FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/42UD/LSC/2019/0080** **A : BTMMREMOTE**
Property	**:**	Revetts House, 59–63 Norwich Road, Ipswich IP1 2EP
Applicants	**:**	Riverdale (Norwich Road) Company Limited, and the 11 individual lessees listed on the application
Representative	**:**	Marcus Croskell [public access barrister)]
Respondent	**:**	Malvin Paul Brown [in person]
Type of Application	**:**	for determination of reasonableness and payability of service charges (insurance) for the years 2012 to date (2019)
Tribunal	**:**	Judge G K Sinclair
Date and venue of Hearing	**:**	Tuesday 28th April 2020, by telephone hearing
Date of decision	**:**	12th May 2020

DECISION

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Cases referred to :
Atherton & ors v M B Freeholds Ltd [2017] UKUT 497 (LC)
Bristol & West BS v Mothew [1998] 1 Ch 1 (CA)
Green v 180 Archway Road Management Co Ltd [2012] UKUT 245 (LC)

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- Material statutory provisions .... paras 21–26
- The hearing .... paras 27–42
- Discussion and findings .... paras 43–60

1. This application was due to be determined by the tribunal by means of an oral hearing at Cambridge Magistrates Court on Tuesday 28th April 2020. However, due to restrictions imposed in consequence of the coronavirus pandemic in late March this had to be altered, and it was agreed that the hearing should proceed as a remote hearing conducted by telephone. In addition to judge, counsel and the parties or their representatives was a recently appointed salaried judge of the tribunal, but strictly in the capacity of observer. This is the decision of the judge appointed to hear the case, and him alone.

2. Reframing the various questions asked in the application form and applicants' statement of case, the applicant lessee-owned management company and the eleven individual lessees seek determinations that :
   a. The duty to insure the building under the residential leases is that of the management company named in the leases, and not the landlord
   b. The landlord is not entitled to demand contributions to the insurance premium from the lessees of the flats
   c. Having arranged insurance through a professional broker the landlord is not entitled to add and retain commission for himself
   d. The insurance arranged by the landlord is non-compliant with what the leases require
   e. The landlord should therefore repay the commission he added to the sums demanded from the lessees of the flats for insuring the building
   f. The lessees of the flats should not have to pay for plate glass insurance which benefits only the ground floor shop units
   g. The lessees of the flats should not have to pay 100% of the service charges for the building
   h. The landlord should remit to the management company contributions due from shop lessees for insurance premiums and service charges
   i. Where the shop units are unlet the landlord should directly contribute the share of insurance and service charges due in respect of such unlet units.

3. At the hearing the applicants also sought an order with respect to the landlord's costs under section 20C of the Landlord and Tenant Act 1985.

4. For the reasons which follow the tribunal determines that :
   a. The duty to insure the building under the residential leases is that of the management company named in the leases, and not the landlord
   b. As the insurance premium forms part of the overall service charge levied by the management company, and in view of the finding recorded under a. above, the landlord is not entitled to demand contributions towards the buildings (or any other) insurance premium
   c. Not having directly arranged the insurance as agent for the management company, the landlord is not entitled to recover reasonable commission under clause 7.2 of the flat leases
   d. Quite apart from the buildings insurance being arranged by the landlord's insurance broker, acting on behalf of the landlord only, the insurance does not comply with the requirements of the lease
   e. Although the authorities cited by the applicant's counsel might entitle the applicants to reimbursement of the entirety of the insurance premiums demanded by the respondent that is not how they have put their case, and the respondent shall instead repay the management company, to credit

against each lessee's service charge account, the commission received by him in the period 2012/13 to 2019/20, assessed in the sum of £8,386.86

f. Subject to it insuring, as a minimum, against the "insured risks" listed in clause 2.10 and such other risks as the landlord shall from time to time reasonably require, it is a matter for the management company whether to include plate glass cover. Failure to protect the structural integrity of the building and its security against intruders at ground floor level might prove counter-productive, as might the landlord's refusal to pay affect the reasonableness of his requirement that it do so

g. As confirmed by paragraph 8.4.2, the costs incurred by the company in carrying out the services are subject to reimbursement, recoupment or indemnity by the tenants (in common with all other tenants of the estate), so that no residual expenses or liabilities shall fall upon the company. The "estate" includes the shop units, so the liability of the flats lessees is less than 100%

h-I. There is a lacuna in the flat leases whereby no mention is made of liability for payment of service charges in respect of either unlet flats or the shops on the ground floor. The shop lease included in the hearing bundle does not mention the management company or its role in managing (and insuring) the building at all, and requires service charges and insurance premiums to be paid to the landlord. The tribunal has no power under the 1985 Act to intervene in non-residential leases. Resolution can be found only by negotiation between landlord and company, by the bringing of County Court proceedings against the landlord, or alternatively by the flat lessees taking steps under Part 1 of the Leasehold Reform Housing and Urban Development Act 1993, upon which professional advice is needed.

5. As the applicant management company is responsible for carrying out services, the cost of which may be passed on by way of service charge, there is no way in which the costs incurred by the landlord in connection with these proceedings (if any, as he has not sought legal advice) can ever form part of the service charge. The application made under section 20C of the 1985 Act is therefore unnecessary and misconceived.

6. While the respondent's case on insurance was always doomed to fail, as any legal adviser could have told him after reading the lease, pursuing a meritless defence is not of itself "act[ing] unreasonably in the bringing, defending or conducting proceedings" which is deserving of an adverse costs order under rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. This application is also dismissed.

Relevant provisions in the lease

7. The sample leases in the hearing bundle are dated 31st October 2005 (flat 17) and 7th November 2005 (flat 5), and start at page [10]. They are tripartite in nature, with Riverdale Assets Ltd identified as "the landlord", Riverdale (Norwich Road) Company Ltd as "the Company", and (respectively) Severine Hamilton and Neil Westby as "the tenant." The premises were demised for a term of 125 years from 1st January 2004 at a stepped annual rent of £175 for the first 25 years, rising for each 25 year period thereafter to £350, £525, £700, and finally £875.

8. Some of the definitions set out in clause 2 are relevant. By clause 2.2 "the estate"

means :

> ...the land in respect of which the landlord is or was the registered proprietor under the Title Number [SK219315] but excluding any areas shown uncoloured on the plan forming the site of any substation gas governor pumping station or similar installation.

9. By clause 2.3 "management areas" means :

> ...those parts of the estate the maintenance of which are the responsibility of the Company including (but without prejudice to the generality of the above) the common parts

However, this must also be read with clause 3.4, which states that :

> The expression "the management areas" where the context so admits includes any additional land and buildings in which the landlord has or which during the term the landlord shall have acquired the freehold or leasehold interest and which shall have been so constructed or acquired to form part of the management areas

10. Clause 2.5 defines the "main structure" as including at 2.5.1 the "common parts", which are themselves defined in 2.6 as meaning :

> ...any entrance-hall lobby passageway staircase landing lifts (if any) and meter cupboard and other ways and areas in the building and any pipes of areas within the estate which are from time to time during the term used in common by the tenants and the occupiers of the building or persons expressly or by implication authorised by them

11. Clause 2.8 refers to "the plan" by reference to that annexed to the lease (except that none is annexed to that in the bundle), and 2.10 defines the "insured risks".

12. The tenant's covenants appear at clause 5, and by 5.1 the tenant covenants to pay the yearly rent to the landlord and the service charge to the company. By clause 4 (the demise) the service charge is payable by way of further or additional rent.

13. Clause 6 contains the landlord's covenants, including at 6.2 to grant

> ...to the company in respect of the management areas all rights necessary for it to observe and perform the covenants given by the company as set out in clause 7.1 and 7.3 hereof. *[NB NOT 7.2, concerning insurance]*

14. By clause 7 the company covenants with the tenant and as a separate covenant with the landlord to undertake three things. Clause 7.1 concerns management obligations, 7.2 insurance of the building, and 7.3 reinstatement of the building after damage by any of the insured risks.

15. At clause 7.1 the company covenants :

> ...to observe and perform its obligations contained in the Fifth Schedule (for which the landlord authorises the company to exercise such rights as shall be necessary for the carrying out of those obligations)

16. Clause 7.2 is crucial to the determination of this application. The company here covenants :

> To insure and keep insured the building or to procure the same through the agency of the landlord or through such other agency as the landlord

shall from time to time specify in the joint names of the landlord and all persons having any interest in the building against loss or damage by the insured risks in some other insurance office of repute in the sum equivalent to the amount at least of the full reinstatement value from time to time of the building (including adequate amounts in respect of professional fees) and the landlord shall be entitled to receive a proper commission in respect of the insurance arrangement and shall also take out and keep on foot in the said names a policy of insurance in any insurance office of repute covering liability for injury to persons in the building and shall make all the payments necessary for those purposes within seven days after the same shall become payable and shall produce to the tenant on reasonable demand at the tenant's expense the policy or policies of such insurance and the receipt for the same PROVIDED THAT instead of effecting the said insurance in the joint names of the said persons the company may ensure that the interests of the said persons are noted on the relevant policies of insurance

17. The Fifth Schedule deals comprehensively with the service charge. Part A deals with Definitions. "Services" means the services, facilities and amenities specified in Part C, and annual expenditure" refers to the costs, expenses and outgoings incurred by the company in respect of the services (as so defined) and also the costs of additional matters set out in Part D. Paragraph 5 defines "service charge" as being the annual contribution payable by the tenant under the lease, being such proportion as shall be certified annually as being just and equitable by the accountants and/or auditors to the company or its managing agents (if any).

18. Part B concerns the performance of the services by the company, calculation by it of the annual service charge expenditure and the mechanism for demanding payment of the lessees' respective shares. Paragraph 8.4.2 explains that :

    The intention of the company and the tenant in relation to the service charge provisions in this lease is that all costs expenses and other liabilities which are incurred by or on behalf of the company shall be the subject of reimbursement recoupment or indemnity by the tenant (in common with all other tenants of the estate) so that no residual liability for any such costs expenses or liabilities shall fall upon the company.

19. Among the specific services to be performed by the company and listed in Part C are :

    10. Maintaining etc the main structure
    14. Insuring against legal liability relating to all third party claims usually insured against under public liability insurance...
    15. Insuring the building against loss or damage by the insured risks in accordance with clause 7.2
    16. Insuring any risks for which the company may be liable as an employer of persons working in or on the building and/or on the management areas or as the owner of the building and/or the management areas or any of them as it shall think fit.

20. Part D lists the Additional Items, the cost of which may be included in the annual service charge levied by the company. They include :

22. Managing and administering the building, employing a firm of managing agents and enforcing observance by tenants of flats of their covenants
23. Employing accountants
26. Administering the company itself and arranging for the calling of meetings
27. Paying the fees and disbursements paid to any managing agent appointed by the company but if the company does not appoint such an agent it shall be entitled to add a sum not exceeding 15% of any expenditure incurred by the company under the provisions of this Schedule for administration.

Material statutory provisions

21. The long title of the Landlord and Tenant Act 1985 is

> *An Act to consolidate certain provisions of the law of landlord and tenant formerly found in the Housing Acts, together with the Landlord and Tenant Act 1962, with amendments to give effect to recommendations of the Law Commission*

The Act concerns tenancies of "dwellings" or dwelling-houses", which may comprise the whole or part of a building.

22. Section 18 of the Act defines the expression "service charge," for the tribunal's purposes, 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... *[emphasis added]*

23. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :
    a. only to the extent that they are reasonably incurred, and
    b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

24. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985; and so are equally restricted to service charges payable by the tenant of a dwelling.

25. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

26. Section 30A of the 1985 Act provides that the Schedule to the Act (which confers on tenants certain rights with respect to the insurance of their dwellings) shall have effect. The Schedule provides at paragraph 2 that where a tenant pays a service charge which includes an element for insurance s/he may by notice in writing require the landlord[1] to provide a written summary of the policy, this to be supplied within 21 days. By paragraph 3 the tenant may ask to inspect a copy of the policy and, by paragraph 7, where damage has been caused and it is a term

[1] For the purposes of the Schedule "landlord" includes anyone entitled to enforce payment of the service charge

of the policy :

> ...that the person insured under the policy should give notice of any claim under it to the insurer within a specified period, the tenant may, within that specified period, serve on the insurer a notice in writing stating that it appears to him that damage has been caused [...] and describing briefly the nature of the damage.

The hearing

27. The hearing, conducted by telephone, was attended by Mr Croskell (counsel) and Messrs Leggett and Matsell on behalf of the applicants and by the respondent, Mr Brown, in person. The tribunal had before it a paper hearing bundle prepared by the applicants comprising 226 pages, to which several missing documents such as the tribunal's directions had to be added. This bundle also included a sample 10-year commercial lease, granted by Mr Brown to Alexandreja Ltd and dated 7th August 2012, for one of the ground floor shop units. Mr Brown submitted his own small bundle of documents, including his statement of case and a copy of the current buildings insurance policy.

28. In a directions order dated 13th January 2020 Regional Judge Wayte had asked the respondent, in his statement of case, to deal with a long list of specific matters. Mr Brown took that as an instruction to concentrate on the tribunal's questions and not those raised by the applicants, so he ignored the latter.

29. Directions specifically aimed at the applicant included requests for the provision of comparable evidence from brokers, of the level of insurance, and the grounds for objection to the premium, administration charge and commission. These are typical for challenges to the landlord's choice of insurer and/or insurance cover.

30. At the outset of the hearing the tribunal asked Mr Brown whether he had sought or obtained any legal advice concerning this application. He confirmed that he had not. The tribunal noted the absence from the lease of the lease plan, which might have assisted in explaining the layout of the building and the extent of the management areas, and the lack of any information from insurance brokers as to usual levels of commission, market rates for insuring a building of this size, etc. Brokers had apparently invited the company to renew such enquiries nearer to the policy renewal date in June.

31. Mr Croskell opened by saying that while the principal issue before the tribunal was the question who was entitled under the lease to insure the building, and the consequences of Mr Brown's actions in that regard after the resignation of the company's original managing agents, EWS, a second issue related to the lack of contribution by the shops or (should they be unlet) the landlord to the service charge due for services performed by the company.

32. The tribunal was referred to a spreadsheet [69] created by EWS which showed the respective net internal areas of each of the flats and also the shops, with their relative percentage shares of service charge recorded against each unit. The service charge was divided into two, A and B, one being divided between the flats only and the other also contributed to by the shop units.

33. The issues raised by the applicants can be summarised as :
    a. The fact that since 2008 the landlord had taken over – and, despite the

service of a solicitors' letter in 2017 asking for his cooperation in doing so, refused to yield to the company – responsibility for insuring the building, a matter which came to a head after the making of a substantial claim for escape of water in 2016 and imposition of stringent terms as to occupancy

b. The landlord's failure to insure the building for its true reinstatement value, putting at risk full recovery in the event of a claim

c. Failure, contrary to the lease, to insure in the joint names of the landlord and all those having an interest in the building; alternatively to note their interest on the policy

d. The landlord's instruction to the broker not to deal with representatives of the company, as evidenced by the broker's email at [123]

e. The inclusion in the buildings policy of additional plate glass cover for the ground floor shops, to which neither shops nor landlord contributed

f. The refusal of the landlord to disclose details of the insurance premiums paid, so that the extent of his own commission could be calculated

g. The issuing of demands for payment of the premium, contrary to the lease

h. The landlord's non-contribution, nor that of the shops, to the service costs incurred by the company under the Fifth Schedule when managing the entire building

34. Mr Brown said that when he bought Revetts House he did what every property owner does immediately on purchase, namely take out buildings insurance. He considered that he had every right to do so, and – despite the three possible options in clause 7.2 being explained to him – believed that his interpretation of the clause was correct and entitled him not only to insure it as landlord but also to receive commission for arranging the insurance. None came from the Lloyds brokers that he uses; he simply topped up the cost of the premium to the same figure each year, making it simpler for lessees by ensuring that the gross premium remained the same. He charged flats two basic premium rates : £280 for the smaller flats and £330 for the duplex ones with balconies.

35. Asked about the apparent lack of candour, for example by invoicing lessees for their contribution to the premium [112] without disclosing the premium paid and the element retained by him, or by providing an insurance schedule [73] where the premium, IPT and policy admin fee were all redacted, it was put to him by the tribunal that if, under clause 7.2, he arranged the insurance on behalf of the company then he was doing so as its agent and owed it fiduciary obligations, including not to make a profit without his principal's informed consent.

36. He was of the view that the applicants had been pestering the broker with queries so instructed them only to deal with one individual, Ron Dixon, described as being an employee of the management company. Whether by that Mr Brown meant the managing agents, Encore, was not clarified.

37. There was in evidence a property reinstatement valuation prepared in October 2015 on the instructions of the company's current managing agents, Encore Estate Management Ltd of Cambridge. That assessed the reinstatement valuation, including allowances for professional fees and VAT, at £4,514,156.05. By contrast, the respondent landlord valued the building for insurance purposes at only £3,500,000; a figure which he regards as adequate, based entirely on his own belief rather than any professional assessment.

38. Mr Brown insisted that the insurance policy covered all windows in the building, including the plate glass; although the windows in each flat are included in the premises demised in the First Schedule, and therefore do not form part of the main structure as defined. The applicants insisted that plate glass cover was additional.

39. Perhaps prompted by the tribunal's observation that it had no jurisdiction to deal with service charge issues in non-residential leases, and that such provisions in the shop leases were inconsistent with the wording of the earlier flat leases, Mr Brown did not have anything positive to say in response to the applicants' claim that he should make a contribution to the company for and on behalf of the shop units, let or unlet.

40. In his closing submissions Mr Croskell referred the tribunal to the table at [158]. These figures had been obtained by the applicants, based on the total amounts invoiced by the respondent to the flat lessees (on the top line) and subtracting the insurance premiums (below the first thick line) disclosed by the respondent in item 2 annexed to his statement of case. He submitted that the "admin fees" (3rd line) apparently charged by the broker were high, although he accepted that the applicants had adduced no evidence on that issue.

41. He referred the tribunal to the parties named in the two policies before it, that for 2015/16 [73, @ 76] and 2019/20 [item 4 annexed to the respondent's statement of case], and argued that the insurance failed to comply with what was required by clause 7.2 in the lease. Although he accepted that the applicants had drafted their case on the basis that they sought repayment of the "commission" retained by Mr Brown he cited two cases which justified an order for reimbursement of the entire premiums. These two cases, decided by the Lands Chamber of the Upper Tribunal, were *Atherton & ors v M B Freeholds Ltd*[2] and *Green v 180 Archway Road Management Co Ltd*.[3]

42. Mr Croskell further argued that the landlord was also non-compliant with the terms of the latest policy concerning unoccupancy [respondent's item 5 – CP22], and thus put the cover at risk, by failing to inspect the interior and exterior of each unlet shop unit at least weekly, and to maintain a record of each inspection. Initially Mr Brown said that a caretaker inspected the exterior for him, then that he looked inside as well, and that he as landlord maintained a record at his home in Upminster. It was put to him that those inspecting premises, whether to prove that public toilets have been cleaned or for some other purpose, usually signed a sheet or file to demonstrate that they had done so. How could the caretaker do this if Mr Brown kept the record of inspections at his home? He confirmed that there was no signed record.

Discussion and findings

43. The obligation to arrange buildings and other insurance under the lease is quite a straightforward matter of construction. Clause 7.2 requires the company first to insure the building, and secondly to insure against public liability. Insurance

[2] [2017] UKUT 497 (LC)

[3] [2012] UKUT 245 (LC)

of the building can be arranged in one of three ways :

a. By the company directly
b. By the company through the agency of the landlord, or
c. By the company through such other agency as the landlord shall from time to time specify.

Nowhere is the landlord granted authority to arrange the insurance itself, on its own behalf.

44. It is therefore open to the company to bypass the landlord entirely and arrange the insurance, although Financial Conduct Authority regulations concerning the placing of insurance contracts would in practice prevent that. Akin to the provision in paragraph 27 of Part D of the Fifth Schedule, were the landlord to be asked to arrange the insurance (again in practice impossible unless the landlord were authorised to conduct insurance business) then he could charge a proper commission for his efforts. The third, and in effect only realistic, option these days is to ask an insurance intermediary specified by the landlord (or any, if none is specified) to arrange the insurance. For this the intermediary would expect payment either by the insurance company with which the business is placed or by way of a fee or commission agreed with its client. The client is the company; not the landlord.

45. Except under option b. above the landlord would not be entitled to commission, and even if he were then it has to be a "proper" commission. As agent, he would owe fiduciary duties to his principal. One of these is not to make a profit at his principal's expense. In a leading case, *Bristol and West Building Society v Mothew,*[4] Millett LJ stated :

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter or circumstances which give rise to a relationship of trust and confidence.

He went on to say :

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out his trust; he may not act for his own benefit or the benefit of a third person **without the informed consent of his principal**.
>
> *[emphasis added]*

46. If Mr Brown, who in any case did not regard himself as an agent but as landlord acting on his own behalf, declined to reveal to the lessees how much of the amount demanded by him was their share of the premium plus tax demanded by the insurer and how much his own secret profit then how can this be regarded by him as "proper" or the result of the lessees' informed consent?

47. What is astounding in this case is the fact that the company, which at paragraph 6 in its statement of case wrongly but depressingly refers to itself as "dormant", allowed the landlord to get away with insuring the building without effective protest for so long. Despite a letter written on its behalf by Birketts solicitors in May 2017 this application was not issued until two and a half years later.

[4] [1998] Ch 1 at 18

48. The company is not dormant. It has appointed managing agents to act on its behalf, and will no doubt take advice from its professional property managers, but decisions on who to insure with, what to insure (subject to covering all the risks mentioned in the lease and such others as the landlord may reasonably require), the setting of reserve funds, the carrying out of major works and the approval and signing of annual service charge and company accounts are the responsibility of the company acting by its directors and/or its members at regular meetings.

49. The company is therefore free to arrange the various types of insurance provided for in clause 7.2 and Part C of the Fifth Schedule, and it alone is entitled to seek payment for this as part of the service charge for which it alone is responsible.

50. What then are the consequences of the landlord arranging insurance which is non-compliant with the lease, as it was neither taken out in joint names nor had the names of all those interested (which principally means the lessees and their mortgagees, not just the company) noted on the policy schedule?

51. In *Green v 180 Archway Road Management Co Ltd*[5] HHJ Huskinson held, at [15] that :

> ...I consider that to place insurance in the name of the lessor, with no mention of the name of the lessee and with the lessee's interest being dealt with merely by the general interest clause, is not the same thing as placing insurance in the joint names of the lessor and lessee. I am confirmed in this view, ie that the intention of the parties under clause 4(ii) was that something more was required than merely the appellant's interest being dealt with under a general interest clause, by the closing words of clause 4(ii) which contemplate that the lessor will allow a note of the interest of any mortgagee to be endorsed upon the policy.

As the insurance had not been placed in accordance with the provisions of the lease during the years 2006/07 to 2009/10 he concluded that the insurance placed by the respondent was not in accordance with clause 4(ii) and that the appellant was not liable to pay any part of the premiums incurred by the respondent for those years.

52. Although *Green* was not mentioned in *Atherton & ors v M B Freeholds Ltd*[6] the Deputy President, Martin Rodger QC, came to a similar conclusion where the lease required the lessees to take out buildings insurance for their own demised premises, which included the external walls of their part of the main structure, in joint names. The lease entitled the lessor to insure the common parts only, and to recover an apportioned part from each lessee under the service charge. Where the lessor was not satisfied that all the lessees were insuring in the joint names of lessor and lessee and proceeded instead to insure the whole building, the Deputy President posed the question :

> ...whether, having procured insurance which does not correspond to the description in clause 3(vii) [the lessor] is nevertheless entitled to recoup the cost from the appellants. The effect of the proviso is that the lessor's entitlement to recoup the cost of insurance is subject to the condition that the insurance be in accordance with the agreed specification. It is a question of construction of the clause whether any departure from that specification was intended to be fatal to

5 [2012] UKUT 245 (LC)

6 [2017] UKUT 497 (LC)

> the right of recoupment. If, as Mr Wragg argues, the specification was sufficiently important so that any departure from it by the lessee, such as by failing to insure in joint names, would be sufficient to trigger the proviso, it must follow in my judgment that full compliance with the specification is an indispensable condition of the lessor's right of recoupment.

As the lessor was entitled to insure the common parts the Deputy President was prepared to make an apportionment, allowing it to retain only a small part of the cost of the insurance of the entire building.

53. These are both Upper Tribunal decisions and, despite the apparent injustice of allowing the tenants to recover the insurance premiums even though cover had been provided (and perhaps claims made), they would be binding on this tribunal but for Mr Croskell's concession that the claim had been put only on the basis of recovery of the improperly demanded commission. Taking the table at [158] as the basis of assessment the tribunal, in the absence of any actual premium receipts or schedules for all of the years in question, takes the row marked "Difference" (below the second thick line) as the measure of the commission improperly retained by the landlord, Mr Brown, for the period from 2012/13 to 2019/20. The sum of the figures appearing in that row is £8,386.86, and that is repayable by Mr Brown to the company and divided by the two rates levied by the landlord before being credited against the respective flat lessees' service charge accounts.

54. The question whether to include cover against plate glass damage directly affects the shops, and under the sample lease this would be paid by the commercial tenant. The problem arises where, as is presently the case, several units lie unlet. The landlord has declined to make any contribution from his pocket. Under the provisions of the flat leases the landlord can "reasonably require" the company to insure other risks than those specifically mentioned in the lease. If he does not, is it wise for the company not to protect itself against damage which could adversely affect the structural integrity and security of the building? On the other hand, if the landlord does require plate glass cover but refuses to enable the company to recover the cost from those that directly benefit, is he reasonably requiring it to do so? On this both parties should apply their minds and seek professional advice.

55. The management scheme devised by the respondent's predecessor in title as landlord was that the lessee-owned and managed company be created to run the building and manage all required services, levying an annual service charge to cover all necessary insurance as well. The company was given in respect of the management areas all rights necessary for it to observe and perform its covenants concerning management and reinstatement of the building. The costs were to be recovered from the flat lessees and all tenants of the estate. These would include the tenants of shop leases yet to be granted. All the company's costs would be divided, as per the EWS apportionment, amongst all occupiers and the company would not suffer a loss (except from non-payers who could be pursued at law).

56. Unfortunately, when Mr Brown came to grant 10-year business leases of the shop units he ignored the company and its rights and management obligations entirely, arranging that the landlord would insure and carry out the services. As the obligation to manage the entire building, and the right to recoup its costs, had

already been agreed between landlord and company it is arguable that Mr Brown has derogated from his predecessor's grant, causing the company loss, but that is a matter which, should it be necessary, only the County Court can consider as this tribunal has no jurisdiction to impose variations in non-residential leases.

57. As it was agreed at the hearing that the percentage net internal area of the shop units is much less than 25% (10.98% according to the EWS spreadsheet at [69]) the company, if appointed as the flat lessees' nominee purchaser under Part 1 of the Leasehold Reform Housing and Urban Development Act 1993, could resolve the entire matter by acquiring the freehold, becoming landlord of the shop units, and thus acquire the right under the business leases to recover contributions to the service charge, including insurance premiums. But that is all for another day, if at all.

58. At the conclusion of the hearing Mr Croskell rather surprisingly applied for an order under section 20C of the 1985 Act, preventing the landlord's costs of the proceedings from being taken into account in the calculation of any service charge payable by the applicants in this or any subsequent year. Although the box was ticked on the application form this was surprising because the service charge costs and expenses under this lease are controlled by the company, not the landlord. Mr Brown has sought no legal advice and has not been represented, but even if he had there is no provision in the lease entitling him to recover his costs by way of service charge. The application is unnecessary, and no order is made.

59. Mr Croskell also applied for his clients' costs under rule 13(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 , on the grounds that Mr Brown had acted unreasonably in defending or conducting proceedings. Although Mr Brown's case was hopeless he was entitled to argue it, and he had done nothing by way of bringing spurious applications or engaging in other time wasting exercises so as to increase costs unnecessarily. Mr Croskell briefly sought to argue that the landlord had ignored a letter before action, but the letter from Longmores dated 21st October 2019 [155–157] is headed "Letter of Claim", refers to the CPR and the Practice Direction on Pre-Action Protocols and to the duty to consider ADR, and refers entirely to seeking disclosure of the insurance policy and associated documents. It was not a letter that even hinted at a tribunal claim such as this.

60. This is essentially a "no costs" jurisdiction, where many parties are unrepresented and have limited grasp of the rules and procedure, and something rather more is required than arguing a poor case to justify the tribunal imposing a potentially heavy financial penalty on a party simply asking – perhaps naïvely – to be heard.

Dated 12th May 2020

Graham Sinclair
First-tier Tribunal Judge