FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CHI/29UL/LSC/2023/0110**
Property	**:**	**Olivia Court, Hythe, Kent, CT21 5FD**
Applicant	**:**	**Ruth Chapman & Others**
Representative	**:**	**Graham Down**
Respondent	**:**	**Blackstone Estates Limited**
Representative	**:**	**Bamptons Management Ltd**
Type of application	**:**	**Determination of liability to pay and reasonableness of service charges Section 27A Landlord and Tenant Act 1985**
Tribunal members	**:**	**Valuer Chair R Waterhouse FRICS,** **Mr Colin Davies FRICS** **Miss Dalal**
Venue	:	**Havant Justice Centre**
Date of Hearing	**:**	**28 June 2024**
Date of Decision	**:**	**8 July 2024**

DECISION

Initial Comment

The Tribunal is very grateful to the parties for their careful, explanation of their submissions.

Procedural History

1.The Applicant made an application for determination of liability to pay and reasonableness of service charges for the years 2020 to 2023 stating that demands for Service Charges were sent out despite the Landlord stating no payments were required

2.Building Insurance and communal electricity were also mentioned in later years.

3.The Application, received on 4 September 2023, from Ruth Chapman, Apartment 8, (Deputy through Court of Projection for Mrs D Clarke), had attached an annexe which comprised a list of leaseholders that were purported to be co applications. The list was;

Block 1

Graham and Liz Down Apartment 3

Jackie Flaxton Apartment 4

Chris Jeffery Apartment 5

Marion Moran Apartment 6

Ruth and Rick Mart Apartment 7

Ruth Chapman Apartment 8

Robert Hammond Apartment 9

Marzia Serna Apartment 11

Block 2

June Chase Apartment 1

Fiona Clapson Apartment 2

Robert Burke Apartment 3

Colin and Catherine Coulson Apartment 4

Kevin Williams Apartment 5

Sharon Waldman Apartment 6

Jimmy and Joyce Chalmers Apartment 9

David Waldman Apartment 10

4.The Tribunal issued Directions on 19 March 2024 listing the matter for a Case Management and Dispute Resolution Hearing which took place by video on 23 April 2024

5.Mr Down of Flat 3 and Ms Flaxton of Flat 4 attended for the Applicant and Mr Barker of Bamptons Management Ltd attended for the Respondent.

6.It was agreed that there were two issues for the Tribunal to consider;

Is the Insurance reasonable?

Is the method of apportionment used by the Management Company reasonable?

7.The Directions issued on 24 April 2024 provided for the Application and documents attached together with the position statement to stand as the Applicants case.

8.The Respondent to send to the Appellant by 21 May 2024 the Respondents case.

9.The Applicant may by 4 June 2024 send a concise Reply to the Respondent.

10.The Applicant shall by 14 June 2024 be responsible for preparing the bundle of relevant documents, copy to Tribunal and Respondent.

Attendance at the Hearing

Applicants Mr Down of Apartment 3, Mrs Waldman of Apartment 6, Mr Waldman of Apartment 10, made submissions at the hearing.

Mr Daniel Webb, Selbourne Chambers, of counsel appeared for the Respondent, instructed by Mr Storey of Hanne & Co solicitors. Witnesses Wade Barker of Brampton's Management Ltd, Mr Mayo of Insurers Insurety, and the Respondent Mr Digges.

Preliminary Matters

11.The Tribunal and the Applicant received from the Respondent's Solicitor Hanne & Co on 26 June at 16:43 ; witness statement from Wade Barker of Brampton Management accompanied by a set of exhibits, Respondent's Skeleton argument and bundle of authorities, a copy of the main Bundle amended by addition of index some 185 pages, a supplementary bundle amended by index of some 96 pages, a statement of costs for the hearing.

12.The Applicant Mr Down by email to the Tribunal requested the Tribunal to refuse to admit the late submissions.

13.The Tribunal reviewed the submissions which would be of assistance to the Tribunal. The Tribunal being aware of the need under Rule 3 to act fairly and justly, in particular given that the Applicants were not legally represented. The Applicants agreed that an hour adjournment would be useful to review the submissions. The Tribunal accepted the papers and the hearing recommenced at 11:30.

The Issues

Is the Insurance reasonable?

Is the method of apportionment used by the Management Company reasonable?

Discussion

Insurance reasonableness

14.Counsel for the Respondent took the Tribunal through the lease. The Tribunal considered the specimen lease, which provides that the Applicants under clause 2.3 b covenant to pay the Landlord the Insurance Rent.

The lease at clause 1.1 defines the insurance rent as:

"the Tenant's Proportion of the cost of any premiums (including any IPT) that the Landlord expends (after any discount or commission is allowed or paid to the Landlord), and any fees and other expenses that the Landlord reasonably incurs, in effecting and maintaining insurance of the Building in accordance with its obligations in paragraph 2 of Schedule 6 including any professional fees for carrying out any insurance valuation of the Reinstatement Value."

15.Under the lease clause 1.1 the Building is defined as "the land and building known as Olivia Court" The plan shows both blocks and some land around them.

16.The lease at clause 1.1 defines the Reinstatement Value as " the full reinstatement value of the Building as reasonably determined by the Landlord from time to time".

17.Under Schedule 3 The Reservations , at 5 Development "The full and free right at any time during the Term to develop any part of the Building (other than the Property or any part of the building over which Rights are granted) and any neighbouring or adjoining property in which the Landlord acquires an interest during the term as the Landlord may think fit."

18.The Respondent around 5 November 2018 wrote to the leaseholders saying that maintenance charges would not be payable during the works to install a new penthouse on top of each block.

19.On the 29 January 2019 the Respondent's agent said that leaseholders should pay the service charge, but it would be reimbursed in one go at the end.

20.The Respondent in their submissions noted that the reimbursements had taken place. The Directions show that the issue has fallen away following the reimbursement.

21.The reapportionment took effect from 20 May 2022, so the insurance at issue is for 2022 and 2023 years only.

22.The Applicants assert the insurance has increased markedly, that similar blocks have cheaper insurance and the addition of the two penthouses with their associated structural steel work has caused the insurance premium to increase significantly.

The second witness statement from Mr W Baker, sets out the various insurance premiums and reinstatement values.

Period of Insurance	Insurer	Buildings Declared Value	Total Premium	Service Charge Year
1 May 2021-30 April 2022	SLIS	£4,691,207	£3711.50	2021
13 May 2022-13 May 2023	Allianz	£9,999,999	£8851.24	2022
26 May 2023-25 May 2024	Allied World	£8,250,000	£20,720	2023

23.The building as originally built comprised a basement, ground, first, and second floor. The landlord had the right to under clause 4 and Schedule 3 to add to the building. This was done by the addition of one penthouse on each block.

24.The new additions form part of the Building for the purposes of the insurance and so reinstatement value and hence premiums should reflect this.

25.The evidence of the Respondent in seeking premiums that cater for the characteristics of the building and its location show that a reasonable approach has been undertaken to secure buildings insurance.

26.The Building with the additions will all things being equal cost more to reinstate and so will in itself increase the reinstatement value and hence the premium. The building is of unusual construction in that the original building is made of structural wood and the weight of the penthouse additions is transferred through bespoke steelwork direct to the ground.

27.The Tribunal considered the 2021 Building Declared Value of £4691207 and respective premium of £3711.50. This relates to the pre completion of the penthouses. No evidence was available to suggest whether the Building Declared Value had been subject to a contemporary valuation or whether the figure was based on an historic assessment. The witness statement of Mr Barker showed that he and Bamptons Management had only become involved with the building post the taking out of the 2021 insurance.

28.The Allianz Insurance for 2022 had a Building Declared Value of £9,999,999. and respective premium of £8851.24. The Building Declared Value was a product of a rebuild cost assessment carried out on 25 April 2022. Mr Barker submits in his Witness statement that Brampton Management approached two of brokers who approached a number of insurers. There was a problem with the cladding, which the Tribunal heard in evidence related to the use of wooden battens.

29.For the 2023-year Mr Barker in his witness statement submits that conscious of the large increase the year before, several insurers were contacted. Again issues with the cladding and potential flood risk caused difficulty.

30.The Tribunal finds the insurance costs for 2022 year provided by Allianz at £8851.24 and Allied World for 2023 year at £20,750 are payable. Zurich and Lloyds syndicate had been approached and no offer of insurance was made. Tristar offered a premium of £104,000.

31.In Mr Barkers witness statement, Mr R Mayo of Insurety noted that the insurers were concerned about the timber floors, timber frame, cladding and

flood risk. Other quotes obtained were around £10,000 in excess of the premium eventually settled at with Allied World at £20,720 for £9,537,500.

32.Mr Barker also noted that for the year 2022 premium was recorded at £ 8851.24 on the schedule but £ 8891.00 recorded in the bundle. Mr Barker noted the difference of £40.00 was caused by the omission of the insurers £40 broker fee.

33.Similarly, Mr Barker in his witness statement, there was a mid-term adjustment to the premium, which was caused by the correction of the insurers understanding that the floors were concrete when in fact they were timber.

34.The Applicants were concerned and asserted that the additional structure of the penthouses with their associated steel sub structures and cladding had an adverse impact on the costs of the insurance.

35.By email dated 5 June Mr Waldman of Apartment 10 included two comparables for the insurance, Aspect – Seabrook Road and Seabrook Heights, Seabrook Road, where the premiums are significantly less. The Tribunal has considered these, and their method of construction is different and so it is difficult to use these as comparators.

36.Additionally in the e mail Mr Waldman, Applicant, asserts that the structural work required to build the two penthouses must increase the cost of the reinstatement costs.

Decision

37.Insurance premiums are essentially a product of the nature of the building, the size and the location. In the case of Olivia Court, the building is an unusual form of construction, structural wood, wood floors and cladding. The evidence shows that this structure has raised concerns with the insurers, they perceive rightly or wrongly it is a greater risk than more traditional construction and have reflected this in the premium. Likewise, the increased size of the building will necessarily have an upward pressure on the size of the premium.

38.Under the lease, the landlord reserved the right to further develop the building and the tenants remain covenanted to pay for the services of the larger building. The matter of apportionment is addressed later in the decision.

39.Finally, insurers have in this case raised again interest in the prospect of flooding, a specific requirement of the lease for the landlord to insure for, which has also increased the premium which they are willing to insure the property for.

40.The landlord is not required to accept the lowest premium but that the premium should be reasonable. The evidence of Mr Barker, Bampton

Management, and Mr Mayo of Insurety has shown that the market has been tested by seeking insurance through a number of potential providers.

The insurance premiums are determined by the Tribunal to be reasonable.

Apportionment

41.A lease of Flat 1 Olivia Court was provided within the bundle and accepted as being of the same format for all the leases in the buildings.

42.At clause 2.3 (c) the Tenant covenanted to pay the Landlord the Service Charge.

43.Within the lease at clause 1.1, the Service charge is defined as " the Tenant's proportion of the service costs".

44.Under 1 Interpretation "Tenants proportion: 1/22 of such other amount as the Landlord may notify the Tenant from time to time."

45.Section 27A LTA 1985 provides jurisdiction " for a determination whether a service charge is payable" and if so "the amount which is payable".

46.As stated by Lord Briggs JSC in Williams v Aviva Investors Ground Rent GP Ltd [2023] UKSC 6 : *"nothing is said expressly about the principles with the FtT is to apply in determining payability. The natural assumption is that the FtT would decide by reference to common law principles of contractual liability, subject to the detailed scheme for statutory control laid down in the immediately preceding provisions of [LTA 1985]*"

47.At [13]-[18] of Williams v Aviva, Lord Briggs JSC makes clear that :

At [14]: The decision on how to apportion aggregate costs among the tenants benefitted by works or services may be a discretionary management decision, although the lease may prescribe how to apportion such as by a fixed apportionment regime:

At[14] : Sometimes the conferral of discretion on the landlord is expressed in the lease, such as the power of the landlord to re-apportion in that case (see [3] where the lease is quoted : "your share of the insurance costs is 0.7135% or such part as the Landlord may otherwise reasonably determine").

48.In Williams v Aviva, the lease required the landlord to exercise its discretion "reasonably"([3],[33]). In contrast , the approach to unqualified discretions was explained in Bradley v Abacus Land 4 Limited: "It is clear following the decision in Aviva that where a lease confers on a landlord an unqualified discretion then

that provision is not void; the landlord is free to exercise it and the only test to be applied by the FtT is one of rationality" (at[44], and [51]).

49.Braganza v The Riverside Group Ltd [2023] UKUT 243 (LC) at [45] : provides guidance on the rationality test.

50."It follows that, after Aviva, the FtT's only task when a leaseholder challenges a discretionally apportionment made by a landlord or its surveyor will be to consider whether the apportionment was "rational", in the sense that it was made in **good faith** and **not arbitrarily** or **capriciously**, and was arrived at taking into consideration all relevant matters and disregarding irrelevant matters. Unless for one of those reasons the decision was not one which any reasonable landlord could make, the FtT must apply it, and may not substitute an alternative apportionment of its own."

51.The Respondent contends that their decision to change the apportionment to 1/24 following the completion of the two penthouses was rational.

52.Counsel contended the decision was rational because; applying a 1/24 was consistent with previous practice which had seen equal shares of 1/22 being determined on the number of flats. Counsel submitted that such an outcome was neither arbitrary or capricious.

Further equal portions were a common approach adopted by landlords.

53.Finally, that the majority of services were to the common parts, and all flats irrespective of the size benefitted from the services.

54.The Tribunal asked whether the increased size of the property would require ongoing increased repair liability and an increased insurance liability and could these not be expected to fall under consideration of all relevant matters.

55.In support of the contention that the decision was rational, counsel for the Respondent called two witnesses; the Respondent Mr Digges and Mr W Barker of the Bamptons Management Ltd.

56.The Applicants asked of the witnesses, would not the fact that the lift being extended to the penthouse with its own security access cause additional expenditure? Would not the extra windows of the penthouses cost disproportionately more to clean?

57.The Respondent's witnesses in the case of the lift believed that any cost would be marginal. With respect to the windows that cleaning of windows was already undertaken so the additional windows of the Penthouses would have a marginal impact also.

58.The Applicants sought to persuade the Tribunal to adopt an apportionment approach based on relative area of the flats. The Applicants referred the Tribunal to a schedule of areas derived from EPC data. The Applicants sought to show that each penthouse was in the order of 3 to 4 times the size of the other flats in the blocks and therefore they submitted an apportionment approach on the basis of relative areas would be the reasonable approach.

Decision of the Tribunal

59.The Tribunal is clear that additional accommodation in the form of the additional Penthouses will cause increased expenditure in their maintenance or services provided to them including window cleaning. However, the effect of increased services being needed for increased accommodation is not in itself a reason to find the apportionment unsound.

60.The Tribunal is limited in its ability to consider the apportionment in the context of a lease provision which provides for unqualified discretion. The test is not whether it is reasonable to alter the apportionment from 1/22 to 1/24 but whether it is rational.

61.Guidance on the test of rationality is set out in Braganza v The Riverside Group Ltd [2023] UKUT 243 (LC).

The First limb of the test, the Tribunal must ask whether the apportionment was carried out in good faith?

62.The evidence before the Tribunal shows that the decision was communicated to the leaseholders at an early stage, there was no dishonesty or attempt to deceive.

A second limb, was the apportionment arbitrarily carried out?

63.Again, there is no evidence that the actions amounted to decision was taken as evidenced by the two witnesses Mr Digges and Mr Barker that various matters including the nature and extent of the two penthouses and their relation to the previously existing building were known and considered.

Third limb, was the apportionment carried out capriciously?

64.There is no evidence the decision was taken in a whim or without logic. There has been a clear trail of logic which has supported the decision-making process.

65.Martin Rogers QC in Braganza also qualified the rationality test, by reference to “taking into consideration all relevant matters and disregarding irrelevant matters.”

66.The examination of the two witnesses for the Respondent in regard to apportionment Mr Digges and Mr Parker in relation to whether the penthouses would present disproportionately higher service charge costs on the basis of their extent, nature and size, had been taken into account in the decision-making process.

The Tribunal stresses the test is not one of reasonableness but one of rationality, and on this basis the Tribunal determines the portion of 1/24 is not irrational and should be used in the determination of the service charge apportionment.

Given the decision of the Tribunal is on a test of rationality rather than reasonableness because the covenant provides for unqualified discretion. The Tribunal does not need to consider an alternative apportionment approaches whether on area of apartments or other bases.

Section 20C

67.The Applicants make a section 20 C Application that the costs incurred by the Respondent in the hearing should not be levied on the service charge.

68.The Tribunal declines to make an Order for the costs of the hearing to be prevented from being levied on the leaseholders by way of future service charge.

69.The Tribunal however having examined the fees note that the solicitors costs are in excess of what is set out in the Solicitors Guideline Hourly rates last published 4 January 2024, where a Grade A national rate is £278 per hour and a Grade D is £134 per hour, whereas those used in the Cost Schedule are £325 and £175 respectively. These rates are approximately 18% in excess of the guideline rates which are so adjusted.

Solicitors' costs of preparation £ 5270 less 18% gives £ 4321.00

Counsel	£5000.00
Sub Total	£9321.00
VAT 20%	£1864.20
Revised total	**£ 11185.20**

Para 5A Application

The Tribunal declines to make an Order preventing any future administration charges if properly incurred, from being levied on the leaseholders.

Tribunal Application and hearing fees.

No Order is made in respect of the Applicant's Application and hearing fee.

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 by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking. 7