FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/00ML/LIS/2020/0029**
Property	**:**	**78a St James Street, Brighton BN2 1PA**
Applicant	**:**	**Synergy Capital Limited**
Representative	**:**	**Mr Green, counsel, instructed by Chandler Harris Solicitors**
Respondent	**:**	**Bruce Gibson**
Representative	**:**	**Mr Blakeney, counsel, instructed by Bosley & Co**
Type of Application	**:**	**s.27A, Landlord and Tenant Act 1985**
Tribunal Members	**:**	**Judge D Dovar** **Mr R Wilkey**
Date and venue of Hearing	**:**	**12th August 2020, Remote**
Date of Decision	**:**	**21st August 2020**

DECISION

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1. This an application for the determination of the payability of service charges for the years ending 2017 to 2019. The Applicant issued a claim in the County Court which was in part transferred to the Tribunal by order of DDJ Morrison of 3rd March 2020. By a directions order dated 5th June 2020, it was directed that the balance of the issues, being interest, court fee and costs, would be dealt by the Tribunal Judge sitting as a County Court Judge. Those directions also provided for the hearing to be conducted remotely, which it has been. This is the decision of the Tribunal, an Order has also been made dealing with the remaining County Court matters under claim no F2QZ50GE.

2. The Applicant claims £6,333.33 arrears of service charge, said to have accrued between December 2016 and December 2019, which include costs said to be incurred in contemplation of forfeiture pursuant to clause 3 of the Respondent's lease, in the sum of £678. Further, interest is claimed under s.69 of the County Court Act 1984 on the outstanding sums at a rate of 8%.

3. The Defence in the County Court, as followed through in the Statement of Case for the tribunal, sets out the following challenges:

    a. a general challenge to payability, in that none of the demands served by the Applicant were accompanied by a summary of tenants' rights and obligations as mandated by s.21B of the Landlord and Tenant Act 1985 ('the 1985 Act');

    b. Specific challenges, being:

i. Management Fees: firstly, that the lease does not permit such a fee; secondly, for the first two years, that such fees are capped due to non-compliance with s.20 of the 1985 Act; and finally, that the sum charged is excessive in any event, and so should be capped under s.19;

ii. a double charge has been made for the year end 2017;

iii. the cost of major works, charged in the year end 2017, were not recoverable under the lease terms and/or were unreasonably incurred or the work was not to a satisfactory standard;

iv. £1,200 sought on account for external repairs for the year end 2019 is unreasonable.

4. Both parties were represented by counsel and the Tribunal is grateful for their assistance. The Tribunal also heard evidence from the Respondent. Despite providing a witness statement and a note in the directions that witness should attend unless their evidence was agreed, no witness for the Applicant was made available for questioning.

S.21B, summary of rights and obligations

5. Mr Gibson made it clear through these proceedings, in his Defence, his Statement of Case and his witness statement, that none of service charge demands relied on by Synergy had been accompanied by the necessary summary under s.21B. If that is right, then none of Synergy's claim can be made out.

6. Synergy has stated the following in that regard:

    a. In their Statement of Case, signed by Mr Stopher, Synergy's solicitor, they stated

        '*The demands included within the bundle were all accompanied by the statement of rights and obligations as required by s.153 of the Commonhold and Leasehold Reform Act 2002*'

        and

        '*The service charge demands have all been served with a Statement of Rights and Obligations';*

    b. Mr Stopher also provided a witness statement, dated 29th June 2020, but no comment was made there as to the inclusion of any summary.

7. As stated above, Mr Stopher was not available to give evidence and so it was not possible to explore with him the basis of the assertions made in the Statement of Case.

8. The bundle contained the demands in question. The first two invoices dated 26th May (a direct recharge for internal works of £1,320) and 17th July 2017 (an on account demand for £3,093) do not have any mention on their face of a summary, nor have any summary following in the bundle.

9. The next three invoices are dated 19th April (£966.50, for 6 months in advance), 15th May (£966.50, for 6 months in advance) and 17th September 2018 (£61, for the year end 2017 balancing charge). Again none refer to any summary and there is no summary following in the bundle.

10. The final invoice is dated 13th February 2019 and is an on account demand for £900 for six months. The page that follows in the bundle is a credit document for a balance charge for the year end 2018, that is dated 28th February 2019. The next page in the bundle is a summary of tenants' rights and obligations. The next page is headed 'Service Charges – Final Notice' and is dated 11th June 2019, that is followed on the next page by an administration charge summary of tenants' rights and obligations.

11. In his evidence, Mr Gibson was clear that none of these invoices were accompanied by a summary. The Tribunal were able to assess Mr Gibson in the course of giving evidence and considered that he was a credible witness and had not simply made up this allegation in order to frustrate Synergy's claim. On the other hand, despite the issue being very clear from the outset, Synergy had produced very little evidence to support their case that the summary had been included. Whilst the Statement of Case made the assertion that they had, the Tribunal had difficulty with this evidence as it did not appear to be given by the person who actually served the demands (but Synergy's solicitors). Further, no detail was given as to whether the summary was on the back or separately included; if the latter, there was no evidence as to either the

general method of serving demands and including summaries or any specific recollection in this case. Finally, the manner in which Synergy had put the bundle together suggested that if included, the summary would have been included separately, as when it appeared in the bundle it did not immediately follow any demand.

12. For these reasons the Tribunal considers that none of the demands in question were accompanied by a summary of tenants' rights and obligations and therefore s.21B of the 1985 renders none of those demands payable.

13. Whilst that disposes of Synergy's claim, the Tribunal is conscious that this defect is remediable and that it has heard evidence and submissions in relation to the substantive matters. The Tribunal will therefore go on to deal with those matters; an approach endorsed by the parties at the hearing.

Double Charge

14. For the year end 2017, there were two demands. One for £3,093 for on account service charges and another for £1,320 as a direct recharge for internal works.

15. The end of year reconciliation showed that there was a £61 deficit and that the total external repairs and maintenance actually incurred amounted to £2,051. That figure was a combination of £1,980 from Russell Builders for 'work undertaken at the above premises' and £71.40

from Greenleas Property Services for cutting open a manhole cover that had unfortunately had a door frame placed across it.

16. Mr Gibson contended that 2/3rds of the Russell Builders invoices was the subject of the direct charge to him; being £1,320. If that is correct, then that sum had been charged twice to Mr Gibson. Both through the usual service charge demand and then again as a direct charge.

17. Mr Green was unable to point to any other invoice or evidence to justify that charge.

18. The Tribunal is satisfied that this is a double charge and would not have been payable.

Managing Agent's Fees

Lease terms

19. By clause 4 (b) (i) of Mr Gibson's lease, the Lessee is to pay his proportion (which is 2/3rds) of '*all moneys expended by the Lessor in complying with its covenants in relation to the Block as set forth in Clause 6 (b) and (c)...*'

20. The fees of managing agents are claimed through clause 6 (c) (iv) which sets out Synergy's obligations as landlord and includes an obligation to

> '*Employ such person or persons (including a contract cleaner at the Lessor's discretion) as shall be reasonably necessary for the due performance of the covenants on its part herein contained and for the proper management of the Block (including at the Lessor's discretion*

the appointment of a Chartered or Certified Accountant) and in particular but without prejudice to the generality of the foregoing employ a firm of Chartered Surveyors or other professional managers of property to handle the management of the Block and the fees of such firm shall be added to the other expenses incurred by the Lessor under the provisions of Clause 6 of this Lease.'.

21. Mr Gibson contended that the fees of the managing agent would only be recoverable if it was reasonably necessary to engage them and that given the modest work that was necessary for management of this building, it was not reasonable.

22. The Tribunal does not agree with this conclusion. Whilst it is clear that this block is unlikely to demand significant management, it is still reasonable to employ management agents, not least to carry out periodic surveys, deal with any maintenance and repair issues that spring up from time to time and administer the service charge. Therefore the Tribunal considers that it is reasonable to employ a managing agent and recover the costs of the same through the service charge. However, that is not an endorsement of the actual work that has been carried out to date, nor the level of fees charged.

Consultation

23. Another matter that Mr Gibson had put firmly into issue was whether or not the managing agent's fees should be capped because of a failure to comply with the statutory consultation provisions under s.20 of the 1985 Act.

24. Again, as with the s.21B issue, Synergy did not provide satisfactory evidence in this regard. Firstly, their Statement of Case only referred to their agreement with the new agents, Hunt PM and not those for Flude, whose fees represented the majority of those claimed. Secondly, whilst they provided the contract of engagement with new managing agents, no contract with the Flude was provided. Thirdly, as there was no witness for Synergy, there was no one to explain these omissions and Mr Green was unable to assist any further.

25. In light of that, the Tribunal draws the inference that the contract between Synergy and Flude was in excess of 12 months and therefore was a qualifying long term agreement within the meaning of s.20, for which no statutory consultation had been followed. Accordingly, the charges for the period when Flude was managing would have been capped at £100 per annum.

Section 19

26. Mr Gibson's final challenge to the management fees is that even if they are payable, the actual service provided has been poor and in any event the level of charge is high even if a good service had been provided.

27. The Tribunal has considerable sympathy with both these views.

28. Firstly, Flude does not appear to have provided a good service, as demonstrated by the double charge highlighted above. Secondly, in any event, £1,500 a year is on the high side for this type of property which did not demand much attention.

29. In light of that, had both the s.21B and s.20 issue not restricted recovery, the Tribunal would have allowed £750 per annum including VAT; this would also have applied for the management fees after Flude, when Hunt PM were appointed.

Professional Fees / Major Works

30. These costs, incurred and charged in the year end 2017, relate to works to the ground floor area. This is a commercial unit under Mr Gibson's flat.

31. The Lessor's obligations under clause 6 (for which it is entitled to a contribution to the costs of the same from the Lessor under clause 4) include remedying

> '*... all defects in and keep in good and substantial repair and condition throughout the term ... the whole ... and each and every part of the Block which is not comprised in the Flat and not subject of the Lessee's covenant in Clause 4 (a) hereof or any similar lessee's covenant in any Lease of the other flat in the Block including without prejudice to the generality of the forgoing: ... 6 (c) (1)(2) the main structure of the Block including ... the foundations and exterior walls thereof and all structural slabs or joists thereof and all internal loadbearing walls ...'*

32. The Block is defined in the recital as the '*ground floor shop premises and the maisonette on the first and second floor*'. The Flat is defined as the said maisonette. The reference to '*other flat in the Block'* in clause 6 is therefore ambiguous and in the Tribunal's view properly construed

must also include the downstairs unit. It cannot have been intended that the Flat would be responsible for contributing the costs of repair of the internal parts of the ground floor commercial unit, particularly those parts which were not structural in a loadbearing sense.

33. Mr Gibson contends that the professional fees claimed of £1,320 for the year end 2017 relate to the commercial unit on the ground floor and are therefore not recoverable from him by way of service charge. Alternatively, it is said they were inflated due to the negligence of Synergy's contractors.

34. The £1,320 (inclusive of VAT) comprises two invoices from HT Partnership, a firm of structural engineers. The first invoice, dated 27th June 2017, for £464.40, is for attendance at site meeting, checking beams and survey as well as discussions. The second, dated 6th July 2017, for £855.60, was for further site visit and preparation of drawings for alteration works on the ground floor. In an email to Mr Gibson dated 22nd August 2017, Mr Harkness of HT Partnership stated

> '*Due to the builder not complying with our recommendations we had to revisit on 2 occasions and prepare design information which the 2 invoices totalling £1,100 plus VAT covered.*'

35. Given the involvement of HT Partnership and taking into account the works undertaken, it appears from the evidence that these were structural in the sense of loadbearing works, which fell within the Lessor's obligations under the terms of the lease. However, from the email of HT Partnership it appears that the approach that was taken was

unreasonable in that the necessary works could have been designed, calculated and carried out at far less cost. Accordingly, these professional sums would not have been allowed as being unreasonably incurred under s.19 of the 1985 Act.

36. Mr Gibson also made the same argument for the internal works of £2,051 claimed for the same period. They were the two invoices referred to above for which he was double charged. The first, dated 17th April 2017 gives little by way of narrative, but as it appears to have been in relation to structural works and appears to have caused the additional work referred to by the HT Partnership. To that end, whilst it may relate to works potentially within the Lessor's obligations, the failure to adhere to the advice of the structural engineers seems to have caused more work to be necessary. To that end, it is difficult to see how this was work that was to a reasonable standard for the purpose of s.19 and accordingly it would have been disallowed. As for the second invoice, dated 6th November 2017, that is also reflective of prior poor workmanship as it relates to the need to uncover a manhole that the previous builders had constructed a door frame over. In any event, that seems to be a matter that was related to the refurbishment of the downstairs unit, being by way of improvement and refurbishment rather than repair. It would therefore not have been recoverable.

Budget

37. The final item challenged was the provision on account of £1,200 for general maintenance for the year ending 2019. Synergy was unable to

show the basis for this amount. Given this was for anticipated small items of repair, with no actual expenditure the previous year, it seemed high to the Tribunal and only £500 would have been allowed.

Conclusion

38. Given the failure to adhere to s.21B of the 1985 Act, nothing is payable.

39. The Tribunal has nonetheless gone on to deal with the other issues which it heard evidence on; albeit that it was provided with limited information from Synergy. To that end had the summary been provided with the demands the amount payable would have been reduced in the following manner:

    a. for the years ending 2017 and 2018, only £100 would be recoverable for management fees;

    b. for the year ending 2019, £500 would have been allowed as a payment on account for repairs, in addition to a management fee of £100 for the period in which Flude was engaged and then £750 for that with PM Hunt.

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 to the First-tier Tribunal at the Regional office which has been dealing with the case.

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.