FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AL/LSC/2019/0445**
HMCTS code (paper, video, audio)	**:**	**P: PAPERREMOTE**
Property	**:**	**Flat 22, 72 Fairthorn Road, London, SE7 7ES**
Applicant	**:**	**Ms S Bolu**
Representative	**:**	**N/A**
Respondent	**:**	**Victoria Way Management Company (Charlton) Ltd**
Representative	**:**	**N/A**
Type of application	**:**	**For the determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge H Carr** **Mr T Sennett**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**15th June 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote hearing on the papers which has been not been objected to by the parties. The form of remote hearing was . P:PAPERREMOTE. A face-to-face hearing was not held because it was not practicable and all issues could be determined on paper. The documents that I was referred to are in a bundle of 175 pages, the contents of which I have noted. The order made is described at the end of these reasons.

Decisions of the tribunal

(1) The tribunal determines that the sum of £5000 is not payable by the Applicant in respect of the charge for building insurance excess demanded in 2019.

(2) The tribunal makes the determinations as set out under the various headings in this Decision

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the lessees through any service charge.

(4) The tribunal determines that the Respondent shall pay the Applicant £100 within 28 days of this Decision, in respect of the reimbursement of the tribunal fees paid by the Applicant

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") and Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")] as to the amount of service charges and (where applicable) administration charges payable by the Applicant in respect of the service charge year 2019. .

The background

2. The property which is the subject of this application is a three bedroom flat on the 4th floor of a purpose built block of flats. The block is one of four blocks and part of a development of flats and houses constructed about 2014 in Charlton. The blocks are between 3 and 6 stories. Included in the service charge provisions is the cost of insurance for the estate of some 222 units and those for a water booster pump.

3. At the directions hearing dated 26th November 2019 it was decided that the matter would be determined on the basis of the papers provided. The directions gave an opportunity for either party to request an oral hearing. No such request having been made the application is being determined on the basis of the documents provided.

4. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

5. The Applicant holds a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge. The specific provisions of the lease and will be referred to below, where appropriate.

The issues

6. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) The payability and/or reasonableness of the administrative charge of £5000 demanded in 2019 relating to building insurance excess.

   (ii) Whether an order should be made under s.20C of the Landlord and Tenant Act 1985

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

The payability/reasonableness of the charge for building insurance excess

The Respondent's argument

The insurance position

8. The Respondent explained the circumstances of the charge as followed. It arranged buildings insurance with Covea Insurance dated 18 June 2018. The annual premium for the buildings insurance for the entire development was £48,603.96. The excess on the buildings insurance for a claim for water egress, was £5,000.

9. The excess was increased to £5,000 owing to a number of claims for egress of water including a large, significant leak which had occurred in 63 Fairthorn Road (one of the other four residential blocks across the development) in 2017. This previous leak was caused by the pipe

fixations on a number of toilets (rather than due to the negligence of a resident) and resulted in a substantial claim against the development's buildings insurance. This affected the subsequent years building insurance premiums and excesses.

The incident

10. On the morning of 14 April 2019, the water pump to the development failed, which caused a water outage to the development from approximately 09:30. Engineers from Thames Water and Harton Services attended to investigate and remedy the outage. The water pump was fixed at 15:02 which is when normal water returned to the development.

11. During the water outage there were emails exchanges between the residents of the development, providing updates. At 22.05, one of the tenants who resides in the flat below the property, returned to their flat to find it flooded with water. The flood then spread to the other flats below: Flat 2, Flat 3, Flat 8 and Flat 15. The Fire Brigade and emergency plumber were called out.

12. The leak was sourced to the property and as water leaking was from the electricity sockets, the water and electricity to the building had to be shut down and turned off. The Fire Brigade and plumber were on site until 04:45 on 15 April 2019 and one of the other residents paid £300 for the emergency plumber, which was repaid to her by the respondent.

13. Following the incident, the respondent was made aware by way of a WhatsApp message from the tenant at the property, that the leak had been caused due to him leaving the kitchen tap turned on prior to him leaving the flat on 14 April 2019. The sink then overflowed and caused the water egress. The respondent understands that the tenant had left the flat overnight for a party, as he was not available when the plumber and Fire Brigade attended between 02:00 and 04:45. The respondent argues that as the tenant was vacating the dwelling for a prolonged period, he had a duty of care to the other residents and leaseholders to check the taps in the flat were turned off prior to leaving his dwelling. This the respondent argues is what one would expect of a reasonable person in normal circumstances.

The legal position

14. Following the claim, the respondent considered the lease, and found it to be silent on the issue of who is to pay the excess payment on a buildings insurance claim. However, at 3 (1), the Lease includes a positive covenant requiring the Lessee/ Applicant to keep the Premises in good repair in order to protect not just the Premises but also other parts of the Estate. At 2 (11)(b) of the Lease there is an agreement for

the Lessee/ Applicant to "indemnify the Lessor against all costs and expenses reasonably and properly incurred… in respect of or incidental to…any action reasonably contemplated or taken by or on behalf of the Lessor in order to prevent or procure the remedying of any breach or non-performance by the Lessee of any of the said restrictions covenants conditions regulations and stipulations.. to the terms of this Lease."

15. The respondent argues that the legal basis on which the sum is payable, is as an administration charge under Commonhold and Leasehold Reform Act 2002 Schedule 11: (3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither— (a) specified in his lease, nor (b) calculated in accordance with a formula specified in his lease.

The reasonableness of the charge

16. As detailed above, one of the other blocks within the development had previously suffered a significant leak, affecting a number of dwellings, and communal areas over a number of floors. The subsequent buildings insurance claim had an effect on the buildings insurance premiums and excesses, especially for egress of water in the subsequent years.

17. The respondent sought three quotes for insurance as follows:

	Total Premium including IPT	Excess of Escape of Water
	£56,908.11	£2,500
	£48,603.96	£5,000
	£45,835.91	£10,000

18. The respondent says that it considered the quotes at the time of renewal. The directors discounted the third quote with an excess of £10,000 and compared the first two quotes. They concluded that in the event that there was no claim for escape of water, then the first quote, with an excess of £2,500 would be £8,304.15 more expensive than the second quote. In the event that there was a further claim for escape of water due to faulty pipes, the second quote, with an excess of £5,000 would save the residents £5,804.15. Accordingly the respondent decided that the second quote with Covea was the most cost effective insurance quotation received and the decision to go ahead with this insurance policy was agreed by the Directors. For the reasons detailed

above, the respondent argues its position that this excess is reasonable given the history of the development.

The applicant's arguments

19. The applicant agrees with the respondent that the lease is silent on the question of responsibility for payment of the excess.

20. She argues that there is no basis for the respondent to recover the excess as a variable administration charge which is not specified in the lease. She argues that the respondent can only recover administration charges that are provided for within the lease and only to the extent that they are reasonable.

21. She considers the money is not payable because it is not specified as an administration charge in the lease, a £5,000 insurance excess is not reasonable as it is extremely unlikely to cause most lessees unreasonable financial burden. Further she argues that she did not cause the damage the excess relates to.

22. She provides further argument on the unreasonableness of the excess payment arguing that she was not given notice that the insurance excess was unusually excessive at £5,000 before the respondent entered into the agreement. She says that the first time she was made aware of the excess amount was when she was sent a service charge demand notice.

23. She refers to the Council for Mortgage Lender's handbook which requires solicitors of prospective purchasers to inform mortgage lenders if insurance excess contribution from any one flat is greater than £1,000. Where this is the case a mortgage lender may refuse to lend which drives down the market value of a property. Therefore, all leaseholders should have been notified of the decision of the respondent.

24. She argues that the respondent states that the insurance premium and excess increased as a result of various claims for water escape in a different building in 2017. She says that she has had to contribute towards the increased cost over the last three years although she had nothing to do with the claim. She has also never made any claims against the buildings insurance policy including the claim this case relates to.

25. She argues that it would have been reasonable for the respondent to accept a policy with a higher premium and lower excess in order to reduce the financial burden lessees would be exposed to as well as to mitigate the risk of property devaluation.

26. She asks for a s.20C order or an order under paragraph 5A of Schedule 11 on the basis of the lease being silent, the excess amount being excessive and unreasonable.

27. The respondent made a reply to the applicant's statement of case. In the reply it argued

(iii) that the excess on an insurance claim was only to be charged to an individual lessee in the event of a negligent or deliberate action by the resident or leaseholder. It considered that the leak from the property was caused by a negligent action and therefore is subject to being charged the excess. In all other situations where there has been an egress of water from a broken or damaged pipe or utility, this has been split as an estate charge, as would be expected from a no fault insurance claim.

(iv) The respondent considered the total cost of the insurance (premium plus the excess) in respect of reasonableness. It was attempting to reduce the total financial burden on the entire development in the event that another pipe failure or no-fault insurance claim had to be brought. At that time, the respondent did not consider it likely that there would be a negligent action which would bring such a claim. Further, it argues that it was reasonable to not plan against a negligent or deliberate action in respect of the excess as this would not be a fair use of development funds.

(v) The respondent considered there was a high likelihood another egress of water claim would occur. However, it thought the risk was of another claim of the same sort; a failure of pipework or utilities. It was on that basis that it considered that a lower total cost, which included a higher excess was the best and most reasonable course of action. This decision would lower the cost for all leaseholders, in the event of a no fault egress of water insurance claim.

(vi) The respondent refers to the RICS Management Code and quotes as follows: "You should consider whether the terms of the lease / tenancy agreement contain provision that, where an insurance claim is as a result of a negligent act by the leaseholder, you are entitled to recover the excess from the leaseholder or whether the lease allows the excess to be paid from service charges." The respondent says that as the Lease is silent on the issue of how an excess is to be recovered it was in a situation where it was required to recover the excess in some way. The excess on all previous insurance claims have been split as an Estate Charge, but these Claims have been no fault claims. The Directors considered that in this situation, due to the

negligent action of a resident, it was reasonable to charge the excess back to the Leaseholder of the flat.

(vii) The Tribunal will note that both Parties are unrepresented. Accordingly, the Company submits that no adverse costs orders should be made in respect to these proceedings.

The tribunal's decision

28. The tribunal determines that the sum of £5,000 charged for the insurance excess is not payable by the applicant.

Reasons for the tribunal's decision

29. The tribunal notes that the respondent has provided insurance schedules and details including a history of water leakage occasioning damage to flats in the past. In accepting the high excess, the directors of the company, of which all lessees are members, determined to balance insurance premium against excess (p 72). The Insurers, Covea, offered a range of premiums for the buildings and different excess options £2,500, £5,000 and £10,000, with the Directors opting for the £5,000 excess and premium reduction of over £8,000.

30. Having regard to the documents relating to insurance cover and the decision to adopt a higher excess than previously applicable due to water leakage, cannot be criticized. The Tribunal has considerable experience in dealing with such insurance issues and views the level of excess as reasonable.

31. This however does not mean that the excess can be charged to the applicant as an administration charge. This can only be done if the lease provides for such a charge. In this instance there is no such provision and therefore the amount is not payable as an administration charge.

32. The tribunal also notes that there has been no proper demand for the sum as an administration charge.

33. Because the monies are not payable there is no need for the tribunal to consider the question of reasonableness.

34. The tribunal notes that the respondent has indicated that it has alternatives available to it to reclaim the costs. The tribunal makes no comment on the likelihood of success of alternative legal action. Nor is it commenting on the liability of a landlord for the actions of her tenant. Those questions are for a different forum.

Application under s.20C and refund of fees

35. The Applicant made an application for a refund of the fees that she had paid in respect of the application. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund any fees paid by the Applicant within 28 days of the date of this decision.

36. In the application form the Applicant applied for an order under section 20C of the 1985 Act. Although the landlord indicated that no costs would be passed through the service charge, for the avoidance of doubt, the tribunal nonetheless determines that it is just and equitable in the circumstances for an order to be made 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.

Name: Judge H Carr **Date:** 15th June 2021

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).