FIRST - TIER TRIBUNAL

PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case References	**:**	**BIR/37UG/LIS/2020/0033P**
Property	**:**	**Brisbane Court, Balderton, Newark Nottinghamshire, NG24 3PS**
Applicant	**:**	**Margaret Hope Keeley**
Applicant's Representative	**:**	**Swaine Allen Solicitors**
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	**:**	**4 May 2021**
Tribunal	**:**	**Tribunal Judge P. J. Ellis** **Tribunal Member N. Wint BSc FRICS**
Date of Decision	**:**	**25 May 2021**

DECISION

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Introduction

1. This is the Decision of the Tribunal concerning the reasonableness and payability of service charges for the years 2017-2020 in respect of leasehold property known as Brisbane Court, Balderton, Newark, Nottinghamshire. The parties are Margaret Hope Keeley (the Applicant) who owns the freehold. The Respondent leaseholder is Chasia Rivka Orgel.

2. Brisbane Court is a mixed development comprising shops and other commercial premises at ground floor and residential accommodation on first and second floors. All residential accommodation has been let typically on long leases by the Respondent. It is not necessary to go into the sub-letting arrangements.

3. The Respondent is head lessee of all residential accommodation. The shops and other commercial properties are let by the Applicant to third parties. This dispute is concerned with the service charge liability for the residential properties let to the Respondent.

4. It is the third occasion on which the parties have referred their dispute over service charges to the Tribunal.

5. The first application (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.

6. 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 apparent overlap with the first application arose because the parties were unable to agree on matters which were not finally determined in that application.

7. By its Decision of 17 February 2021 (the February Decision) the Tribunal determined the issues of payability for the years 2004-2016. The Tribunal then gave Directions for determination of the remaining years in dispute from 2017-2020.

8. The parties complied with the Directions of 17 February 2021 with their respective submissions. The parties agreed the matter could be dealt with on the papers but at first appointment to determine the outstanding issue the Tribunal agreed with the Respondent's request that the Applicant give further particulars of the make up and calculation of her claim. Also, as the Applicant

had included a claim for a contribution to a sinking fund, the Tribunal gave leave for both parties to make submissions on whether on a true construction of the lease the Applicant was entitled to include a demand for a payment to a sinking fund.

9. The Applicant served further particulars of her claim and both sides made submissions on the payability of a contribution to a sinking fund.

The Claims

10. For each of the years 2017-2020 the Applicant claims:

    a. A contribution to the insurance premium for the property calculated in accordance with the terms of the lease
    b. Reimbursement of costs incurred in connection with repairs and maintenance
    c. Management charges, and
    d. For years 2019 and 2020, a contribution to the sinking fund.
    e. There are claims for gardening costs but following the first Decision of the Tribunal, the gardening claims are limited to £250.00

11. The sums claimed under each item of claim are set out in the Decision Table below.

12. The Respondent throughout this matter complained, with some justification, that the information supplied by the Applicant's agent was inadequate. The Respondent passes on her liability for service charges to her lessees. Delay and provision of inadequate information by the Applicant's agent is prejudicial to the Respondent who is unable to recover some of the charges due to inadequate description of the work or service the subject of the charge.

13. In response to the claims the Respondent asserts that:

    a. The insurance claims were not properly calculated because there was no separation of the elements of the premium between residential and commercial occupancy
    b. The gardening and maintenance work was undertaken without consent to the appointment of trades people with long term qualifying agreements
    c. The managing agent changed without consultation in either 2016 or 2020
    d. The lease makes no provision for a sinking fund

Issue No.1 - Insurance Premiums

14. The Respondent challenged the sum claimed for years 2017-2019 on the basis that the premiums were calculated on the basis that cover extraneous to residential property was included.

15. The Applicant served further particulars of the insurance policy. It is a property owners policy with a loss of rent clause but no cover for either business interruption or plate glass. The Applicant makes no claim for finance charges as the premium is paid in full on demand. The claim is for 50% of 2/3rds of the premium for the entirety of Brisbane Court. The Applicant has applied a discount of 8.6% for the loss of rent cover which is relevant only to the commercial premises.

16. In respect of year 2020 the Respondent asserted the sum claimed was excessive in addition to the assertions made in respect of service e charge years 2017-2019. The Respondent did not adduce any evidence of suitable alternative policies at a lower premium.

Issue No. 2 - Repairs and Maintenance

17. The Applicant asserted in her Statement of Case merely that the sums claimed were 50% of the total expenditure for each of the relevant service charge years without giving any information about the make up of the charge. The Respondent sought clarification of the work done to justify such claims. The Tribunal directed the Applicant to give further information about the work and the subject of the claims.

18. By her further particulars the Applicant described the works as follows:

a.	2017	Warriner	Replacing Broken Paving Slabs	£120.00
		Entire Facilities	Repairs to sunken slabs	£594.00
		Via Highways Agency		£42.00
			Total	£756.00
			Respondent's Share 50% of Total	**£378.00**

b.	2018	Lincoln Roofing	Repairs and Maintenance	£54.00
		Mr P Gilchrist	Repairs and Maintenance	£492.00
		Sign Centre	Repairs and Maintenance	£108.00
			Total	£654.00
			Respondent's Share 50% of Total	**£327.00**

c.	2019	Lincoln Roofing	Repairs and Maintenance	£1483.80
		Mr P Gilchrist	Repairs and Maintenance	£854.00
			Total	£2337.80
			Respondent's Share 50% of Total	**£1168.90**

d. 2020 The Applicant admits maintenance charges are not yet finalised for this year but asserts it is reasonable to charge £3000.00 on account of maintenance expenses. £3000.00 is 50% of the total budget for 2020 including the commercial element.

19. The Applicant admitted that no invoices were available to support the claims for 2017. The best evidence available to her were ledger entries in the accounts of her then managing agent Hodgkinson and Elkington. According to her Further Particulars, the supporting invoices were lost when another agent was appointed as manager of Brisbane Court. No more information appears in the ledger than set out above.

20. Invoices for the works in 2018 are produced. They show that the work of Sign Centre was to update the sign of J Cottier, Butcher. The work of Lincoln Roofing is described as a call out to repair a leak above a salon. The work of P. Gilchrist (House Maintenance) Limited is described as manhole cover removal and replacement.

21. In 2019 there is a substantial account from Lincoln Roofing for repairs to a balcony leak and from P. Gilchrist Limited for guttering repair and cleaning including equipment hire.

22. The Applicant did not produce any evidence of either of consultations regarding the substantial items of work or any agreement to provide maintenance services.

Issue No. 3 - Management Charges

23. The Applicant asserts the Management Charges for the years 2017-2019 were calculated in accordance with the First Decision of the Tribunal. The calculation used to deduce the management charge in each of these years was 5% of 50% of the rent collected from the occupiers of Brisbane Court.

24. In 2020 the Applicant entered a new management agreement with Lambert Smith Hampton trading as HLM, its residential property management business. The management charge for that year was 50% of the management agreement between the Applicant and HLM discounted for a handover period

of 1 January-1 May for which period the Applicant did not seek recovery otherwise the management charge would have been £2880.00.

25. It is apparent from the Applicant's claims that the new agent has introduced charges not seen before. There is a claim for £400.00 accounting fee and an out of hours fee of £230.40. The Applicant admits that neither charge forms part of the standard management agreement but both are considered necessary. The accounting fee, because the lease anticipates accounts will be prepared by the managing agent. The out of hours fee is regarded as a necessary part of providing the landlord's services described at clause 2(2) of the lease.

26. The Respondent contends there was a change of managing agent with effect from 2016 when the agency changed from Hodgkinson and Elkington to HLM. At that time there should have been consultations with the lessee regarding the new managing agent contract.

27. The Applicant asserts that in 2016 Hodkinson and Elkington was taken over by Lambert Smith Hampton who continued to act as agent in accordance with the original contract described in the Tribunal's first Decision. The Respondent's representative was not convinced by the explanation and produced copies of company documents of Hodgkinson and Elkington indicating its continued existence under a new name, Oakhouse Commercial. Mr Reiffer refers to the RICS guidance and asserts that the change in 2016 was such as to require a new management agreement.

28. The Applicant admits that the effect of the change in 2020 was a new agreement resulting in the appointment of HLM to manage the residential properties and Lambert Smith Hampton to manage the commercial properties at Brisbane Court.

29. The charges raised for each of the relevant service charge years are set out in the Decision Table.

Issue No. 4 - Sinking Fund

30. In 2019 and 2020 the Applicant made a claim for £2500 and £2000 respectively for a sinking fund. Both sides agree the lease does not expressly provide for a sinking fund.

31. The Applicant avers that the terms of the lease implicitly authorise the establishment of such a fund. The Respondent's case is that the terms of the lease are specific as to what services are provided by the landlord and a proper construction of the lease excludes a sinking fund.

The Lease

32. It is for the tribunal to decide whether or not the lease allows the landlord to impose the charge which will be credited to a sinking fund or a reserve fund.

33. For this reason, it is necessary to recite in full the relevant clause in the lease which is clause 2:

"*the lessee for itself and its assigns to the intent that the obligations may continue throughout the term hereby created hereby covenants with the lessor as follows:-*

(1) To pay the reserved rent at the times and in the manner aforesaid
(2) (a) to pay and contribute to the lessor one half of

(i) Two thirds of cost of insuring and keeping insured throughout the term hereby created the Buildings (including the demised premises) against loss or damage by fire storm and tempest and (if possible) aircraft and the explosion and such other risks normally covered under a comprehensive insurance as the lessor shall reasonably determine........

(ii) The water rates accessed on the buildings (so long as the demised premises shall not be separately accessed)

(iii) The reasonable and proper cost of maintaining repairing redecorating and renewing

(a) The structure of the buildings including the main walls drains roofs foundations chimney stacks gutters and rainwater pipes and all other conduits as hereinbefore defined

(b) The gas and water pipes electric cables and wires in under or upon the Buildings

(iv) The reasonable and proper costs of maintenance and upkeep of the Common Parts

(v) That reasonable and proper cost of and incidental to compliance by the lessor and with any notices regulations or orders of any competent local or other authority in respect of the property or any part or parts thereof (only those affecting the demised premises)

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

(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 day of December in each year........ The lessee .... Shall on the first day of January and the first day

of July in each year pay a sum equal to ½ 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

34. The text omitted relates to the service charges payable in the first year of the lease. The other provisions of clause 2 are not relevant to the calculation of the service charge.

The Decision

34. It is regrettable that the parties seem unable to resolve their differences. The Tribunal is surprised they chose not to refer the matter to mediation. If there are disputes in connection with the future years' service charges the Tribunal hopes the parties will attempt resolution through mediation when it is offered.

35. Brisbane Court is described in the 2017 Decision (BIR/37UG/2017/0035). It was built by the late husband of the Applicant who inherited the property on his death. The Tribunal accepts and understands that the Applicant has relied heavily on the agent appointed to manage the property. In the 2017 Decision the Tribunal determined that the residential flats at Brisbane Court have the effect of making the property subject to the scheme of regulation imposed by the Landlord and Tenant Act 1985 and associated legislation. The Tribunal recited the relevant legislation in the 2017 Decision. It does not propose to repeat that recital in this Decision.

36. The Tribunal heard the parties submissions in connection with the Preliminary Issues (the February Decision) and considered their respective Statement Of Case with supporting documents and further submissions. The Tribunal has made its Decision in respect of each item of claim set out in the Decision Table.. The remainder of this Decision explains the reasons for those determinations.

37. **Repairs and Maintenance**: S20(3) Landlord and Tenant Act 1985 applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount. For the purposes of subsection (3) of section 20 the appropriate amount is an amount which results in the relevant contribution of any tenant being more than £250.

38. In each of the service charge years from 2017-2019 the Applicant incurred charges which exceed the sum of £250. There was no consultation with the Applicant about the relevant work. The Applicant has not put forward any explanation for the failure to consult in these proceedings. Although the

Applicant and her agent may have operated under a misapprehension that the relationship with the Respondent was not governed by the Landlord and Tenant Act 1985, that misapprehension was cured by the First Decision.

39. The Tribunal was not satisfied with the evidence supplied relating to either work done or charges rendered. The best evidence from the Applicant were unsubstantiated ledger entries naming payees without more.

40. The charge for work by Gilchrist in 2018 is capped at £250.00. The claim for £108.00 for Sign Centre is disallowed entirely as it does not relate to the residential property.

41. The charges of Lincoln Roofing and Gilchrist in 2019 are also capped at £250.00 for each claim.

42. The proposed charge of £3000.00 for 2020 is an on account charge. The lease permits such a claim. The Applicant has stated an intention to consult about the work proposed but has given very little information regarding the proposed work other than to refer to estate road and roof repairs required. As the Applicant has only the Respondent to deal with rather than all the residents in Brisbane Court it is unreasonable to demand such a large sum on account without a better indication of what work is required. However, as work is anticipated for which the Respondent may be ultimately responsible it is reasonable for her to make a contribution on account. The average of maintenance charges for 2017-2019 was £855.00. The Respondent should contribute that sum.

43. **Insurance Premiums**: The Tribunal is satisfied with the explanation given for the insurance premium claims which do not include plate glass or finance charges. Commission has been accounted for. A reasonable discount has been applied for non-residential cover. Although the Respondent is suspicious of the insurance claims the Tribunal considers the claims reasonable.

44. **Management Charges**: Although the Respondent reasonably felt that the Applicant had permitted the agent to make unreasonable charges, in the First Decision the Tribunal determined how the management charge should be calculated. The charges for years 2017-2019 were calculated in accordance with the Decision. There was a change of owner of the assets of the original managing agent (Hodgkinson and Elkington) including the contract for Brisbane Court when Lambert Smith Hampton acquired its business. Mr Reiffer maintained that the change was such as to require the Applicant to consult with the Respondent about the contract with the agent in accordance with RICS guidance. However, as it was an asset acquisition by Lambert Smith Hampton they are simply carrying on with the agreement signed by

Hodgkinson and Elkington. There is no evidence that the method of calculating management charges changed from the method determined by the Tribunal. The charges for 2017-2019 are reasonable.

45. In 2020 a new management agreement was made with HLM, the residential property managing arm of Lambert Smith Hampton. There was no consultation with the Respondent about the new contract. It has resulted in significant new additional charges which were not raised before.

46. The Respondent has good cause for protesting about this new arrangement. It is a long-term qualifying agreement for services which will result in the Respondent facing charges in excess of £100.00. The consultation duties imposed on a landlord by the relevant legislation were laid out in the 2017 Decision. The Applicant's claim for management charges is capped at £250.00.

47. **Sinking Fund:** The terms of the lease describe the parts of the property for which the tenant is liable to pay a reasonable and proper contribution to the cost of "*maintaining repairing redecorating and renewing*". For the first time the Applicant's managing agent has included a sum for a sinking fund in the claim for years 2019 and 2020. The Applicant has not seen such a demand before and strongly objects to the demand now. The Respondent avers that where the landlord seeks to recover money from the tenant, on ordinary principles there must be clear terms in the contractual provisions said to entitle him to do so and refers to *Gilje v Charlgrove [2001] EWCA Civ 1777*

48. The issue for the Tribunal is whether on a true construction of the lease the landlord is entitled to require contributions to a sinking fund. The lease entitles the landlord to require a payment on account of service charges at paragraph 2(2)(b) but that clause does not extend to a sinking fund. The Applicant's representative, quite fairly, concedes that the lease could be clearer but contends the wording is sufficient to include a sinking fund. The Respondent's representative refutes that contention and asserts that if the Tribunal was dealing with an application to amend a lease it would be opposed on the grounds that there is no ambiguity in the lease.

49. In *Arnold v Britton [2015]UKSC 36* Lord Neuberger quoting in part Lord Hoffman said:

> *"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] UKHL 38, [2009] 1 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." per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-3".

50. He then went on to enunciate seven factors to assist interpretation, the first of which was "t*he reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed".* In That case the court was concerned with construing words which were in the lease. In this case the Tribunal is asked to imply something which is not there, namely the right of the landlord to require a contribution to a sinking fund.

51. At clause 2(2)(a) the lease describes the services the landlord will provide for which the tenant must "*pay and contribute one half*". There is no mention of a sinking fund. The method of calculating the sum payable for service charges each year is defined in clause 2(2) (b). It requires a payment on 1 January and 1 July each year a payment of 50% of the sum payable for the preceding year on account of the contribution in the current year and on demand "*such further sum or sums as the lessors managing agents shall reasonably require on account of such contribution*". The words "such contribution" are defined as being ascertained and certified by the lessors managing agent. The power to require an anticipatory payment is restricted to being contribution to expected expenses in the current year.

52. The terms of this lease are different from those in the cases of *Leicester CC v Master LRX/175/2007* Lands Tribunal and *Garrick Estate Ltd v Balchin [2014] UKUT 0407 (LC)* where clauses which provided for recovery of the cost of services "....to be incurred by the lessor in observing and performing its duties" and to "demand by way of service charge the due proportion as hereinafter defined of expenditure incurred or to be incurred by the Lessors" respectively were held to permit the creation of a reserve fund notwithstanding the absence of an express power to do so in the lease. Moreover the relevant clause does not cover charges of a regularly recurring nature which were considered in Rendale v Modi [2010]UKUT 346 LT and by the Court of Appeal *in St Mary's Mansions Ltd v Limegate Investment Co Ltd and Others [2003] 1 EGLR 41*.

53. In this case the lease is a bilateral contract joining only the lessor and lessee. The residents of Brisbane Court are tenants of the Respondent, as is known to the Applicant. Any charges which are imposed on the Respondent are passed on to her tenants. Any claim now for a contribution to a sinking fund affects the residents who will have the right to challenge the need for a sinking fund and their duty to contribute to one where their leases do not impose a duty to contribute to such a fund.

54. There have only ever been two parties involved in the head lease of Brisbane Court namely the Applicant's late husband and herself as successor on the one part and the Respondent on the other.

55. The Tribunal is satisfied the lease did not anticipate the need for a sinking fund because the wording of the lease provides for the delivery of services by the landlord and the recharge of those services through the charging provision of clause 2(2)(b) which allows for some anticipatory element if the budget for the services in any year includes services to be delivered in that year.

56. Moreover, the Applicant has not specified what work will be done or when, other than to make an unparticularised assertion that some work is required on the roof and the estate road. The Applicant has conceded consultation is required before such work can be undertaken. As the only party to consult with in connection with the residential leases is the Respondent, it is right for that consultation to take place first so that the Respondent may know how to pass on the requirement to her lessees.

57. In his submission on behalf of the Respondent Mr Reiffer claimed that the demand for a contribution to a sinking fund is in fact an overclaim which would nullify the service charge demand for the relevant year's contrary to ss18(2) and 19 Landlord and Tenant Act 1985. The Tribunal does not consider the demand for a contribution to a sinking fund was a deliberate act but a misapprehension of the Applicant's rights under the lease.

58. **Account Fee and Out of Hours Fee**: Charges raised for an accounts fee and an out of hours fee are not allowable. The Applicant justified them as being incidental to the services which the landlord is obliged to provide but as they were not raised under the old contract it appears these are new charges which come with the new contract. They were not raised under the original contract. They cannot be severed and introduced now as new items.

59. In conclusion the Tribunal determines that the sums payable for each of service charge year 2017, 2018, 2019 and 2020 is that sum set out in the Table below:

Item & Year	Applicant	Respondent	Decision
2017			
Management Charge	1539.53	100	1539.53
Insurance	2818.13		2818.13
Gardening	250	250	250
Maintenance	378	250	Nil
Total claim for 2017	4985.66		
Allowed			**£4607.66**
2018			
Management Charge	1356.2	100	1356.2
Insurance	3149.93		3149.93
Gardening	275.83	250	250
Maintenance	327	250	304
Total claim for 2018	5108.96		
Allowed			**£5060.13**
2019			
Management Charge	1738.02	100	1738.02
Insurance	3331.54		3331.54
Gardening	250	250	250
Maintenance	250	250	500
Sinking Fund Reserve	2500	Nil	Nil
Total claim for 2019	8069.56		
Allowed			**£5819.56**
2020			
Management Charge	1680	100	250
Insurance	3573.96		3573.96
Gardening	300	250	250
Maintenance	3000	250	250
SinkingFund	2000	Nil	Nil

Accounting Fee	400	Nil	Nil
Out of Hours Fee	230.4	Nil	Nil
Total Claim for 2020	11184.36		
Allowed			**£4323.96**
Respondent Offers		2400	
Applicant's Claim	29348.54		
Tribunal Decision			**£19811.31**

Appeal

60. If either of the parties is dissatisfied with this decision they may apply to this Tribunal for permission to appeal 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).

61. If the application to appeal 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.

62. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Tribunal Judge P. J. Ellis