FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/34UF/LSC/2019/0047**
Property	**:**	**Pavilion Court, Stimpson Avenue, Northampton NN1 4ND**
Applicant	**:**	**The Overs Management Company Limited**
Representative	**:**	**David McClellan, Director**
Respondent	**:**	**Gateway Property Holdings**
Representative	**:**	**Kerry Coleman, in-house solicitor**
Type of application	**:**	**For the determination of the reasonableness of and the liability to pay a service charge (insurance)**
Tribunal members	**:**	**Judge Wayte**
Date of decision	**:**	**16 December 2019**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sum of £5,172.69 is payable in respect of insurance for 2018/19 and £3,881.33 for 2019/20.

(2) The tribunal determines that the late payment fee of £30 is not payable.

(3) The respondent has conceded that the applicant may choose whether to arrange insurance itself for future years, provided it complies with the lease as set out in this decision.

(4) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A to Schedule 11 of the Commonhold and Leasehold Reform Act 2002 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service or administration charge.

The application

1. The Applicant sought a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount payable in respect of insurance of the Property.

2. The relevant legal provisions are set out in the Appendix to this decision.

The background

3. The property which is the subject of this application is a modern development of 42 long residential leases granted between 2007 and 2008. The applicant's representative is one of the original leaseholders under a tri-partite lease dated 24 October 2008. That lease was granted by the developer, David Wilson Homes Limited and envisaged the transfer of the freehold to the applicant management company, who under the lease were intended to take responsibility for management, including insuring the property on behalf of the lessor and lessees.

4. In fact, the freehold was transferred to the respondent on 11 September 2009. No explanation was provided by either party as to why the freehold was not transferred to the applicant. The respondent's statement of case claims that the applicant asked it to insure, following the respondent's nomination of a particular insurer, although this is disputed by the applicant's current directors. Copies of the insurance certificates have been provided for 2010 through to 2019.

The issues

5. Directions were originally given on 8 August 2019. Following a challenge to the tribunal's jurisdiction by the respondent, a telephone case management hearing was held on 3 October 2019 which resulted in amended directions of the same date. Both parties were required to submit bundles for a paper determination, including statements of case. The issues have been clarified following receipt of the parties' bundles as required by the directions and the respondent's challenge as

to jurisdiction was not pursued. The remaining issues are therefore as follows:

(i) The service charge years in dispute: the application mentioned 2007 to date but this would pre-date the respondent's ownership of the freehold. The respondent maintains that any refund can only go back 6 years due to the Limitation Act 1980;

(ii) The payability and/or reasonableness of the insurance costs for the years to be determined;

(iii) The payability of the late payment charge of £30 levied by the respondent;

(iv) Whether an order under section 20C of the Landlord and Tenant Act 1985/paragraph 5A of the Commonhold and Leasehold Reform Act 2002 should be made, limiting payment of the landlord's costs of the proceedings.

6. Having considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The service charge years in dispute

7. As stated above, the application sought a refund of any overpayment from 2007 to 2017. However, this respondent only bought the freehold in 2009 and therefore the earliest any claim could commence against them would be from that date. The respondent has also raised the potential of the Limitation Act 1980, which limits claims under contract to 6 years.

8. As stated in Tanfield Chambers' Service Charges and Management (4th Edition), there is Upper Tribunal authority stating that a tenant's application under section 27A of the 1985 Act will not engage the Limitation Act 1980, as it is for a determination of payability and/or reasonableness rather than an action to recover arrears of a service charge. However, section 27A is also clear that no application may be made in respect of a matter which has been agreed or admitted by the tenant, for example by a long period of payment without challenge. The tribunal's case management powers and the overriding objective in the Tribunal Procedure (First-tier Tribunal)(Property Chamber)Rules 2013 may also operate to limit cases in terms of proportionality to deal with them fairly and justly.

9. This application has been brought by the management company, following a change in directors in 2018. Although the company is owned by the leaseholders, the application concedes that there was general apathy before that date, partly due to the fact that over 75% of

the flats are buy-to-let investments rather than owner-occupied. There is no evidence in the bundle that the insurance arrangements have been challenged by the applicant before 2018 and in those circumstances, taking into account the considerations in paragraph 8 above, the tribunal determines that this application should be limited to the insurance premium claimed for 2018/19 and 2019/20. It may be that individual leaseholders are able to provide evidence of protest in respect of payment of the insurance costs before 2018 but that would require a separate application in respect of any earlier period by them.

The payability of the insurance costs for 2018 /19 and 2019/20

10. The starting point in respect of payability is the lease. The relevant clauses are as follows:

By the Third Schedule, paragraph 2 the lessee covenants: *"To pay all insurance premiums or the proportion of such premium or premiums attributable to the Property as the Management Company shall incur pursuant to the obligation contained in paragraph 9 of the Sixth Schedule."*

By the Fifth Schedule, paragraph 5 the lessor covenants: *"Where its identity is separate from that of the Management Company and pending the transfer of the freehold to the Management Company to comply with the covenants on the part of the Management Company set out in the Sixth Schedule."*

By the Sixth Schedule, paragraph 9 the management company covenants to: "*Insure and keep insured the Building (including the Property) in the joint names of the Lessor, Lessee and other lessees and their mortgagees against all risks from time to time included in the usual comprehensive block buildings insurance policy and such other risks as the Lessor shall in its absolute discretion deem necessary in a sum equal to their full re-building cost (including the removal of debris)(as determined by the Lessor's Surveyor) for the time being, together with an adequate sum in respect of architects and surveyors fees in such reputable insurance office as the Lessor shall determine…"*

The Eighth Schedule sets out the expenditure to be recovered by means of the service charge, which includes:

By paragraph 1: "*All sums spent by the Management Company in and incidental to the observance and performance of the obligations on the part of the Management Company pursuant to Sixth and Seventh Schedule."*

By paragraph 3: *"The costs of effecting and maintaining in force the insurance policy referred to in paragraph 9 of the Sixth Schedule and of any further insurance policy which the Lessor may effect in respect of the Property of the Building (including insurance against public and third party liability)."*

11. The applicant's case is that the respondent assumed responsibility for insurance, presumably relying on paragraph 5 of the Fifth Schedule, albeit on a selective basis as it makes no attempt to comply with any of the other management covenants in the Sixth Schedule.

12. The respondent's statement of case dated 23 October 2019 concedes that the obligation to insure is in fact with the applicant but claims that it was asked to insure by the applicant back in 2009. By way of evidence, three emails have been produced from 2011-2013 in respect of requests for a copy of the latest insurance schedule.

13. The tribunal agrees with Mr McClellan that these emails are not evidence of a request for the respondent to place the insurance in the first place but in any event they are not relevant to the period in dispute. It is clear that following the change in directors in 2018 any prior request has been rescinded. Despite the applicant's objections, the respondent has continued to demand payment of the premium and even charged a late payment fee. This behaviour can only be consistent with an attempt by the respondent to place insurance under its covenant in paragraph 5 of the Fifth Schedule "*to comply with the covenants on the part of the Management Company set out in the Sixth Schedule*."

14. So did the insurance comply with the covenant in paragraph 9 of the Sixth Schedule? That covenant required the insurance to be placed "*in the joint names of the Lessor, Lessee and other lessees and their mortgagees"*. The AXA Property Investors Protection Plan Certificate produced for 01 July 2018 to 12 August 2019 states that the Insured are Gateway Property Holdings Limited and The Overs Adnitt Road Management Company Limited. The interest of the lessees and their mortgagees are noted in general terms as "Additional Interests".

15. This case has similar facts to the Upper Tribunal authority of *Denise Green v 180 Archway Road Management Co Ltd* [2012] UKUT 245 (LC), also involving an AXA policy. Judge Huskinson held that a failure to name the lessee on the face of the policy meant that it was not placed in accordance with a covenant to insure in joint names and therefore the leaseholder was not liable for the premium. A general reference to lessees' interests was not sufficient. The tribunal wrote to the parties indicating that it proposed to apply the decision to this case but would consider representations received by 16 December 2019. Both parties responded by this deadline.

16. The Applicant noted that even its own name was incorrect on the certificate, being described as The Overs *Adnitt Road* Management Company Limited rather than simply The Overs Management Company Limited. The Respondent argued that the facts of the *180 Archway Road* case were not similar. In particular, the *Archway* case involved only 4 flats whereas there were 42 here and a requirement in this lease for not only the leaseholders but also the mortgagees to be insured. It submitted that the sheer number of interests would be impractical or impossible to record without a substantial increase in the administrative cost and burden of recording them. It also submitted that the wording of the additional interest clause provided equivalent benefit to the leaseholders of being named and the advantage of cover in the event of any flat being transferred without notice to the insurer.

17. On balance, although the respondent is not complying strictly with the terms of the lease, the tribunal accepts that the wording of the clause could well cause practical difficulties given the number of flats. The applicant should make enquiries in the future as to whether the insurance certificate could reflect that it should be in the joint names of the landlord, leaseholders and their mortgagees but with some flexibility as to changes within the insurance period. It is not clear why the management company are a party and in any event, the name is incorrect. In the circumstances, the tribunal will not follow the *180 Archway Road* case on these facts. Since insurance has been placed by the freeholder for 2018 and 2019, the tribunal will proceed to consider the reasonableness in terms of the cost of those policies, as set out below.

18. For completeness, the parties also raised an issue as to the meaning of "*in such reputable insurance office as the Lessor shall determine…"*. The tribunal considers that this means that the Lessor can specify which insurance company should be used, a relatively common provision in long leases. The qualification is that the insurance office must be "*reputable"* but that will limit the choice of the applicant if it is to secure insurance itself in future. For the avoidance of doubt, the tribunal does not consider that the respondent is entitled to elect "*to insure via an alternative insurance office*" as claimed by its property manager in her email to the applicant's representative dated 28 June 2018. It would seem that the respondent now accepts that position as set out in its statement of case which post-dates that email.

The reasonableness of the insurance costs for 2018/19

19. The premium charged to the applicant for 2018 was £7,523.92 and for 2019 £5,645.57, inclusive of tax. No explanation has been provided for the difference in cost, apart from a large claim in 2015. The premium now appears to be back to pre-2016 levels.

20. The applicant challenged the reasonableness of the cost of the policy mainly on the grounds that the cost is inflated by a commission of some 40%. The directions dated 3 October 2019 required the respondent to disclose "*any remuneration, commission and other sources of income or other benefits in connection with placing or managing insurance received by the landlord/associated landlord, its broker or other agents re insurance*." They contained an express warning that failure to provide evidence requested may result in the Tribunal drawing an adverse inference from that lack of evidence.

21. The respondent's statement of case admitted that the broker received a commission but provided no further details or evidence, despite the directions. The applicant relies on an email from May Warren, the Senior Property Manager of Gateway Property Management Limited dated 7 September 2018 which states: "*Regarding commission, Gateway take a 40% commission on buildings insurance and 10% on terrorism totalling £2578.18 here*."

22. Gateway Property Management are a related company to the respondent and demand the premium from the management company. In the circumstances and in the absence of any evidence from the respondent the tribunal determines that the respondent benefit from a commission as set out by their manager. It is not clear what service is provided by them to justify such a commission and in the circumstances the tribunal considers that the premium for each year (excluding tax) should be reduced by 35%.

23. The applicant has stated that it has no objection to the sum insured except where the sum may have a bearing on the commission element of the policy. Obviously, any increase in the sum insured will increase the premium and therefore the commission. A report commissioned by the applicant in 2016 gave the reinstatement cost as £4,269,000. The certificate for 2019/20 states the declared value is some £4.6m. If the applicant is to insure in future they would be advised to consider a revaluation bearing in mind the passage of time since the last report.

The tribunal's decision

24. The tribunal therefore determines that the amount payable in respect of insurance for 2018/19 is £5,172.69 and for 2019/20 is £3,881.33 i.e. the total charged to the management company less 35% of the premium to reflect the commission.

The Late Payment Fee

25. The respondent made no attempt to identify any clause in the lease which entitled it to raise a late payment fee against the applicant. This is not surprising as the lease was not intended to operate in this way.

In the circumstances the tribunal determines that the late payment fee of £30 is not payable.

Application under s.20C/paragraph 5A

26. In view of the fact that the respondent has now conceded that they are not entitled to insist on the applicant using its block policy and the reduction of the insurance costs to take into account the commission, the tribunal considers it just and equitable to make an order under section 20C of the 1985 Act, so that the respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge. For the same reasons, the tribunal also makes an order under paragraph 5A of Schedule 11 to the 2002 Act, extinguishing any tenant's liability to pay contractual costs in respect of these proceedings.

Name: Judge Wayte

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

Section 18

(1) In the following provisions of this Act "service charge" means 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.

(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.

(3) For this purpose -
   (a) "costs" includes overheads, and
   (b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
   (a) only to the extent that they are reasonably incurred, and
   (b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

   and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(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.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20C

(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 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.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 5A

Limitation of administration charges: costs of proceedings

5A (1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.