FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/00HP/LIS/2019/0005
Property	**:**	Flat 19 Barons Court, 100 Princess Road, Branksome, Poole BH12 1BP
Applicant	**:**	Caroline Helen Kelleway
Representative	**:**	
Respondent	**:**	(1) Silverstone Properties Limited (2) Hythelodge Limited
Representative	**:**	Black Graff LLP
Type of Application	**:**	Determination of service charge
Tribunal Member(s)	**:**	Judge D. R. Whitney
Date of Determination	**:**	22nd July 2019

DETERMINATION

Background

1. The Applicant seeks a determination of various service charges for the years ending 2013 to 2018 inclusive.

2. Directions were issued on 23rd January 2019 with subsequent directions issued following a telephone case management hearing on 12th April 2019. It was agreed the issues to be determined were:

    - Was the cost of insuring the building which included the cost of insuring the garage block reasonable and recoverable from the Applicant?
    - Were various sums linked to maintenance of the garage block and surrounding area recoverable from the Applicant?
    - Was the Applicant required to pay 1/20th of the costs of maintenance of driveway and roads?

3. The Applicant is the owner of the leasehold interest in Flat 19 Barons Court, 100 Princess Road, Branksome, Poole ("the Property").

4. Hythelodge Limited are the management company who demanded the service charge and Silverstone Properties Limited are the freeholder.

5. The Respondent conceded at the CMH that the lease does not allow the Respondent to recover the cost of insuring the garage block. Its position was however that by including the garages within the insurance this did not increase the cost.

6. These directions and the dates for compliance were made with the agreement of all parties. Both parties agreed that the matter may be determined by the Tribunal on paper without the need for a hearing. Neither party sought to rely upon any expert evidence.

7. A hearing bundle has been supplied by the Applicant and references in [] are to pages within that bundle. The Respondent's representative has also filed a skeleton argument.

Determination

8. The tribunal in making its determination has had regard to all matters contained within the hearing bundle and skeleton argument filed.

9. The Property is one of 20 flats which are contained in two purpose built blocks. The blocks are set in grounds lying between Princess Road and Poole Road. There is also a separate block of 8 garages.

Two of the garages are let on long leases to persons who are leaseholders of residential flats. The remaining 6 garages remain in the ownership of the freeholder.

Garage Insurance

10. It was helpfully conceded by the Respondent that under the terms of the lease the Respondent could not recover the cost of insuring the premises. The Respondent principally relies upon a witness statement and exhibits of Mr David Armstrong of Towergate Underwriting Group Limited. In short his evidence is that including the garages means that they are insured at a discounted rate and it would not be cost effective to split the policy (see paragraph 5 of his statement).

11. The Applicant suggests that including the garages is in breach of the lease and as a result of their being included the premium is higher. She refers to an insurance valuation undertaken by Mr Rob Samways for Rebbeck Brothers whom the tribunal believes are the Respondent's property managers for the development. This valuation [83-88] states that the re-build cost of the garages would be £62,000 amounting to 3.152% of the total value insured.

12. Further the Applicant relies upon a witness statement of James McComish of McComish Insurance Brokers Limited. In short his evidence is that including the garages in the policy will lead to some increase in the cost payable for insuring the totality including the garages.

13. The Respondent suggests the tribunal should have no regard to the witness statement of Mr McComish or the valuation of Mr Samway both being effectively expert evidence. The tribunal disagrees. The insurance valuation of Mr Samway was prepared for the Respondents and forms part of the basis of the insurance they have in place. As a matter of fact this does give a value for the garages which no doubt an insurer would have regard to. Certainly it would seem this valuation was obtained for the purpose of ensuring adequate insurance was in place.

14. The Applicant also contends due to the case of Green v. 180 Archway Road Management Co Ltd [2012] UKUT 245 (LC) that none of the premium is payable. The tribunal disagrees with this interpretation of that case. In that case the insurance was not in accordance with the lease. In the instance case it is accepted that the insurance is in accordance with the lease but what is covered includes the garages the cost of insuring which should not be recovered from the leaseholder.

15. The tribunal does not accept the Respondents arguments. Whilst the amount of any reduction in the premium charged to the leaseholder may be modest they are not entitled to include the

garages. We find as a matter of fact the Respondents choose to include the garages with the rest of their legal estate for ease and convenience. Further the garages were insured at a discounted rate as stated by their witness Mr Armstrong. As freeholder this is their prerogative but in so doing they must apportion the costs. Mr Armstrong does not suggest that there is no cost involved including the garages simply that to apportion the premium would require valuations. It is unclear whether he is aware of the Samways valuation. Such a valuation is something that the Respondents do already have within their possession.

16. The tribunal determines that for each of the years in dispute the insurance premium payable by the Applicant should be reduced by 3.152%. This is the percentage of the total value which can be apportioned to the garages using the Samways valuation. This was a valuation prepared on behalf of the Respondents and as a matter of fact may be used for the apportionment exercise as recommended by Mr Armstong.

Maintenance of the garage block

17. The Respondent relies upon the leading case of Arnold v. Britton [2015] UKSC 36. The Respondent suggests that the garages fall within what under the lease they are required to maintain and that the cost is recoverable under the service charge regime.

18. The Applicant owns the Property subject to a lease made between her and the Respondents dated 22nd July 2014 [40-50]. This is a statutory extension of the original lease dated 1st July 1988 and made between the Respondents and Mrs N C Reed [15-39]. It is common ground that the lease plan does not contain any red line despite "the Site" being defined as "…the land shown edged red on the Plan." The Importance of this is that "the Reserved Premises" are defined by reference to the Site. The Respondents case is that in looking at the wording of the lease as a whole it is clear that the garage block should form part of the Site.

19. The Applicant relies on one of the garage leases [51-60] which requires the Respondents to maintain and repair the garages subject to payment of one eighth of the costs. The Respondents are once again the freeholder and management company whom originally granted this lease.

20. The tribunal notes that it is the Respondent seeking to recover the costs incurred by it in maintaining the garages. The tribunal suggests if there is any ambiguity in the terms of the lease such ambiguity should be determined in favour of the leaseholder.

21. It is unfortunate there is no red line upon the plan and that this was not corrected when the lease extension was granted. As a matter of fact the garages are treated as a separate building that happens to

be on the site of the two blocks of flats. This is the case in the leases presented. The tribunal is satisfied that when the original lease was drafted and the garage lease was drafted (which appears to be in or abut 1985 although the exact date cannot be read on the copy within the bundle) it was intended that the repair and maintenance of the garage would be dealt with separately. It would have been easy for the Respondents to have included the garages within the lease, the definition of Estate Buildings could have been changed to ensure the garage block formed part. It would appear it was always envisaged by the draftsman of the leasehold scheme that those persons who owned a garage would contribute towards the insurance and maintenance of the same and that the garage block would be treated separately to the two blocks of flats.

22. We do not accept the Respondents argument that the garage block should be included within the Site. Looking at the totality of the evidence and the wording of the leases, including the garage lease which of itself is part of the scheme for this site we do not accept the respondents proposition.

23. We are satisfied that the garage block does not form part of the Reserved Premises and any and all costs relating to the same are not recoverable under the terms of the Applicants lease. It will be for the Respondent to re-draw the service charges for the years in dispute removing any and all items which are attributable to works to the garage block.

Maintenance costs of the driveway

24. The Applicant contends that whilst her lease specifies she must pay 1/20th of the costs of the maintenance of the driveway and road on the estate this apportionment is wrong.

25. The Applicant contends this since she states the owners of the garages should contribute towards the costs. The garage lease, within the bundle, provides that if the owner of that lease does not own a flat they should contribute towards the cost of maintaining the roadways. If the owner of that lease also owns a flat and contributes as a flat owner they are not required to make an additional contribution. The Applicant suggests in short this may mean that the Respondent could recover more than 100% of the cost or that the 6 undemised garages do not contribute to the maintenance of the roadways.

26. We prefer the argument of the Respondent on this point.

27. It is plain the Applicant is required to contribute towards the costs of maintenance of the driveway and roads on the estate. Her proportion is fixed under the terms of the lease as 1/20th. The tribunal does not have any jurisdiction under this application to

depart from that proportion which the lease applies. The Applicant must pay 1/20th of all such costs.

Section 20C and fees

28. The Applicant in her application sought an order pursuant to Section 20C of the Landlord and Tenant Act 1985.

29. The Respondent states that no representations have been made despite the directions providing that the parties should make any representations they wish to make within their statements. As a result the Respondent suggests that the tribunal should not make any order. Further the skeleton argument sets out that the Applicant has withheld all service charges and they suggest that notwithstanding this application the bulk are payable.

30. Whilst it is correct that the Applicant has made no further representations her application included a request for an order and the question of reimbursement of fees is always at the tribunal's discretion. We are satisfied it is appropriate for the tribunal to consider what if any order should be made. It is plain from the case papers that both parties have approached the application in a wholly appropriate and proportionate manner.

31. In exercising its discretion the tribunal must consider all matters. It is not simply an exercise in who may be said to be a winner. This tribunal is satisfied that the application was necessary to resolve these issues as to the interpretation of the lease. On balance it determines that exercising its discretion it would not be just and equitable for the Respondent to be in a position to recover any costs incurred in this application and so the tribunal makes an Order pursuant to Section 20C.

32. Further the tribunal exercises its discretion and orders that the Respondent will within 21 days reimburse the Applicant for the application fee of £100.

Judge D. R. Whitney

RIGHTS OF APPEAL

1. 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.

2. 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.

3. 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.

4. 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