FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case Reference	**:**	**CHI/29UC/LSC/2023/0138**
Property	**:**	**21-27 Westmeads Road** **Whitstable** **Kent** **CT5 1LW**
Applicant	**:**	**Mr Mark Holmes**
Representative	**:**	**None**
Respondent	**:**	**Assethold Limited**
Representative	**:**	**Eagerstates** **Counsel Mr R Granby instructed by Scott Cohen**
Type of Application	**:**	**Determination of liability to pay and reasonableness of service charges Section 27A Landlord and Tenant Act 1985. Orders pursuant to Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002**
Tribunal Members	**:**	**Mr I R Perry FRICS** **Mr M J F Donaldson FRICS** **Ms T Wong**
Date of Hearing	**:**	**1st May 2024**
Date of Decision	**:**	**21st May 2024**

DECISION

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Summary of Decision

1. The Tribunal determines that the management charge of £567.78 for 2023 is payable to the Landlord by the Tenants.

2. The Tribunal has determined that it will not make orders pursuant to Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Background

3. On 14th August 2023 the Tribunal received an application from Mr M Holmes who is a director the Bartons Yard Whitstable Management Company Ltd ("BYWMC"), for determination of liability to pay and the reasonableness of service charges for the year 2023 relating to buildings insurance charges and associated fees. The total value in dispute is £567.78.

4. The Applicant sought further orders pursuant to Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

5. The Tribunal issued directions on 15th January 2024 and listed a Case Management and Dispute Resolution Hearing for 6th February 2024. Due to technical reasons this hearing was unable to proceed and so the Tribunal issued further directions on 8th February 2024 setting out dates for compliance by the parties with a full hearing listed for 1st May 2024.

6. On 22nd March 2024 the Respondent submitted a case management application requesting an extension of time to submit its statement of case. The Tribunal agreed to the extension and extended the submission date to 28th March 2024. The Tribunal stated that no further extensions of time would be allowed unless in exceptional circumstances. The Respondent did not provide its statement of case to the Applicant.

7. On 28th March 2024 the Respondent made a further case management application requesting that the directions be varied or struck out because;

   > paragraph 22 of the Directions provided that the Applicant was to provide a statement of case accompanied by a statement of truth and any relevant documents by the 29th February 2024.
   >
   > The Applicant has not provided any statement of case. There are various documents that have been sent and a statement of truth but no statement of case and so the Respondent does not know what the case is that it has to respond to.

   The Tribunal stated it was at a loss to understand why the Respondent waited to raise that issue until some four weeks after the allotted date. The Respondent had made its own application to extend the dates for the submission of its case, without making any reference to the absence of the Applicant's case.

8. On 3rd April 2024 the Applicant submitted his statement of case, together with a case management application to amend the directions or debar evidence. The grounds for the application were.

> Paragraph 23 of the directions provided was for the Respondent to reply by 21/03/2024 to my application. The respondent applied for an extension on 22/03/2024 after the date provided. The court kindly allowed them an extension until 28/03/2024 at 4pm. This date and time passed with NO correspondence being received. However, today (03/04/2024) being late again I have now seen a request from Eagerstates for a Case Statement. They are fully aware of the case details, from our earlier Position Statement. Also they failed to appear, or give any reasons at the original hearing scheduled for 06/02/2024. So In response I have sent our statement of Case and hope this is acceptable.

9. Having had regard to all correspondence received, the Tribunal decided to issue amended directions dated 11th April 2024.

10. Paragraph 10 of those directions stated that by 15th April 2024 the Respondent shall send to the Applicant:

    - A signed and dated statement with a statement of truth (i.e. "I believe that the facts stated in this witness statement are true") which sets out each aspect of its case including a response to the points made by the Applicant
    - Copies of any other relevant documents relied upon
    - Any witness statements (see below)

11. The Applicant emailed the Tribunal on 16th April 2024 attaching a case management application stating:-

> Paragraph (sic) 10 of the Court's Directions sent out on 11/04/2024, was for the Respondent to send the Applicant a signed & dated Statement of Truth, responses to the applicants case statement and copies of relevant documents by 15/04/2024. The Respondent has failed to follow the Courts Direction on this matter. I have not received any documentation from Eagerstates (Mr Gurvits) in the time frame set out by the Court.
>
> I do not believe Mr Gurvits has any evidence to counter my Application on my right to manage and provide my own building insurance.

12. A further email from the Applicant was received on 21st April 2024 with another case management application stating:-

> As per paragraph 10 of the Court Directions dated 11 April 2024, the Respondent was to send his Case Statement and relevant (sic) documentation along with a Statement of Truth.
>
> The Statement of Truth was missing from the Respondents documents.
>
> These documents were sent to the Applicant 4 working days late with no prior warning or plea to the court. I feel these are delaying tactics by the Respondent in order to hinder this case.

13. No comments had been received from the Respondent until the night before the Hearing.

14. No application to request an extension to the deadline has been received from the Respondent.

15. Upon consideration of the Applicant's case management applications and having regard to the conduct of the Respondent in these proceedings, the Tribunal said it was minded to debar the Respondent from taking part in these proceedings in accordance with Rule 8 (2) (e) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

16. Further directions were issued on 29th April 2024 stating that the Tribunal would deal with the application to debar the Respondent at the start of the hearing on 1st May 2024.

17. The Tribunal also reminded the Respondent's representative that the Tribunal did not appear to have received written authority from the Respondent that they had authority to act on their behalf and that unless authority was received from Assethold that Eagerstates were representing them in these proceedings, then Eagerstates will not be able to appear and represent Assethold at the hearing.

18. On the afternoon of 30th April 2024, the Tribunal was contacted by Scott Cohen Solicitors to say that they had been instructed on behalf of Assethold Limited and that Counsel Richard Granby, would be representing them at the hearing on the following day.

19. Late on 30th April 2024 or early on 1st May 2024 the Tribunal was provided with a skeleton argument from Mr Granby and a copy of an Upper Tribunal (Lands Chamber) case *Cos Services Ltd v Nicholson {2017} UKUT 382 (LC); {2018} L. & T.R. 5.*

20. At 09.33 on the day of the Hearing the Tribunal received a letter confirming that Scott Cohen would be acting on behalf of Assethold.

The Law

27A Liability to pay service charges: Jurisdiction

(1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

Application to Debar

21. On the morning of the hearing the Tribunal first considered the application to debar the Respondent from the proceedings. The Tribunal was fully aware that Eagerstates, who had been the Respondents representative to this point, was a company in the same or similar ownership as the Respondent itself, and the Tribunal had been sufficiently frustrated to seriously consider whether to debar the Respondent.

22. However, given that the Respondent had, at the 11th hour, instructed legal representation who in turn had engaged Counsel, the Tribunal decided that it could best decide the issues within the original application with the Respondent's representative taking part in the hearing.

23. The Applicant expressed his frustration at this decision given that he considered the Respondent had failed to engage fully in the process up to this point.

The Property

24. Within the papers the property is described as a 3-storey modern building, and it is situated at the junction of Westmeads Road and Diamond Road. At ground level there is a single commercial unit and some undercroft parking. There are 2 flats on the first floor and 2 flats on the 2nd floor.

The Lease

25. The Tribunal was provided with a copy of a tripartite lease between Weston Homes, BYWMC as the first two parties and Wayne Ralph Cheeseman and Jacqeline Ann Mitchell as Lessees relating to Plot 12 Bartons Yard. It is unclear which flat within the block this relates to, nor is it clear that all units within the

property have identical leases, but the Tribunal proceeds on the basis that this is a lease that is the same as for the other units in the block.

26. At Clause 4.2 the Tenants covenant with the Landlord and the Company "except in so far as it has been paid to the Company to repay to the Landlord on demand a reasonable proportion of the expense which the Landlord shall from time to time incur in the insurance of the Building or Buildings (as appropriate) in the full reinstatement cost of the Building or Buildings against loss or damage by the Insured Risks ....pursuant to Clause 6.6".

27. Clause 5 of the Lease, and its subclauses, sets out the covenants between the "Landlord Company and other Tenants" relating to expenses and service charge provisions.

28. Clause 6 of the Lease contains the Landlord's covenants with the Tenant and the Company. At paragraph 6.5 it states, "unless the insurance is vitiated by any act or default of the Tenant to keep the Property and Estate insured (and to pay all premiums for such insurance upon the same becoming due) in the name of the Landlord and the Company...."

29. At Schedule 4 of the lease the Obligations of the Company, ie BYWMC, are set out. There is no reference to the Company dealing with the insurance of the building.

The Applicants Case

30. Mr Holmes clearly and simply set out his case. He had purchased his flat as new from the original builders Weston Homes PLC who are defined within his lease to be the Landlord with Mr Holmes, as the occupying leaseholder, defined as the Tenant.

31. A second party to the lease is Bartons Yard Whitstable Management Company Limited ("BYWMC"). The Tenantss of the various flats in the building each became a shareholder of BYWMC which was established to manage the building. Mr Holmes refers to BYWMC as a Right to Manage Company ("RTM").

32. BYWMC in turn appointed Ringley to manage the day-to-day issues with the building. At that stage Weston Homes PLC were content for BYWMC and Ringley to arrange the insurance of the building.

33. In 2016 Assethold acquired the freehold interest from Weston Homes and therefore became the Landlord. Assethold appointed Eagerstates to manage their interests and they decided that they should and would, as the freeholder/landlord, take over the arrangement and responsibility for the building's insurance.

34. In 2021 BYWMC became dissatisfied with Ringley and appointed Let Solutions Ltd of Whitstable as their agent to manage the day-to-day issues with the building. At that stage Mr Holmes approached Mr Gurvitz of Eagerstates in the

hope of organising the insurance through Let Solutions and in the belief that he had a right to do so on the basis that BYWMC is an RTM.

35. Mr Gurvitz of Eagerstates declined to pass the insurance over and, in the words of Mr Holmes, he and Mr Gurvitz have been at loggerheads ever since.

36. The item disputed as per the Application is “2023 Insurance cost” in the total value of £567.78 which is the fee charged by Eagerstates for expenses incurred in placing appropriate insurance and collecting premiums.

37. The cost charged to the tenants for insurance in 2022 was £927.13 per unit comprising 1/5 share each of the insurance premium of £3,942.35, broker fee of £100 and £593.30, itself a charge made by Eagerstates calculated as 15% of the premium.

38. The insurance charge for 2023 was slightly lower being £870.60 per unit comprising 1/5 share each of the insurance premium of £3,735.20, broker fee £50 and management fee of £567.80 (sic) being 15% of the premium. In this case it seems that the 15% has been charged on the broker fee as well as the premium. There is a small arithmetical error in the calculation as £567.78 is the amount stated within the Application.

39. Mr Holmes had obtained 3 additional quotes for insurance of the building from Let Solutions.

    i) CDC £1,503.64
    ii) Aviva £1,626.23
    iii) Allianz £2026.97.

40. Mr Holmes states that he has served a section 30A request to Eagerstates for details of the insurance, but that Eagerstates have not responded appropriately.

41. Mr Holmes concluded by stating his wish to manage the buildings insurance and move forward with clarity. He considers that the management charge of £593.30 (sic) is unreasonable and unjustified.

The Respondent’s Case

42. Eagerstates, acting on behalf of the Respondent, submitted a statement of case stating that they had not seen any of policy documentation in support of the quotes obtained by the Applicant so could not compare prices, but none of the policies included loss of rent cover for the ground floor commercial unit.

43. They also state that the premium for the insurance had increased over the past couple of years as a result of the level of cover having been increased from £500,000 to £1,500,000 which in turn was as a result of them obtaining a Reinstatement Cost Assessment. They state that the lease allows for the Landlord to charge a management fee and that 15% is not a large fee and is a reasonable charge.

44. They also state that the quote from Aviva contains a flood risk endorsement, that the type or category of any Tenants is limited and that there is only an uplift of 20% when most mortgage providers expect 30%.

45. Eagerstates state that the quote from Allianz relates to only 1 of the premises, contains health and safety restrictions, has an uplift of only 15%, has no loss of rent cover and includes a flood exclusion clause.

46. They state that the quote from CDC has no details whatsoever and explain that they use an external broker to ensure the market is tested regularly so that rates obtained are reasonable, which has resulted in a reduction in the premium between 2022 and 2023.

47. Eagerstates and Mr Granby ask the Tribunal to note that BYWMC is not a Right to Manage Company (RTM)

The Applicant's Response

48. In a response stated to be on behalf of the owners and directors of BYWMC Mr Holmes explains that he has never been provided with details of the current insurance policy so could not obtain quotes on a like for like basis.

49. He maintains that it does not say in the lease that the landlord is responsible for the building insurance but that it does state the Management Company has been incorporated to provide services to and for the Tenants and Transferees of the estate and otherwise manage the estate. The only payment to the Landlord mentioned in the lease is for the ground rent, nothing else.

50. Mr Holmes considers that Eagerstates have failed to understand the original lease and maintains that he had not received any proof that insurance cover was in place.

The Hearing

51. At 10.00 am on Wednesday 1st May a hearing was held using the HMCTS Video Hearing System. Mr Granby of Counsel was the sole representative of the Respondent. The Applicant represented himself and Ms Mulcahey, one of the other directors of the Management Company, was observing.

52. The Tribunal had been provided with a paginated bundle of 257 pages although the electronic page numbers did not match the document page numbers. For the sake of this decision the page numbers referred to are as per the original paper copy and marked at the bottom right hand side of each page and are enclosed on square brackets [ ].

53. Mr Holmes outlined his case to the Tribunal as per his earlier written representations and concluded again that his wish is for the Managing Agents acting on behalf of BYWMC to manage the insurance, and to go forward with clarity.

54. Mr Granby presented the case on behalf of Assethold. He maintains that Mr Holmes is the only party to this case and that whilst Mr Holmes application is made in the name of BYWMC, it is the tenants who are responsible for paying the charges in question, although he agrees that other tenants could apply to the Tribunal.

55. He said that Mr Holmes is mistaken in his assertion that BYWMC is an RTM and that advice given by the Leasehold Advisory Service to Mr Holmes was based on this assumption and was therefore incorrect.

56. Mr Granby asked the Tribunal to consider the definition of “Insured Risks” [p23] and to particularly note that flood cover is specifically included. Paragraph 4.2 of the Lease [p27] requires the Tenant to pay costs of insurance and expenses that the Landlord incurs to the Landlord and paragraph 6.5 [p32] requires the Landlord to keep the Property and the Estate insured.

57. Referring to case *Cos Services Ltd v Nicholson {2017} UKUT 382 (LC); {2018} L. & T.R. 5* Mr Granby maintained that paragraph 4.2 of the Lease requires the Tenant to pay to the Landlord the cost of the insurance itself and the reasonable costs incurred in obtaining the insurance, and that the Landlord is not obliged to necessarily place the insurance with the company offering the lowest premium.

58. Mr Granby referred to the 3 alternative quotes that had been obtained by Mr Holmes. He stated that the quote from CDC included little detail as to the level of cover, that it limited occupiers to working people, included a flood exclusion and that the level of cover was £1,438,530 which is slightly below the rebuild value.

59. The quote from Allianz was for cover of £1,725,000 but the policy included no loss of rent for the commercial unit, no employer’s liability and public liability of only £5 million. The subsidence excess is higher than the existing policy, there is only a 15% uplift from day 1 and it would not comply with the terms of the Lease as flood is not included.

60. The cover offered by the Aviva quote does not include flood, has an inappropriate occupation clause, does not include loss of rent or business interruption.

61. Speaking of the other sums, comprising the management fees, Mr Granby maintained that 15% was a reasonable amount, which is partly justified by his client not charging any other management fee.

62. Within the bundle the Tribunal had been supplied with a copy of the current Property Owners Select Certificate from Allianz [p122] which refers to four residential flats and a commercial unit. The declared value is £1,450,000 and the Landlords contents cover is £20,000. A full copy of the policy documents followed [123-243].

63. The Tribunal was also provided with a Reinstatement Cost Assessment, obtained by Eagerstates, dated 23rd August 2022 and prepared by JMC Chartered Surveyors and Property Consultants who recommended that the site should be insured for a minimum of £1,200,000 if the policyholder is VAT registered and £1,450,000 if the policyholder is not VAT registered. The valuation is current for 12 months from August 2022.

64. Mr Granby concluded that the copy of the insurance certificate is proof of insurance, that his clients are required to insure the building at a satisfactory level, that they are entitled to reclaim the cost of the insurance itself and their costs in arranging that insurance. His clients believe that in this case 15% of the premium is a reasonable charge to cover their costs.

65. Mr Holmes stated again that in effect Assethold and Eagerstates are owned by the same people and are effectively the same party. In his view a 15% charge was too high.

66. The parties were then invited to make representations regarding the two applications for cost orders made pursuant to Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002

67. Mr Granby considered that if the Tribunal were to find against his client, then a Tribunal would likely decide that the costs of these proceedings could not be included in any future management charge.

68. Mr Holmes stated that the Tribunal's ruling from today would affect how things go forward.

Consideration and Decision

69. The Tribunal finds that paragraphs 4.2 and 6.6 of the Lease make it clear that the responsibility for insuring the property lies with the Landlord who is entitled to claim the cost of the insurance and the costs incurred in arranging that insurance from the tenants.

70. The Tribunal has been provided with no evidence that BYWMC is a Right to Manage Company and concludes that, unfortunately, Mr Holmes has misunderstood the standing of BYWMC as established when the leases were first written when the property was built.

71. The Tribunal is conscious that the role of the Landlord is to ensure that the level of cover within the insurance policy conforms with the requirements contained within the lease and then must obtain funds from the 5 Tenants to cover the insurance premium and associated costs. The Landlord is required to pay the premium even if the Tenants have not all paid their share of the premium when the premium is due.

72. The Landlord has shown that certain expertise is required to ensure compliance with the insurance requirements within the lease and has obtained

a Reinstatement Cost Assessment which showed that the property had been seriously underinsured in the past.

73. The Tribunal therefore concludes that the Landlord is entitled to recover the cost of the insurance and a sum to cover the costs of placing that insurance and then to collect those sums from the Tenants.

74. However, it is clear from the correspondence provided to the Tribunal that Mr Gurvitz could have been more cooperative in providing information to Mr Holmes which would have enabled Mr Holmes to obtain competitive quotes and perhaps avoided these proceedings. Cooperation in itself is not a legal requirement. The Tribunal is also conscious that it has been told that Eagerstates have not complied with a s30 application although neither party gave evidence to confirm or deny that there exists a recognised Tenant's Association.

75. The Tribunal further noted that the Respondent had been uncooperative in its oft times lack of response to the Applicant's correspondence and requests, and the non-compliance with the Directions of the Tribunal to the point that an application to debar was considered.

76. The Tribunal must decide whether a charge of 15% is reasonable. There is no clear guidance on this issue and the Tribunal received no evidence of what charges are made on or for other similar properties in the Whitstable area. Common sense would suggest that there must be a 'de minimis' figure but there must also be a 'de maximus' figure above which a charge would be unreasonable.

77. Given that the Management charge for the year in question is £567.28 is to be divided between 5 properties, equating to £113.46 each, the Tribunal finds that the sum is reasonable and is therefore payable.

Applications under s.20C and paragraph 5A 23.

78. The Applicants have applied for cost orders under section 20C of the Landlord and Tenant Act 1985 ("Section 20C") and under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("Paragraph 5A").

79. The relevant part of Section 20C reads as follows:- (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 … the First-Tier Tribunal … 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…".

80. The relevant part of Paragraph 5A reads as follows:- "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".

81. A Section 20C application is therefore an application for an order that the whole or part of the costs incurred by the Respondent in connection with these proceedings cannot be added to the service charge of the Applicants or other parties who have been joined. A Paragraph 5A application is an application for an order that the whole or part of the costs incurred by the Respondent in connection with these proceedings cannot be charged direct to the Applicants as an administration charge under the Lease.

82. The Tribunal has considered the applications for orders pursuant to Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

83. In this case the Tribunal has found that the Landlord was entitled to recover the costs of placing the insurance, and to collect those sums from the Tenants. Not all Tenants were a party to this case.

84. The Tribunal has therefore determined that it will make no orders at this stage pursuant to Section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

85. In the case that the Landlord does seek to recover the costs incurred in this hearing then the Tenants are each able make an appropriate application to this Tribunal.

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. Where possible you should send your application for permission to appeal by email to rpsouthern@justice.gov.uk as this will enable the First-tier Tribunal Regional office to deal with it more efficiently.

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.