12744

FIRST - TIER TRIBUNAL

PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case References	**:**	**BIR/37UG/LIS/2017/0035 (1)** **BIR/37UG/LLC/2017/0011 (2)**
Property	**:**	**Brisbane Court, Balderton, Newark Nottinghamshire, NG24 3PS**
Applicant	**:**	**Margaret Hope Keeley**
Applicant's Representative	**:**	**Karen Keeley**
Respondent	**:**	**Chasia Rivka Orgel**
Respondent's Representative	**:**	**Mr Martin Reifer, Fairview Management Limited**
Applications	**:**	**(1) Application for a determination of liability to pay and reasonableness of service charges pursuant to s27A Landlord and Tenant Act 1985 (the Act)** **(2) Application for an order that costs incurred by the landlord in connection with the first application are not to be regarded as relevant costs in determining the amount of any service charge payable by the tenant pursuant to s 20C Landlord and Tenant Act 1985**
Date of Inspection And Hearing	**:**	**12 December 2017**
Tribunal	**:**	**Judge P. J. Ellis** **Mr N. Wint FRICS**
Date of Decision	**:**	**14 March 2018**

DECISION

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DECISION

1. The Tribunal determines that the following sums are reasonable and payable under s27A of the Act

2004	*£1489.46 (Insurance only)*
2005	*£4546.74*
2006	*£2622.37*
2007	*£2249.61*
2008	*£2324.72*
2009	*£2360.54*
2010	*£2062.15*
2011	*£2046.08*
2012-2017	*£0.00*

2. Costs of the Applicant are not relevant costs to be taken into account in determining the amount of any service charge payable by the Respondent.

Introduction

1. The first application in this case is by Mrs Margaret Hope Keeley of Oakwood, The Street, Thornham Magna, Suffolk IP23 8HB (the Applicant) for determination of liability to pay and reasonableness of service charges pursuant to s 27A of the Landlord and Tenant Act 1985 (the Act).

2. The Applicant is the registered freehold proprietor of Brisbane Court, Balderton, Newark, Nottinghamshire under title number NT 221496 (the Property).

3. The Respondent to the first application is Chasia Rivkel Orgel who is the owner of a leasehold interest in part of the Property pursuant to a lease dated 30 December 1988 registered with title number NT237085 (the Lease).

4. By the first application the Applicant seeks an order in relation to service charges for each year from 2004 to the present.

5. By the second application the Respondent seeks an order that the Applicant's costs incurred in these proceedings are not relevant costs to be taken into account in determining any service charge payable by her pursuant to s20C of the Act.

6. The second application was not issued until 8 December 2017. However, as it was closely related to the first application the Tribunal consolidated the application with the first application on 11 December 2017.

7. It is convenient for the purposes of this decision to refer to Mrs Keeley as the Applicant and Mrs Orgel as the Respondent.

The Claim

8. In these proceedings the Applicant landlord seeks a determination relating to service charge years 2004-16 and also a determination for the current year 2017. The sums claimed are set out in the Table annexed showing for each service charge year (which runs from 1 January to 31 December) the amount claimed for service charges and insurance and sums actually paid. The Applicants total claim is for the sum of £52,715.84 but this sum includes ground rent and court fees which are not relevant to these proceedings. The Tribunal has calculated that the total sum allegedly outstanding for service charges and insurance is £49,975.95 having deducted from the Applicant's claim ground rent and court fees together in the sum of £1,370.00. The Tribunal cannot identify the remaining difference of £70.00 between its calculation and the Applicants adjusted claim of £51,345.84 but the difference is immaterial in light of the tribunal's decision.

9. By her response to the first application the Respondent raised as her primary submission that the Applicant is required to comply with section 21B of the Act when demanding payment of any service charge due under the lease. The Respondent alleged that the Applicant had failed to serve the statutorily prescribed information with any service charge and accordingly no service charge is payable for any of the service charge years in dispute because any demand is now out of time. The Respondent also contends that the service

charges were incorrectly calculated in any event as they were not calculated in accordance with the terms of the lease.

10. The case came before the Tribunal on 11 December 2017. In the course of the hearing it became apparent to the Tribunal that the Applicant's representative was unfamiliar with the requirements of the Act relating to the service of prescribed information with service demands. The Tribunal allowed the Applicant's representative time to make submissions regarding the obligations to serve information before preparation of this Decision.

11. The Applicant's submissions which were made within the time allowed conceded that the Applicant had failed to serve accompanying information but raised an argument that the parties conduct over the relevant years amounted to a course of dealing which did not require service of accompanying prescribed information and consequently the Respondent was estopped by convention from denying the validity of service charge demands.

12. The Applicant's admission has narrowed the issues but this Decision deals with the service charge demands in any event and whether or not they were properly calculated in accordance with the lease.

The Property

13. Brisbane Court is situated in a mainly residential area close to Newark. It is a mixed-use site comprising three buildings, designated A, B & C on the lease plan, constructed of brick and tile arranged around an open quadrangle. The fourth open side is next to Bull Pit Road with car park spaces between the road and the central square. It is believed the site was constructed during the 1950s.

14. Each building has three storeys. The ground floor is occupied by retail units and the upper two floors comprise residential maisonettes. There are six maisonettes in two of the buildings and four maisonettes in the third building being sixteen in total.

15. There are twenty two garages arranged in groups around the outer perimeter of the site. Fifteen of the garages are owned by the Respondent. Others are

used either for storage by the owners of the retail units or are owned by occupiers of the apartments.

16. Most of the maisonettes have been sold to third party long sub-leaseholders many of whom let their property short term tenants. The Respondent retains two of the maisonettes for her own use although it is not known whether they are presently occupied.

17. Each block is of a slightly different appearance. In previous years balconies have been removed from blocks A & C. A balcony is in place on block B. The maisonettes have their own entrance ways to the rear of each block. New owners have typically replaced the windows of their properties.

18. The general condition of the site was reasonable although the some of the garages were in poor condition and the access road to garages to the rear of block B is uneven.

<u>The Lease</u>

19. The Lease was made on the 30th day of September 1988 between George Bernard Keeley, the late husband of the Applicant, and Lodgeday Commercial Limited.

20. By the terms of the lease the site was defined as

"the property known as Brisbane Court Newark in the County of Nottingham together with the shop premises maisonettes and residential accommodation and garages erected thereon or on some part or parts thereof and also the Common Parts".

21. The demise to the Lessee was described in the Lease as being

"Firstly all those premises forming part of Brisbane Court being on the First and Second Floor of the Buildings marked A, B and C (of the lease plan) and including the ground floor entrance halls stairways and access areas ...... Secondly all those garage premises situate on the Property...."

22. The term of the lease was one hundred and ninety nine years from 29 September 1988.

23. By clause 2 of the Lease the Lessee covenanted to pay the reserved rent and at clause 2 (2) (a) (i) to pay and contribute to the Lessor one half of:

"two thirds of the 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 explosion and such other risks normally covered under a comprehensive insurance as the Lessor sole shall reasonably determine"

24. By further paragraphs in clause 2 (2) (a) the lessee further covenanted to pay one half of:

"(ii) the water rates

(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 cost of maintenance and upkeep of the Common Parts

(v) the 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 (but only those affecting the demised premises)

(vi) the proper and reasonable fees of the Lessor's Managing Agents for the general management of the Property (including the Buildings).

25. Clause 2 (2) (b) of the Lease provides that "*such contribution shall be ascertained and certified by the Lessor's Managing Agents (whose certificate shall be final and binding on both parties hereto) once a year on the Thirty-first day of December in each year*"

26. The same clause provided for a payment on account in the first year of the Lease and then provided that the Lessee 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 Lessor's 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..."

27. Although the entire site is described as mixed-use residential and retail, the Lease is of the residential maisonettes only. The retail units are let on individual business leases between the Applicant and shop owners.

The Management Agreement

28. According to the evidence of Mr David Keeley, Brisbane Court was acquired by his father George Keeley in 1988. Mr Keeley senior died in April 2015 when ownership passed to the Applicant who is now 83. Mr David Keeley began to take an interest in the Property upon the death of his father. Until then he knew little about the detail of the management of the Property which was handled by his father and Mr Tim Shaw of Hodgson Elkington LLP of Lincoln. That firm was acquired by Lambert Smith Hampton and Mr Shaw is now employed by them. He has retained responsibility for management of the entire site.

29. Mr Shaw gave evidence that he was appointed in or about 2001 at about the time the Respondent acquired her interest in the Property. The Applicant disclosed the terms of the agreement made between Mr George Keeley and Hodgson Elkington LLP.

30. The agreement is described as a Commercial Property Management agreement. The Conditions of Engagement provide that Hodgson Elkington LLP "*will act as Managing Agents in respect of the properties known as Brisbane Court Balderton Newark Nottinghamshire*" and another unrelated property. The agreement takes effect from 6 November 2001 and will continue until terminated on three months' notice in writing.

31. The agreement provided at clause 3

"During the Management Period the Managing Agents will manage the property in a proper and business-like manner in accordance with the principles of good estate management and in the best interests of the client"

And at clause 5

"the Managing Agents duties will include the following:

a) To use their best endeavours to collect on behalf of the Client all rents and monies from time to time falling due for payment by the Tenants to the Client in respect of the property under management including any service charge payments due to the property Service Charge Account. For the avoidance of doubt this excludes insurance premium payments unless subsequently agreed between both parties."

32. Clause 9 allows the Managing Agents to retain out of the monies collected by them on behalf of Mr Keeley fees in accordance with the schedule attached to the agreement. The Management Fee Schedule attached to the agreement states

"A management fee
- *Management fee of 5% of annual rents collected*
- *VAT will be charged on all fees at the prevailing rate as previously advised."*

The Hearing and the Parties Submissions

33. The Applicant acting by her son and daughter in law Mr and Mrs David and Karen Keeley issued these proceedings on 10 August 2017. The reason for the application was that service charge demands rendered by Mr Shaw were outstanding. The last payment was received on 10 February 2011 for the sum of £2,342.54 in respect of insurance. Arrears of the allegedly outstanding service charges are now in the sum of £52,715.84. The Applicant seeks a determination that the service charges are reasonable and payable by the Respondent.

34. The Respondent answered the application by putting in issue the validity all of the service charge demands since inception of the lease because they had not been served with accompanying prescribed information. In light of the failure to comply with the statutory obligations the Respondent contends that she is not obliged to make any payment. In view of the primary contention by the Respondent the Tribunal invited Mr Reifer on behalf of the Respondent to make his submissions first.

35. His submissions were that that not only are service charge demands unenforceable they are incorrectly calculated in any event. Further the Respondent contends that the contribution to the insurance premium payable under the lease was also incorrectly calculated as it includes inadmissible risks. Consequently the Respondent claims that she is entitled to be repaid excess charges for the insurances premiums.

36. The Applicant had adduced a schedule summarising demands for payments allegedly due from the Respondent and annual service charge summaries. Mr Reifer said that the Applicant's bundle did not include all relevant documents because it omitted other correspondence between the parties including certificates relating to the accuracy of the service charges given by the managing agent. He produced samples from his file of papers which indicated that charges had been certified as properly due which should not have been included.

37. Typically service charges comprised a management charge calculated either by reference to a percentage of rents collected or a fixed charge and the charges of a caretaker or landscape contractor. The Respondent submitted the management charges were calculated by reference to a percentage of the rent

account for the entire site including all commercial occupiers or a fixed fee which was unreasonable.

38. The Respondent also contended that the Applicant could not now cure the defect in the service charges because over 18 months had passed since the service charges were incurred and in so far as charges were within 18 months before a valid service charge demand was made the sums claimed were improperly calculated and were not in accordance with the management agreement.

39. Mr Reifer on behalf of the Respondent referred to *Ruddy v Oakfern Properties [2006] EWCA Civ 1389* where it was held the expression "a tenant of a dwelling" as appears in s18(1) of the Act includes an /intermediate landlord holding a lease of a building which contained a number of dwellings.

40. He asserted that the situation at Brisbane Court was substantially similar to that described in Ruddy accordingly the Respondent was entitled to the protection afforded by the Act which requires any service charge demand to be accompanied by the prescribed information. In the absence of such information the demands are defective and the Respondent is under no obligation to make any payments. The Respondent further submitted that in any event the demands are defective by reason of the miscalculation of the insurance premiums and the use of rents from non-residential properties as a basis of the calculation.

41. Mr Reifer agreed on behalf of the Respondent that no payments were made since 2011 and asserted that any payment prior to that year, other than for ground rent, was made under protest or under pressure of court proceedings.

42. His further submissions were that not only had the Applicant failed to comply with the requirements of s21B of the Act, there had also been a failure to comply with the requirements of s20 by consulting with the Respondent in connection with long term qualifying contracts in particular the management agreement with Lambert Smith Hampton and the contract for caretaking or landscaping.

43. Mr Reifer submitted that the only sums payable as service charge were a proper portion of the insurance premium and a maximum of £250.00 towards other expenses for any year.

44. He then referred to service charge demands and budgets which referred to different formulations of the management charges.

45. The statement of the Respondent's account prepared by Mr Shaw for the hearing refers to "16 Flats". The statement shows service charge demands, ground rent and insurance premiums due for the years from 2003 to the present. Payments were made by the Respondent sometimes after court proceedings were issued so that by February 2011 the Respondent was £329.16 overdue.

46. Throughout those years, service charges were calculated by reference to services, typically the service of a caretaker and a percentage of 'rent fees'.

47. Mr Reifer referred the Tribunal to the budget for 2005. It shows a demand for service charges calculated by reference to 10% of the site service charge and 50% of rent fees. In 2006 the claim for a management charge is presented as a fixed fee but there is still a percentage charge described as rent fees.

48. Mr Reifer also asserted that a long-term arrangement which had been made with a landscape contractor was a qualifying contract made without consultation under s20 of the Act. The sums claimed for this contract were in excess of the sums allowable without consultation because the value was not less than £1,500.00 per annum.

49. In summary Mr Reifer contended that if the Tribunal found that the service charge demands including the management charges were validly claimed, they were incorrectly calculated as the only basis of calculation of the management charge was that set out in the Commercial Property Management agreement namely 5% of rents and as no rent was payable by the Respondent other than ground rent the management charge was no more than £250 per annum.

50. Further the insurance claims indicated that the Respondent was being improperly charged for her portion of the premium which in any event

included coverage which was not relevant to the Respondent namely plate glass damage and business interruption.

51. Mr Reifer's final submission was that there was a further defect in the service charge claims for 2015 and 2016 in that the name given as the landlord is Mr G Keeley for the period after his death until 31 December 2016 contrary to s 48 of the Landlord and Tenant Act 1987.

52. In conclusion Mr Reifer submitted the want of correct information in the service demands deprives the Tribunal of jurisdiction but he seeks a determination of entitlement to refunds or credits in respect of charges wrongly calculated.

53. In response Mrs Karen Keeley on behalf of the Applicant stated that the landlord had at all times relied upon the advice of Mr Tim Shaw in the conduct of the management of the entire site including the lease with the Respondent.

54. At the request of the Tribunal Mr Shaw attended the hearing to give evidence and also made a written statement.

55. His evidence was that when he was first appointed he continued with the accounting procedure adopted by his predecessor. He treated the site as a commercial operation because the Respondent was not in residence. He asserted that the Respondent does not benefit from or have use of the services which form part of the service cost described in the lease therefore it was proper to treat the relationship between the Applicant and her predecessor as a commercial relationship.

56. When giving his evidence at the hearing he admitted that service charge demands had not been accompanied by prescribed information because as far as he was concerned such information was not necessary in commercial cases. He knew that Mrs Orgel's lease was for the residential properties only and that the shop units were let on business tenancies with the Applicant. It was a matter for the Respondent to ensure that proper service demands were served upon residents.

57. Mr Shaw told the Tribunal that his practise is entirely commercial and that residential management is conducted by a specialist department within Lambert Smith Hampton.

58. He is responsible for organising management and maintenance contracts for the entire site. As far as he is aware the only long-term contract is with the caretaker. Other contractors are arranged as and when required.

59. Mrs Karen Keeley on behalf of the Applicant conceded that the insurance premiums were incorrectly calculated and required adjustment. However, as far as the management charges were concerned she submitted the charges of Lambert Smith Hampton and their predecessors were reasonable even though possibly miscalculated.

60. As far as the form of the service charge demands was concerned she relied upon Mr Shaw. As neither of Mr nor Mrs Keeley had been involved with the management of the property until after the death of Mr George Keeley they were unable to comment on the circumstances leading to the Commercial Property Management agreement but agreed it formed the basis of the relationship with Mr Shaw and his firm.

61. Following the hearing the Applicant made further submissions with the permission of the Tribunal. Birketts LLP solicitors were instructed to prepare the submissions. By them the Applicant relied upon the decision of Ruddy v Oakfern Property in which a head lessee was held to be a tenant notwithstanding that the individual units were sublet to tenants. The lease between the parties provides for a variable service charge. Accordingly the Tribunal has jurisdiction under the Act to determine the dispute.

62. As far as the requirement for service of prescribed information is concerned the Applicant asserts that the requirement imposed by the operation of the Act and the Service Charge (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007 was effective from 1 October 2007 and consequently there was no need for service of a demand accompanied by prescribed information for the years under review from 1 January 2004 until 30 September 2007.

63. Thereafter the Applicant does not deny there was an obligation to serve accompanying information and concedes no such information was served. The Applicant contends that it would be unjust to disallow the service charge demands because of the failure to serve the prescribed information as the issue was not raised by the Respondent until 2 November 2017 in preparation for this hearing.

64. The Applicant then submits the Respondent is estopped by convention from asserting the demands are not payable because the five conditions for an estoppel set out in *Jetha v Basildon Court Residents Co Ltd* [2017] UKHT 58 (LC) are satisfied.

65. The Applicant submitted there was a common assumption or misapprehension between the parties that it was not necessary to serve the prescribed information. The Applicant alleges the Respondent has paid service charge demands issued after 1 October 2007 without demur thereby raising a common assumption that it was not necessary to serve prescribed information. Moreover as the Applicant has provided services to the Respondent it would be unjust to deny an entitlement to recover the cost of the services especially as the Respondent is entitled to recover expenditure from her lessees.

66. The Applicant also relies upon *Admiralty Park Management Co Ltd v Ojo* [2106] UKUT 421 (LC) in support of the contention that it would be unfair for the Respondent to be allowed to "dispute his liability in those circumstances on grounds which he had chosen not to raise for many years".

67. In reply to the factual assertion of making no protest when making payments the Respondent rarely paid without protest and in fact faced county court proceedings to compel payments. The Respondent produced a letter date 26 April 2007 to Mr Shaw by which a payment of £5,769.86 was made "under protest" together with a further letter of 17 January 2008 enclosing two cheques for payment of charges also made under protest. The reason for the protest being given in the second letter that there was no breakdown of money demanded and that complaints about the services were unanswered.

The Law

68. Sections 18 -30 of the Act provide a statutory framework for the regulation of the relationship between a landlord and tenant of residential property in connection with service charges.

69. S18 (1) of the Act gives the meaning of "service charge" as

"an amount payable by a tenant of a dwelling as part of or in addition to the rent—

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs."

And relevant costs are

"(2)The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable."

70. In s38 Dwelling is defined to mean:

"A building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it;"

71. In this case there is no dispute that the Respondent is a tenant of residential dwellings albeit in 14 of 16 maisonettes the Respondent is the landlord of a long sub-lease. The primary dispute is whether the circumstances of the Respondent's relationship with the property means she is a commercial occupier.

72. Parker LJ in *Ruddy v Oakfern* held the fact that the Respondent is an absentee landlord does not prevent her from being the tenant of a dwelling.

He said:

"the definition in section 38 does not require that the tenant himself should begin occupation of the dwelling and hence it is apt to include a tenant who has sublet (ie a mesne landlord). However the question arises whether a mesne landlord who is tenant of a building comprising a number of

dwellings together with common parts falls within the definition. Such a mesne landlord is plainly a tenant of a 'building' but not of 'a building occupied or intended to be occupied as a separate dwelling'. Can it then be said that notwithstanding that he owns the entire building he is nevertheless a tenant of 'part of a building occupied or intended to be occupied as a separate dwelling'. I have come to the conclusion that the answer to that question is yes."

73. In this case there is a limitation issue. S20 of the Act provides

"(1) *If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to sub-section (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.*

(2) Sub section (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

74. As said in *Westmark (Lettings) Limited v Peddle* [2017] UKUT 0449 "*To apply section 20B (1) to any relevant cost it is necessary to know the date on which that cost was "incurred". If that date was more than 18 month before the date on which a demand for payment was served on the tenant then, subject to section 20B (2), the tenant will not be liable to pay so much of the demand as was attributable to that cost.*

75. *The leading case on identifying when a cost is incurred for the purpose of section 20B (2) is OM Property Management v Burr [2013] 1 W.L.R. 3071, in which the Court of Appeal distinguished between a liability and a cost and held that a cost is "incurred" once an underlying liability to pay for a service crystallises and is made certain. Approving the decision of the Tribunal that it is the cost that must be incurred, the Court explained (at [8]) that a liability to pay for a service does not become a cost for the purpose of section 21 B(1) until it is made concrete, "either by being met or paid or possibly by being set*

down in an invoice or certificate". At [13] Lord Dyson (with whom Moses LJ and Pill LJ agreed) said: "the incurring of costs entails the existence of an ascertained or ascertainable sum which is capable of being adjusted by repayment, reduction etc. The mere provision of services or supplies does not without more entail anything which is capable of being adjusted in this way."

76. The Act requires that a landlord serving a service charge demand must also serve information in prescribed form. S21B of the Act provides as far as relevant

"(1) A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges.
(2) The Secretary of State may make regulations prescribing requirements as to the form and content of such summaries of rights and obligations.
(3) A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) is not complied with in relation to the demand."

77. A further protection of the tenant of a dwelling who has received a service charge demand may rely on the provisions of s27 A of the Act in seeking a determination that the service charges are reasonable.

S27A of the Act provides

(1) An application may be made to the appropriate tribunal 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,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.
(2) Subsection (1) applies whether or not any payment has been made.
(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified

description, a service charge would be payable for the costs and, if it would, as to—

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

78. There is a further protection for the tenant who may face demands for payment of costs which were incurred over 18 months before the demand contained in s21B

"*(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.*

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

79. In so far as the claim relating to costs is concerned 20C of the Act provides that

"*(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court residential property tribunal or leasehold valuation tribunal or the First-tier Tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.*"

80. S25 of the Act provides

"It is a summary offence for a person to fail without reasonable excuse to perform a duty imposed on him by or by virtue of any of sections 21 to 23A.

81. In view of the date of the age of the claims it is also necessary to consider the implications of the Limitation Act 1980 which provides at s8

(1)An action upon a specialty shall not be brought after the expiration of twelve years from the date on which the cause of action accrued.

(2)Subsection (1) above shall not affect any action for which a shorter period of limitation is prescribed by any other provision of this Act.

And s29(5)-(7) provides

(5)Subject to subsection (6) below, where any right of action has accrued to recover—

(a)any debt or other liquidated pecuniary claim; or

(b)any claim to the personal estate of a deceased person or to any share or interest in any such estate;

and the person liable or accountable for the claim acknowledges the claim or makes any payment in respect of it the right shall be treated as having accrued on and not before the date of the acknowledgment or payment.

(6)A payment of a part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest shall be treated as a payment in respect of the principal debt.

(7)Subject to subsection (6) above, a current period of limitation may be repeatedly extended under this section by further acknowledgments or payments, but a right of action, once barred by this Act, shall not be revived by any subsequent acknowledgment or payment.

In this case the lease does not reserve the service charge as rent.

Decision

82. The Applicant's admission that the Act applied to service charge demands with effect from 1 October 2007 has narrowed the issues so that it is unnecessary to decide whether the Respondent was a tenant of residential property. For the avoidance of doubt the Tribunal is satisfied that the lease is a lease of residential accommodation and applying *Ruddy v Redfern* that the Respondent is tenant of a dwelling and therefore entitled to the protection of ss18-30 of the Act regulating service charges subject to the Applicant's contention that the Respondent is estopped from relying on the protection of the Act.

83. In making its determination the Tribunal has identified the reasonable sums payable as service charges for each year and then considered the consequences of the Applicant's failure to comply with relevant provisions of the Act. It has also considered the Applicant's submission that the Respondent is estopped from relying on the provisions of the Act. This decision first describes the way the service charge is calculated. It then considers the effects of non-compliance with the Act and the estoppel submissions. It then sets out the determination for each of the service charge years the subject of the application. In view of the age of some service charge years claims it is also necessary to consider whether the Limitation Act 1980 has any effect on years 2004-2006 which in any event pre-date relevant obligations imposed by the Act in 2007.

The Service Charges

84. The service charge demands comprise three elements:

(a) 50% of two thirds of the insurance premium for cover described in the lease;

(b) 50% of the costs, duly certified, incurred in maintaining the building and the Common Parts of it; and

(c) the reasonable costs of the lessors managing agent for managing the Property (including the Buildings).

85. As far as the insurance element is concerned the Applicant conceded both that the demand for contribution was incorrectly calculated because the policy included irrelevant risks and the entire cost was passed on. The Tribunal was not told the additional cost of the irrelevant cover because the Applicant did not have that information available. The parties agreed to meet to identify the excess charge but for the sake of this decision the Tribunal finds that two thirds of the premium is payable for each year.

86. The charges relating to maintaining the Property and Common Parts should be apportioned so that the Respondent is responsible for 50% of those charges. There are two problems for the Applicant in relation to these costs. First the items the subject of charge were qualifying works and it is admitted that no consultation occurred before they were incurred. Second the admitted failure to serve prescribed information.

87. At the hearing the Applicant submitted annual service charge statements prepared by the managing agent for the years 2012 to 2016. The statements

describe the expenditure. In each year the charge for external landscaping was in excess of £1,500.00. The evidence was that the landscaping was undertaken by a single contractor. In view of the Applicant's belief that the relationship between the parties was a commercial contract not regulated by the Act it is inevitable that there was no consultation over the appointment of a landscaping contractor. For the reasons given at paragraphs 92below the Tribunal rejects the submission that the requirements of the Act did not apply. Consequently it finds that there was a failure to comply with the consultation requirements. For each year the Tribunal will allow only the maximum sum permissible under s20 and the Regulations being £250.00 per annum. In addition in each year some charges were incurred for repairs and maintenance. Mr Shaw admitted that he arranges maintenance works as and when required. Therefore he took on the role of maintenance manager as well as managing agent. As the charges allocated to repairs and maintenance were substantial and never less than £1,345.00 the maximum sum recoverable under this heading is also £250.00pa. In conclusion, the total allowable for each year between 2007 and 2016 being the years subject to the consultation provisions is £500.00pa.

88. For the years before introduction of the consultation provisions, that is 2004, 2005 and 2006 the situation is more complex. No service charge demands were presented in 2004. In 2005 and 2006 the service charge demands were calculated by reference to the management fee and 50% of the service charges for all of Brisbane Court. In view of the decision regarding the calculation of the management fee the sum payable for these years is 5% of the rents collected from Brisbane Court and a reasonable sum for other services anticipated by the lease. As the parties were unable to give evidence regarding those items of charge the Tribunal has applied the charging method demonstrated for later years.

89. The method of determining service charges was to deduce a total of costs of service supplied to Brisbane Court together with the management fee to arrive at the total expenditure for allocation. That sum is then divided by 50% and the resulting figure divided into quarterly demands. The Tribunal has adopted the sums payable for 2005 and 2006 in the absence of any evidence to say they were other than reasonable at the time.

90. The management fee is set typically at £3,000.00pa, also a sum greater than that permitted under the consultation obligations. Also a sum far in excess of

the agreed fee of 5% of rents collected. As the lease provides for the payment of a reasonable management fee there is a conflict between the Commercial Management Letting agreement and the lease. The conflict arises because the lease provides that the lessee will pay the reasonable and proper fees of the managing agent. As the only rent collected under the lease is the ground rent, the effect of the strict interpretation of the two documents in favour of the Respondent's contention would result in a management fee of £2.50pa. That is not a reasonable sum. The alternative view is that the Applicant has agreed to cap fees at 5% of all rents collected from occupiers of Brisbane Court. The Tribunal has determined that this is correct approach. There was no evidence before the Tribunal of the rents collected and the parties are directed to file an agreed schedule of the effect of this determination.

91. The Tribunal has determined the sums payable for each year as appears on the Table appended. However, that is not the end of the matter. The Applicant has failed to serve demands accompanied by prescribed information in accordance with the Act. The Applicant is unable to recover payments of service charges until the defect is corrected but for the years between 2007 (when the present requirement was introduced) and 2016 any demand is unenforceable if it is served more than 18 months before the date of the demand accompanied by prescribed information. In this case the Tribunal is satisfied that the Applicant acting by their agent regarded the service charges as incurred and the sum payable by the lessee properly quantified at the time of service of the invoices as anticipated by *Westmark* and *OM Properties*. The Applicant realised the consequences of failure to comply with the obligations imposed by the Act and submitted the Respondent was estopped from relying on the obligations.

Estoppel

92. The Applicant's argument raised the issue of whether or not it is possible to opt out of the requirements of the Act by agreement however made such as in this case by conduct amounting to an estoppel.

93. The Tribunal does not consider that it is possible for parties to disregard the obligations imposed by the Act relating to service charges and prescribed information. S25 makes it a criminal offence to fail to perform a duty imposed by ss21-23A which will include the duty imposed by s21B. S26 of the Act provides that ss18-25 do not apply to service charges payable by a tenant of a local authority, National Park Authority or a new town corporation. These

sections are cited as illustrations of the way in which the legislation is framed. There are no provisions describing opting out of the legislation and the fact it is a criminal offence emphasizes the importance of complying with the legislation although the Tribunal makes no observation upon whether there was a reasonable excuse under the Act for non-compliance.

94. However and in any event for the avoidance of doubt the Tribunal finds on the facts that there was no estoppel by convention. The Applicant avers that she relied upon the advice and assistance of the managing agent in the conduct of the management of the property. Mr Shaw admits and accepts that no service charge demand was ever sent to the Respondent accompanied by the prescribed information as required by s21B.

95. The circumstances in which an estoppel by convention arises were described by HHJ Behrens in Jetha in the following paragraphs of his Decision:

"*Estoppel by convention is described by Lord Steyn in Republic of India v India Steam Ship Co Limited ("the Indian Endurance and The Indian Grace") [1998] AC 878 at 913–914: "[A]n estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption. It is not enough that each of the two parties acts on an assumption not communicated to the other. But ... a concluded agreement is not a requirement.*"

96. There is further assistance in *Christopher Charles Dixon EFI (Loughton) Ltd v Blindley Heath Investments Ltd* [2015] EWCA 1023 at paragraphs 90 – 92. 90 Again, Dixon J's judgment in Grundt explains the position (and the evidential burden) clearly (see page 675):

"*The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it.*"

97. Briggs J (as he then was) elaborated on this in *HMRC v Benchdollar Limited and Others* [2009] EWHC 1310 (Ch) when summarising the principles he considered to be applicable to the assertion of an estoppel by convention arising out of non-contractual dealings, which he derived largely from another decision of this Court, namely Keen v Holland [1984] 1 WLR 251. His summary was as follows:

"It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them. The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it. The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter. That reliance must have occurred in connection with some subsequent mutual dealing between the parties. Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position." 92. As to (i) above, we do not think there must be expression of accord: agreement to the assumption (rather than merely a coincidence of view, with both proceeding independently on the same false assumption) may be inferred from conduct, or even silence (see per Staughton LJ in "The Indian Grace" [1996] 2 Lloyds Rep 12 at 20). However, something must be shown to have "crossed the line" sufficient to manifest an assent to the assumption."

98. The Applicant's solicitors helpfully paraphrased the conditions and the Tribunal further summarises them in this way:

   a. There is an express sharing of the common assumption

   b. For which the party allegedly estopped has assumed some element of responsibility

   c. Upon which the party alleging the estoppel has relied to a sufficient extent

d. And the reliance has continued in the dealings between the parties

e. To his detriment so that it would unjust for the other party to later assert the true legal or factual position.

99. The Tribunal is not satisfied the Applicant has established facts which will justify a finding that there is an estoppel.

100. In so far as the service charges from 1 October 2008 are concerned it is the Applicant's case that the original lessor Mr George Keeley and later his estate relied upon professional advisers. There was no engagement with the Respondent sufficient to satisfy the first condition. It is common ground that there was conflict between the parties. County court proceedings were issued to recover charges and payments made by the Respondent were made under protest. The Tribunal finds that the parties disagreement related to the calculation of charges and that there was never any common assumption about the method of calculation therefore there could not have been any common assumption about the invoicing. Simply put, the Applicant was under a misapprehension over the nature of the tenancy wrongly believing it to be a commercial tenancy and so exempt from the requirements of the Act.

101. As the Tribunal rejects the submission that the parties shared a common assumption it is not necessary to consider the remaining conditions. However, for completeness the Tribunal finds that the Respondent is not going back on any alleged agreement. This is an opportunity for the Respondent to state her case having previously protested at the method of calculating the charges. Further there was no reliance by the Applicant on any conduct of the Respondent as throughout the duration of the Commercial Property Management agreement until the hearing, Mr Shaw believed he was correct with his calculation of service charges and method of invoicing.

102. Other cases referred to the Tribunal involving allegations of estoppel by convention were entirely different as they did not relate to the question of whether or not it is possible to contract out of the statutory framework established by ss18-25 of the Act.

103. The position is different for 2017 if the Applicant serves a properly formulated demand but it is necessary to deal with the lack of consultation over the long term qualifying contracts and the managing agent's appointment. In the absence of evidence that those matters are agreed or the obligations

discharged the only sum recoverable is 50% of two thirds of the insurance premium payable for the correct insured risks.

Service Charge Years 2004-2006

Effect of Limitation Act 1980

104. The position of demands for service charges between 2004 and 2006 until the introduction of the prescribed information is complicated by the issue of limitation. The effect of s8 of the Limitation Act 1980 is that an action on a specialty shall not be brought after the expiration of 12 years from the accrual of the cause of action. S27A requires the Tribunal to determine whether a service charge is payable. The parties agree that the Respondent made payments to the Applicant sufficient to discharge the demands in those years. At first the Respondent made payments without need for court proceedings. By the end of 2006 the Respondent had accrued debt of £4841.48 which was satisfied by a payment in April 2007 after the issue of county court proceedings. The Respondent through Mr Reifer sought to argue that the payment was made under protest and was not an acknowledgment of the debt but as the parties were unable to explain why proceedings were necessary the Tribunal finds that there is no reason to believe the delayed payment was because of protest. The Applicant or her predecessor appears to have made no claims in 2004 other than the insurance charge. The Tribunal determines that the sums claimed for 2005 is reasonable. As payments were made nothing more is due to the Applicant for 2004 or 2005. For the year 2006 the sum payable is £2622.37.

Service Charge Years 2007-2017

Effect of s21B

105. In view of the decision that it is not possible to disregard the application of the Act it follows that the Respondent may withhold payment of service charges for the years 2007 -2016 as appears on the Table unless a valid demand accompanied by the prescribed information may be served.

106. So far as 2017 is concerned the Applicant has yet to serve a valid demand and therefore the Tribunal makes no determination on the amount of service charge payable. However, as the effect of s21B is suspensory, the entitlement to payment is reinstated upon service of a valid demand.

107. In the years 2007-2011 the Tribunal has determined the sums payable for those years as appears in the Table:

2007	£2249.61
2008	£2324.72
2009	£2360.54
2010	£2062.15
2011	£2046.08

The Respondent has made payments in those years sufficient to meet those demands and therefore the withholding effects of s21B are irrelevant.

108. For the years 2012-2016 the Tribunal has determined the reasonable sums for service charges are set out in the Table but as the Respondent has made no payments the withholding provisions are relevant and nothing is payable.

2012	£2841.20
02013	£2888.85
2014	£2923.59
2015	£500.00
2016	£3128.71

109. In so far as 2017 is concerned as no valid demand has been served there is nothing payable and the Tribunal has made no determination of what sum is reasonable.

Effect of s20B

110. The Respondent has submitted that it is too late for the Applicant to cure defects under s21B by service of a later compliant demand. The Tribunal makes no decision on that submission because the Applicant has not yet served any curative demand and the issue has not arisen.

Cost of the Application s20C

111. The Tribunal has decided that the Applicant and her predecessor have failed to comply with any of the obligations under the Landlord and Tenant Act 1985 in relation to this residential tenancy. Although the Applicant issued these proceedings it was the first time that the Applicant understood the Act could have application to the Lease. An invitation to mediate the dispute was refused by the Applicant and offers by the Respondent which the Tribunal considered reasonable were refused. Accordingly the Tribunal directs that the Applicant's costs associated with this application are not to be regarded as

relevant costs for the purposes of determining any amount payable by the tenant as service charges.

Appeal

112. 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).

....

Judge PJ Ellis

Brisbane Court
Claim

Date	Demand		Paid	Credits	Payable subject to Decision
	Service Charge	Insurance			
2004		£ 2,256.75			Insurance only
2005	£ 2,913.52	£ 2,475.36	£ 4,801.12	£ 1,035.56	4546.74
2006	£ 2,913.52	£ 2,572.37	£ 2,622.37	£ 482.13	2622.37
2007	£ 3,632.53	£ 2,650.92	£ 5,769.86		2249.61
2008	£ 4,006.33	£ 2,764.73	£ 4,221.49	£ 2,403.10	2324.72
2009	£ 3,267.04	£ 2,819.00	£ 4,603.50		2360.52
2010	£ 3,835.00	£ 2,366.90	£ 13,313.91	£ 1,250.00	2062.15
2011	£ 3,775.44	£ 2,342.54	£ 3,286.42	£ 295.18	2046.08
2012	£ 4,375.00	£ 3,547.28			2841.2
2013	£ 5,125.00	£ 3,619.47		£ 1,289.00	2888.85
2014	£ 6,335.00	£ 3,672.11		£ 1,083.50	2923.59
2015	£ 9,375.00			£ 1,333.40	500
2016	£ 9,870.00	£ 3,982.89		£ 5,888.00	3128.71
2017	£ 4,626.00	£ 4,534.79			
Total	£ 64,049.38	£ 39,605.11	£ 38,618.67	£ 15,059.87	
		Total Claim		**£ 49,975.95**	

Brisbane Court
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