FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/LSC/2021/0055**
Property	**:**	**36A Tivoli Crescent, Brighton BN1 5ND**
Applicant	**:**	**(1) Kenneth Peter Thomas** **(2) Troy Watkins**
Representative	**:**	**Felicity Thomas**
Respondent	**:**	**Geneva Investments**
Representative	**:**	**Christian Fox (Counsel, instructed by Stephen Rimmer LLP)**
Type of Application	**:**	**s.27A LTA'85**
Tribunal Members	**:**	**Judge D Dovar** **Mr Hodges FRICS** **Mr Gammon**
Date and venue of Hearing	**:**	**6th January 2022, Remote**
Date of Decision	**:**	**8th February 2022**

DECISION

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1. This application, dated 21st June 2021, is brought under under s.27A of the Landlord and Tenant Act 1985 for the determination of the payability of service charges for the years ending March 2016 to March 2021.

2. Directions had been given by the Tribunal on 5th August 2021 for the Respondent to provide disclosure of documents.

3. Under cover of a letter dated 31st August 2021, the Respondent provided their position statement together with copies of all invoices, demands, payments and section 20 notice. The index to the documents enclosed also referred to a Statement of Account.

4. A case management hearing was held on 17th September 2021, at which further directions were given, including the provision by the Respondent:

    a. of the service charge accounts for the years ending 2016-2020 and, if available 2021;

    b. any other relevant documents relied upon.

5. The Property is the basement flat in a converted building.

Lease Terms

6. The Applicants' lease is dated 9th October 1974 and is for a term of 99 years from that date. It provides materially as follows:

    a. By Clause 3 (i) (b) the Lessee covenants to pay '*all rates taxes assessments charges impositions and outgoings …*';

b. By Clause 4 (II)

(a) to '*Pay and contribute … a one third part of the monies expended by the Lessor in complying with its covenants in relation to the Building as set forth in Clause 6 (B) and (D) hereof*';

(b) *Pay to the Lessor …*

> *by equal instalments on the 25th day of March and the 29th day of September in advance in every year the sum of Fifty pounds per annum or such greater sum as the Lessor or his agents shall in their absolute discretion deem appropriate (hereinafter called 'the Estimated Sum') on account of the Lessee's liability for the next half year under sub-clause (a) hereof in respect of such part of the costs charges and expenses of the Lessor as shall be considered to be of a regular and recurring nature …*
>
> *As soon as practicable after the twenty-fifth day of December in every year the Lessor or his agent shall serve on the Lessee a notice in writing duly certified by the Lessor or his agents of the actual amount of the Lessee's aforesaid liability for the previous year and the Lessee shall forthwith pay to or be entitled to receive from the Lessor the balance (if any) by which such amount falls short of or exceeds the Estimated Sums already paid by the Lessee*

PROVIDED ALWAYS that any amount repayable to the Lessee under this sub-clause may at the option of the Lessor be applied in or towards the payment of the Estimate Sums due from the Lessee for the next or any other ensuing period.'

7. Clause 6 contains the Lessor's covenants, which include

   a. At (B) an insurance obligation; and

   b. At (D) an obligation to

   '(i) *Keep the main structure and in particular the roofs .. (d) the boundary walls and fences of the Building in good and substantial repair and condition …*

   (iv) Employ such person or persons as shall be reasonably necessary for the due performance of the covenants on its part herein contained and for the proper management of the Building …

   (v) Keep or cause to be kept proper books of account of all costs charges and expenses incurred in carrying out his obligations hereunder …'

Accounts

8. The accounting period under the lease runs to 24th March in each year, with Estimated Sums due on 25th March and 29th September.

9. For the year end 2016, prior to the instruction of the current managing agents, the Respondent seems to have been managing in-house and had provided a list of the actual expenses for that year in the total sum of £388.58. Comprising £45.36 for lighting and heating; £76.82 for Planning and Building Regs; and £266.40 for Repairs and maintenance.

10. The Tribunal was provided with service charges accounts for the years ending 24th March 2018, 2019 and 2020.

11. For the year end 2018, the accounts did not show the previous years accounts, which suggests that no accounts were prepared for that year. They did show the budget of £4,020, in particular £400 had been budgeted for cleaning, £100 for electricity and £200 for health and safety. None of those items incurred any actual expenditure. Further £1,500 was charged for management fees and £300 for accountancy fees. There was a surplus for this year of £1,127.18 which was transferred to the reserves.

12. For the year end 2019, the same budget had been set with the same three items identified above and the same absence of actual expenditure on those items. This year the surplus was £749.44 which again was transferred to the reserves.

13. For the year end 2020, the same budget had been set, with the same three items identified above, however for this year, there had been some expenditure on health and safety. Further, there was a deficit of £395.08 which was taken out of the reserves.

14. For the year end 2021, the budget totalled £4,285 and included management fees of £1,575, accountancy fees of £360 but nothing for cleaning or electricity. There is a note at the bottom which states that the communal electricity and cleaning is billed directly to and paid by the landlord who does not recover that expense via the service charge.

15. The Tribunal was not provided with the accounts or estimates for the year end 24th March 2017. Nor were we provided with the accounts for 2021. We understood that the accounts had not yet been drawn up for the year to 24th March 2021. We did receive the budget for the year end 2022, but that was outside the scope of the application. The omissions reflect poorly on the management from time to time of the Property and the lack of disclosure in relation to the 2017 suggests a failure to comply with the Tribunal's directions.

Demands

16. By an invoice dated 13th January 2016, £738.48 was demanded by way of service charge and ground rent, said to fall due on 10th February 2016. It was not clear whether this was claimed on account or was reflective of actual expenditure.

17. In their Statement of Case, the Respondent stated that since PS&B took over as managing agents, the half-yearly service charge in advance had been demanded in the sum of £669.94 per leaseholder and it was asserted that these were reasonable. Whilst it was suggested by the Respondent that they took over in 2016, this seems unlikely as there were no proper accounts until 2018.

18. For the years ending March 2018 to 2021, £669.94 had indeed been demanded on a half yearly basis from the Applicants.

19. Further, on 21st October 2020 the Applicants received a request for payment from the Respondent in the sum of £8,338.50 for 'S20 External Works to Front, Side and Rear Elev', this was said to fall due on 21 November 2020.

20. On 4th February and 11th August 2021, the Applicants received a request for payment from the Respondent in the sum of £889.59, comprising, £712.94 for half yearly service charge in advance, plus £166.65 for Major Works. These demands were for the accounting period ending March 2022.

21. The statement of account provided by the Respondent reflected the demands set out above, including a charge of £162 for legal action levied on 18th February 2021. It starts with the year end March 2018 and it appears from that schedule that initially no sums were outstanding.

Challenges

22. With that background in mind, attention is now turned to the specific challenges raised by the Applicants.

Sinking Fund

23. Firstly, the Applicants challenged the application of a sinking fund over the years. Whilst they accepted that the latter words of clause 4 (ii) (a) permitted a type of reserve, where the Lessor had over budgeted and that

surplus could be carried over, they did not consider that this permitted a sinking fund. The Respondent did not dispute this.

24. It did strike the Tribunal as wrong for the budget to include for many years, items which the Lessor had no intention of either incurring or putting through the service charge. For example the cost of cleaning and for communal electricity was budgeted for when it was clear that that was never going to be actually billed. Not only was it not included prior to 2018, but by 2021 this position had been expressly confirmed. The result of including these items was that was that there was a surplus, which the Respondent carried off into a reserve. That was not the basis upon which the service charge mechanism should be operated. The Lessor was not able to overestimate in order to create a surplus and build up a reserve; as seemed to be suggested by the Respondent. The Lessor's estimate had to be appropriate under the lease (being an estimate of the cost incurred in the next 6 months) and reasonable under s.19(2) of the Landlord and Tenant Act 1985. It was plainly not appropriate to include in the budget a sum in respect of which there was never any intention to recover the incurred costs from the leaseholders.

25. However, given that those all related to budgeted amounts and for those years in question, the actual expenditure had been determined, their relevance diminished, save that in respect of the years in question, they should not have been charged and the surplus carried to the reserves should therefore be taken out of the reserves and credited to the Applicants. Taking into account the deficit for the year end 2020, this

amounted to the sum of **£363.44** not being payable. This is arrived at in the following manner:

a. For three years, £500 was wrongly budgeted for cleaning and electricity, so £1,500 was overclaimed, in respect of which the Applicants were apportioned their 33.3% share, being £495;

b. Account must be taken of the deficit of £395.08 in 2020 which was taken out of the reserves and of which 33.3% is apportioned to the Applicants, being £131.56;

c. The total credit is therefore £363.44.

26. Further, there were two sums in the statement of account for the Property which were headed 'Half Yearly Reserve for Major Works' in the sum of £166.65 for the periods 25th March 2021 to 28th September 2021 and 29th September 2021 to 24th March 2022.

27. These were challenged by the Applicants but fall outside of the years that were subject to this application. Had they not have been, then the Tribunal would have considered that they were not payable. Firstly, they were impermissibly demanded outside of the half yearly service charge demands and secondly, the lease does not make provision for an ad hoc sinking fund. As set out above, a reserve fund can only be established through a genuine and reasonable over budgeting of expenditure in any one year. The same considerations apply to the £1,000 budgeted for 2022 for major works.

Accountancy fees

28. The Applicants challenged this cost heading on two grounds. The first is that the lease did not allow these fees as it only allowed an audit and that had not been carried out. The second was that the fee of £300 was excessive for what was produced by the accountants.

29. The Tribunal does not agree with either point. Firstly, the lease allows for the cost of keeping proper books of account. There is no specific reference to an audit. This cost falls within the lease provisions. Secondly, the cost is not excessive, but within the range of what would be expected for modest accounts.

Management Fees

30. The Applicants challenged the level of management fees on the basis of the poor service they had received; a challenge under s.19 of the Landlord and Tenant Act 1985 based on the fact that the service was not of a reasonable standard.

31. In support of that, they relied on historical correspondence with the managing agents. Not all of the correspondence relied on was with the management agents, nor all at a time when they had been appointed. The first emails relied on were in 2016 and were to the Respondent directly and their solicitors. This cannot therefore form a basis for reducing the charges of the managing agents for later years.

32. There was some correspondence to the managing agents in 2019 with regard to the proposed major works, to which there was no response other than a series of holding emails. That also referred to unanswered

questions from the previous October 2017 and March 2018. In June 2019 the managing agent apologised for the delay in responding, and promised a response would be forthcoming. But it was not.

33. The Respondent was unable to provide any explanation as to why the queries had not been addressed but pointed out that there was not much correspondence over the years. It was also said the managing agent's fees included budgeting and organising work and management. The Applicants contended that £500 was more appropriate given the low level of service and work that was provided, being solely the administration and issuing of the requests for payment.

34. The relevant Management Agreement sets out under the services to be provided '*Dealing with day-to-day leaseholder issues and reporting to and taking instructions from the Client'*. A service echoed in the RICS Residential Management Code (3rd Ed), paragraph 4.2 '*You should respond promptly to reasonable requests from leaseholders to information or observations relevant to the management of the property including a timescale by which the request will be dealt with.'*

35. Given the lack of response by the managing agent for the years ending March 2018 to 2020, the Tribunal considers that the managing agents have provided a poor standard of service in terms of communication. For that reason for the years in which that persisted, a reduction of £250 plus VAT is made. Amounting to a total of £900, which when applied to the Applicants, results in the sum of **£300** not being payable.

Double Charging and Common Parts

36. The Applicants had raised an issue of double charging for the year end 2016. However, on closer examination it became apparent that the sums in question had been charged partly in the previous year end. The Applicants accepted that in light of that, there had been no double charging.

37. There was also a query as to whether they were liable for the cost of maintenance of the common parts, including common part electricity. The Respondent confirmed that they were not liable for the cleaning of the common parts, nor communal electricity.

38. However, the Respondent contended they were liable for the costs of the fire alarm and its maintenance as well as for health and safety and fire inspections and works. This latter point was disputed by the Applicants on the basis that as they were in the basement flat, that did not benefit from the fire alarm system.

39. The Tribunal agrees in that the lease is narrowly drawn in respect of what costs can be recoverable and none of the provisions permit the cost of common parts, save for structural parts, conduits and the like used in common, and boundary walls. The Respondent relied on clause 3 (i) (b) to recover these costs. However, the Tribunal does not consider that that clause can be utilised to recover these costs. That clause relates to taxes and rates that are imposed on the property per se, not costs incurred by the Landlord in fulfilling its obligations.

40. Accordingly, the following items are not allowed:

a. £3.50 for a smoking sign in the common parts in 2017;

b. £450 fire protection and £250 on health and safety risk assessment for the year end 2020; and

c. £450 fire alarm maintenance budgeted for the year end 2021;

41. Therefore the sum of **£384.12** is not payable by the Applicants (being their share of £1,153.50)

Asbestos Report

42. An asbestos report obtained in 2017 at a cost of £210 was challenged. The report was necessary to identify whether asbestos was present. The Applicants contended that they should not have to pay for it, if it was not disclosed to them. That is not however the test as to whether a cost is recoverable. In this instance the Tribunal considers this cost is recoverable and falls within the Respondent's management of the Property as well as in anticipation and part of major works to the structure.

Tender Charge

43. In the year end 2018, the managing agents charged £380.10 in respect of preparing a specification and tender for the repair and redecoration of the front elevations. This was based on '35% of 10% management fee of the anticipated contract value' plus VAT.

44. The Applicants challenged this on the basis that the managing agents had failed to take into account their observations about problems with

water ingress to the foundation and their flat. None of their observations were to be found in the specification. Further, they complained that no survey had been carried out prior to the tender and that this only covered one part of the building. Had a proper survey been carried out, all the elevations would have been dealt with. An issue was also taken with the fact that in July 2020 a further £285 was charged for re-issuing the tenders. The Respondent contended that there was no need for a survey for this type of work, which was routine maintenance and the cost was reasonable.

45. The Management Agreement provides that this is an additional service which can be charged for at the rate of up to 12.5% plus VAT of the net contract sum plus 2.5% plus VAT of the net contract sum for s.20 administration. In this case the charge is 10% plus VAT and only 35% was charged at this stage.

46. The Tribunal considers this was reasonably incurred and the work to a reasonable standard. Whilst it might have been short sighted to only tender for one elevation, the Tribunal did not consider that that was such an unreasonable approach to take.

47. Further the Tribunal also considers that the subsequent re-tendering cost is allowable on the basis that circumstances can change with the result that a landlord may reasonably change their mind as to the scope of the works to undertake, which appears to be the case here. This does not render the cost unreasonable.

Search

48. £72 was challenged for a cost incurred in the year end March 2020 for obtaining an address for another tenant who was in default. The Respondent contended this was recoverable under clause 3 (i)(b), the Tribunal for the same reasons set out above disagrees. Therefore the sum of **£23.98** is not payable.

Fire Alarm

49. £90 was incurred in the year end March 2020 for a fire alarm call out to flat 5. This was challenged, the Tribunal agrees that this should not be recoverable as it relates to a particular demise and not the premises as a whole. Further, for the reasons set out above in relation to common parts, it would not be recoverable even if it could be brought within the heading of health and safety. Therefore **£30** is not payable.

Bank Charges

50. £25 was challenged in the year end March 2022 for bank charges, but this was outside the years subject to this application.

Out of Hours

51. The managing agents had started charging £37.50 for out of hours emergency cover. This was a late challenge, made only at the hearing and not in their Statement of Case. It also is dated 29th March 2021 and therefore falls outside of the years subject to this application, the last being the year ending 24th March 2021.

52. It is however noted that the Management Agreement provides under additional services and charges 'Provision of Emergency out of hours

service by specialist contract - £7.50 inc VAT per unit service retainer fee p.a.' It is not clear how these two sums can be reconciled, but that is not a matter for this Tribunal given that it falls outside of the application.

Major Works

53. The Tribunal was taken through the major works which were carried out between Autumn 2020 to early 2021; being external repairs and redecoration to the front, side and rear elevations. The Applicants provided various photographs and provided an accompanying narrative. These painted a clear picture of inadequate works. This was evident from:

    a. Detritus left after completion of the works, scaffolding foot plates, a tin of paint, blocked drains;

    b. A failure to move wires and paint behind them or to paint behind drain pipes, even though there was a 2' gap;

    c. The boundary wall in front of the building, below pavement level, had not been properly sealed and there was already staining and moisture present;

    d. Ivy had not been comprehensively removed from an exterior wall, but has been partially painted over. The tender document specifically said that the ivy would be removed. This also meant that the wall had not properly been prepared for painting;

    e. The Applicants' back door had not been varnished and was in need of treatment as was the front door;

f. Windows had not been properly filled and repaired and showed signs of being rotten and within a couple of months of the works the painting had cracked and the filler was coming out;

g. The seal to the Applicants' kitchen window had already come away and was letting in moisture.

54. The Respondent had little to say in response. The attempt to deflect the issue by saying that the details had only been set out at the hearing was difficult to sustain in light of the fact that the photographs were in the bundle and part of the claim and needed little explanation apart from where in the property they related.

55. However, more fundamentally the demands to the Applicants for these works were ad hoc and were not made in accordance with the lease terms. The demand was a one off demand made on 21st October 2020 for £8,338.50. The lease did not permit demands to be made in this manner. It only permitted two on account demands a year, each was to be on the basis of what the anticipated costs were to be for the coming 6 months. This was not one of those. The only other potential demand was a deficit demand. However, that had to be the deficit of estimated compared to actual after a certificate had been presented setting out the shortfall. Instead, this demand was the Applicants' apportioned total cost of the major works. It was made without reference to the on account sums demanded and was made before the 2021 accounts had been prepared. Further, it was described as 'S20 External Works to

Front, Side & Rear Elev.' Accordingly, the sum of **£8,338.50** is not payable.

56. These costs would naturally fall into the year end March 2021. However, the Tribunal was not provided with the actual account for those years; it appears they have not been made up. Given the fact that the demand is not valid and the actual accounts have not been provided, this Tribunal is not able to deal definitively with the cost of the major works in this application. As an actual cost, it will only become payable once the accounts are completed and a deficit demand made.

57. However, the Tribunal has already made clear above the clear problems with the work that the Applicants had identified and a reduction in the order of around 30 to 40% would have been justified. That would have taken into account the poor standard of work, the need to undertake further works to remedy the same and the fact that the issues raised did not cover the entirety of the work, but there was a good inference that the other work was of a similarly poor standard.

Chartered Surveyors fees

58. A similar problem bedevils the Applicants challenge to the £883.50 charged by Clarion Chartered Surveyors in February 2021. The 2021 accounts not having been provided and no adjustment to the statement of account having been made or any transfer to the reserves of any surplus or deficit demand or transfer out of the reserves for any deficit, the Tribunal is not able to determine this particular issue. This sum has not actually been demanded yet.

59. The Applicants challenged this sum on the basis they did not know what the charge was for. The Respondent had stated in their Statement of Case that this was for the supervision of the major works carried out between Autumn 2020 and early 2021. Whilst no time sheets had been provided, the Tribunal did have details of various site visits and photographs which justified the hours claimed. However, the standard of the major works was clearly poor with obvious corners being cut to the detriment of the Applicants. Therefore whilst these sums are ostensibly recoverable, given the poor quality of the works carried out, a similar reduction to that set out above would have been warranted.

Section 20C and paragraph 5, Schedule 11, reimbursement

60. The Respondent was unable to point to any provision in the lease which would have enabled the recovery of the cost of this application through either the service charge or an administration charge. The Tribunal does not consider that the lease does permit recovery. In any event, the Tribunal makes an order under both section 20C of the 1985 Act and paragraph 5 of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 to restrict any recovery. Not only have the Applicants been substantively successful on most of their application, but the Tribunal was not impressed with the manner in which the Respondent had engaged with these proceedings in that it had failed to provide all the necessary documents and raised thin arguments in relation to a number of items.

61. The Respondent made no submissions in respect of the application by the Applicants for reimbursement of the hearing and application fee and for the same reasons as set out above, the Tribunal orders the Respondent to pay those to the Applicants within 14 days, being the sum of £300.

Conclusion

62. The Respondent has overcharged the Applicants **£9,440.04** in respect of service charges. Had the major works (and surveyors fees) been properly before this Tribunal they would have been substantially reduced. An order is made restricting all costs from being recovered through either the service charge or an administration charge and the Respondent is to reimburse the Applicants the sum of £300 within 14 days of receipt of this determination.

JUDGE DOVAR

Appeals

A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk .

The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.