurance and management charges for years 2005 to 2016.

36. In summary, it is this Tribunal's decision that:

a. The Tribunal has jurisdiction in relation to management charges and insurance for years 2012 to 2016,
b. Curative demands have been served for years 2012 to 2016 and if so, are those demands ineffective by reason of either s20B or s21B the 1985 Act

37. Having made those decisions, the Tribunal has heard the parties submissions in relation to the insurance and management charges for years 2005-2016 and made its determination.

38. At the hearing, the parties were not prepared to deal with the service charges in the third period. The Tribunal was asked not to consider those years but leave them outstanding for a later hearing. The Tribunal has given directions for that hearing in this Decision.

39. By Rule 9(2) of the Tribunal Procedure Rules the Tribunal must strike out the whole or a part of the proceedings or case if the Tribunal

(a)does not have jurisdiction in relation to the proceedings or case or that part of them; and
(b)does not exercise any power under rule 6(3)(n)(i) (transfer to another court or tribunal) in relation to the proceedings or case or that part of them.
By Rule 9(3)(c) the Tribunal may strike out the whole or a part of the proceedings or case if the proceedings or case are between the same parties and arise out of facts which are similar or substantially the same as those contained in a proceedings or case which has been decided by the Tribunal.

40. The Applicant contends that the 2017 Decision left open the issue of both management charges and insurance because the parties were unable to quantify either item of charge until the Tribunal had made its Decision. The Respondent contends that payments made in these years was made under duress. The sum paid was excessive and Mr Reifer asserts the Respondent is entitled to a repayment.

41. At the 2017 hearing it was apparent that the Applicant through the managing agent had rendered incorrect management charges and had not correctly apportioned the insurance premiums (paras 59 & 85). The Tribunal determined the correct method of calculating management charges (para 90) and directed the parties to file an agreed schedule to give effect to its determination. The correct method of calculating the management charges is in the 2017 Decision. The Tribunal will not revisit that issue. However, this Tribunal is aware that the management charges and insurance payments were not finally determined in 2017 but the Decision should have enabled the parties to settle the remaining issues. It was not explained why the parties had not complied with directions. Mr Reifer stated he had tried to agree matters with the Applicant but Mr Alford was not in a position to say why there had been no progress so far as the Applicant was concerned.

42. In any event as the parties have not agreed the outstanding issues, the Tribunal respectfully agrees with the decision in *Penman* that it has jurisdiction in relation to management and insurance charges between 2005 and 2016.

43. The Applicant agreed that the insurance premiums were improperly calculated. The Tribunal determined the that 50% of two thirds of the premium was payable in each service charge year. The parties agreed to meet to identify the excess sum which had been charged (paragraph 85).

44. In the 2017 Decision the Tribunal determined the sums payable for the years 2004 - 2011 (see paragraphs 104-107 for the reasons) and found that as

payments were made sufficient to meet the demands the withholding effect of the operation of ss20B and 21B was irrelevant.

45. As far as the service charge years 2005-2011 is concerned, this Tribunal is asked to determine issues between the same parties that arise out facts which are similar or substantially the same as those contained in the 2017 proceedings decided by this Tribunal. Rule 9(3)(c) gives the Tribunal discretion whether to strike out this part of the application.

46. The Tribunal does propose to exercise its discretion in respect of these years. It has determined what sum is payable. The Applicant's claim for these years is therefore struck out under rule 9(3)(c).

Service Charge Years 2012-2016

47. In Mrs Keeley's statement of case filed in accordance with the Directions the Respondent accepted the Tribunal had jurisdiction to determine the issues relating to insurance and management charges but relied on rule 9(3)(c) in respect of all years between 2005 and 2017 because of the 2017 Decision.

48. The Tribunal did not decide what sum was payable for service charge years 2012-2016 in the 2017 Decision. The parties have not met to discuss insurance as the Applicant proposed nor has a schedule of management charges been agreed. Therefore, in the absence of an agreement on these issues the Tribunal will exercise its jurisdiction under s27A of the Landlord and Tenant Act 1985 (the Act) to decide the matters for the parties.

49. As far as management charges are concerned the Tribunal has already decided the correct approach to their quantification is to calculate 5% of rent collected and will not reopen that issue. Mr Reifer made submissions objecting to that method but as it was settled by the Tribunal his submissions are not accepted.

50. In the 2017 hearing the Applicant accepted that service of prescribed information required by s21B of the Act had not been served. Demands were

re-served accompanied by the prescribed information in August 2015. Mr Reifer challenged their validity on the grounds that the name of the landlord was incorrect. He also raised a question whether or not the address given for the landlord was correct. After Mr Alford made enquiries of his client, he was able to confirm the address was correct. The manuscript alterations to the demands corrected the name of the landlord at the date of the demand. The Tribunal finds that the demands were not in breach of s47 Landlord and Tenant Act 1987.

51. Although the demands were served quarterly rather than at half yearly intervals, the lease provided for on account demands. Mr Reifer criticised the demands for their alleged inaccuracy rendering them invalid. The Tribunal finds that alleged inaccuracy does not invalidate the demands per se. Also, the Tribunal determined in the 2017 Decision that the failure to serve demands accompanied by prescribed information did not invalidate the demand but had a suspensory effect.

52. The relevant demands were all expressed as being quarterly service charges in advance.

53. Both sides referred to the Decision of Mr Justice Morgan in *Shulem B.* in which he considered s20B and the application of s20B(2) stating "*the subsection appears to require the lessor to identify the costs which have been incurred so that when one comes to apply section 20B(2) to the relevant notification one will be able to say whether the costs, which the lessor wants to take into account in determining the service charge, were notified to the lessee.*"

54. The lease provides for payment of service charges on demand on account of the service charges for the year. The demands were a summary statement of what was required on account. The Tribunal finds that they were a sufficient notification of a demand for the purpose of s20B(2).

55. The original demands were valid and contain information describing what the Respondent is expected to pay, s20B(2) provides that s20B(1) shall not apply. The Tribunal is satisfied that s21B, by re-service of the demands with the prescribed information, has cured the defect in the original demands. It follows that the suspension of the award for years 2012-2016 is lifted by the curative effects of the re-served demands.

56. The Tribunal's 2017 Decision identified the sum payable for insurance as payable subject to the issue of prescribed information. In formulating this application, the Applicant has accepted that determination and formulated a claim for management charges. She has accepted the finding of the Tribunal of 50% of 5% of rent collected ascertained from the rent roll.

57. The Tribunal has decided the Applicant's claim for management charge is reasonable as it follows the reasoning of the 2017 Decision.

58. The Tribunal was invited to exercise its discretion in relation to the proper apportionment of the insurance charge. Both sides were making estimates of what should be deducted. Although Mr Reifer was unhappy with the suggestion that the proposed deduction was fair, he was unable to give satisfactory evidence of an alternative method of determining the deduction. The Applicant was candid with the explanation of the reason for the proposed deduction. The Tribunal from its experience was satisfied that the deduction of 6.9% in total was reasonable. The total sum payable for service and management charges including the amount determined in the first decision (subject to reduction in insurance premium of 6.9%) are:

	Year	Award
a.	2012	£4171.38
b.	2013	£4330.19
c.	2014	£4344.82
d.	2015	£2193.91
e.	2016	£4571.09

Service Charge years 2017-2020

59. The issued application also seeks a determination of the payability of service charges for the years 2017-2020. The Tribunal invited the parties to make submissions regarding those years but neither side was prepared because they had prepared their cases in accordance with the direction that the Tribunal would deal with the preliminary points. This Tribunal therefore proposes to issue directions for the determination of the remainder of this application.

60. The Tribunal directs the parties to file and serve statements of case with any supporting evidence within 28 days of the date of this Decision. They are also to state whether they are content with a paper determination. If not they are to give dates when they are not available in February and March 2021

Appeal

61. If either of the parties is dissatisfied with this decision they may apply to this Tribunal for permission to appeal on a matter of law to the Upper Tribunal (Lands Chamber). Any such application must be received within 28 days after these written reasons have been sent to them rule 52 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013).

Tribunal Judge Peter Ellis
Chair