FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AX/LSC/2024/0115**
Property	**:**	**72A Coombe Road, New Maldon, Surrey KT3 4QS**
Applicant	**:**	**Mrs N Dhalla**
Representative	**:**	**Crawford Legal Services**
Respondent	**:**	**Ms B Price**
Representative	**:**	**Not legally represented**
Type of Application	**:**	**For the determination of the liability to pay service charges**
Tribunal Member	**:**	**Judge P Korn**
Date of decision	**:**	**23 August 2024**

DECISION

Description of hearing

This has been a remote hearing on the papers. An oral hearing was not held because the Applicant requested a paper determination, the Respondent did not object, and the sums in dispute are relatively small.

Decisions of the tribunal

(1) The Dyno-Rod charge of £49.00 is payable by the Respondent in full.

(2) The building insurance premium of £413.27 for 2022/23 and the building insurance premium of £541.21 for 2023/24 are payable by the Respondent in full.

(3) The building insurance premium of £350.11 for 2018/19, the building insurance premium of £334.61 for 2019/20, the building insurance premium of £350.44 for 2020/21 and the building insurance premium of £420.16 for 2021/22 will each be payable in full once the Respondent has been served with a fresh demand accompanied by a valid summary of rights and obligations.

Introduction

1. The Applicant seeks a determination under section 27A of the Landlord and Tenant Act 1985 Act ("**the 1985 Act**") that certain charges are payable by the Respondent in full.

2. The Applicant is the joint freeholder of the building ("**the Building**") of which the Property forms part. The other joint freeholders are Mr S Dhalla, Dr N Rahim and Mrs S Rahim. The Respondent is the leasehold owner of the Property.

3. The Building is a mixed commercial and residential space. The ground floor is commercial (more details below), the Respondent's two-bedroom flat is on the first floor, and there are two one-bedroom flats on the first and second floors respectively.

4. The charges in question are as follows:-

Service Charge Year	**Nature of disputed item**	**Amount paid by Respondent**	**Amount sought in total by Applicant (including amount paid)**
2018/19	Building insurance premium	£292.94	£350.11
2019/20	Building insurance premium	£295.87	£334.61
2020/21	Building insurance premium	£325.46	£350.44

2021/22	Building insurance premium	£358.01	£420.16
2022/23	Building insurance premium plus share of Dyno-Rod charge	£394.01	£462.27 (of which £49.00 is the Respondent's share of the Dyno-Rod charge)
2023/24	Building insurance premium	£433.41	£541.21

General observations

5. This case was set down to be determined on the papers alone, without an oral hearing, at the request of the Applicant and with the agreement of the Respondent. Given the relatively small sums in dispute it is understandable that the Applicant would want to avoid paying a hearing fee, and that the Respondent would want to avoid the possible risk of having to reimburse that hearing fee, and understandable too that both parties would not wish to take time away from their business/personal lives to attend a hearing. It does, though, need to be emphasised that as a consequence any factual evidence adduced by the parties has not been tested by cross-examination at a hearing and therefore that less reliance can be placed on that evidence.

6. The hearing bundle is long and contains a large amount of correspondence, and it is neither practical nor appropriate to try to summarise its whole contents, particularly in the absence of a hearing at which the parties could have identified what they considered to be the key items. The summary of the parties' written submissions below is therefore limited to an overview of those arguments and documents that I consider to be the most pertinent.

Written submissions

Respondent's submissions

7. The Respondent states that when her lease ("**the Lease**") was granted the Building comprised (i) a two storey doctor's surgery with a newly built ground floor extension into Lime Grove and (ii) the Respondent's own self-contained 2-bedroomed flat, built above the new extension with its own entrance. Planning permission was granted for this, subject to a deed which restricted the number of doctors to 3 at any one time and the number of patients to 6800. She adds that the landlords' need to adhere to the aforementioned deed is embedded in the Lease,

with payment of service charges being dependent upon its being complied with.

8. Initially, her service charge proportion of 25% of service costs as specified in the Lease was reasonable in her view, as her flat occupied approximately half of the first floor. Insurance was the only service charge levied at the time as each property owner paid the landlords' builder directly for the external maintenance of their respective properties. In 1996 and 1997, the building size was increased by around 20% by the addition of a second floor at the front of the building and a room for records storage. The landlords, accordingly, agreed to reduce her service charge proportion to 20%.

9. In 2005, the freehold was sold to the present landlords, including the Applicant, and permission was granted to convert the first and second floor offices to residential flats and the ground floor to a dental practice. Planning permission was subject to further restrictions with the number of dentists limited to 3 at any one time and the number of patients further reduced from 6800 to 6600.

10. The Respondent states that *"the overutilisation of the Building, ignoring the Deed, referred to in my Lease, will have inflated the premiums"*. By way of explanation of this point she adds that the operation of four surgeries, 25% more than allowed, and following construction works in 2020 to create a fifth surgery, are now 40% more than allowed by the deed referred to in the Lease. She also states that from 2006 onwards the new flats were rented on short term tenancies with 'Landlords and Property owners' cover added to the policy. The dental practice was sold to Vadel Ltd on 30 November 2015, under a 20-year lease. Bonsors were later instructed to produce a reinstatement and revaluation report, and the report concluded that the buildings insured sum should increase from £585,704 to £992,000 which led to a rise of £505.83 in the premium. Both of the new flats were later sold on long leases in November 2021 and December 2022 respectively. Bonsors took over as the managing agents for the Building on 31 May 2022.

11. The Respondent has set out why she disputes the amount of the insurance premium in each of the service charge years. First of all, she contends that the amounts demanded are no longer reasonable for a two-bedroom self-contained flat in this location. Four-bedroom properties in the same road have similar sums insured under their buildings insurance cover but are paying considerably less than is being charged to the Respondent for a two-bedroom flat. Secondly, the policy has changed names from 'Surgery' to 'Commercial Property' to 'Property Owners' but always remains with Aviva with the same reference. In her submission, many elements included are not part of buildings insurance or for effecting public liability, and it is not reasonable or fair for a residential leaseholder to be expected to pay for

elements of cover for the commercial, surgery, property owner, products, data cover or contents that are solely for the benefit of the landlord and/or the commercial leaseholders outside those normally contained in a comprehensive residential buildings policy and outside the covenants in the Lease. She adds that public liability will have increased following a 40% increase in usage of the commercial premises.

12. Thirdly, premiums on recent demands are no longer those shown on the policy schedules as the Applicant has deducted various amounts without providing evidence. Handwritten notes on schedules or figures in emails show amounts for 'non-payment of rent', 'terrorism cover' 'revenue protection' etc. but these do not include all the non-building related risks and the amounts seem arbitrary, varying from year to year. The Respondent has repeatedly asked for a premium breakdown directly from the insurers, as provided on residential insurance policies, but the Applicant has consistently refused to obtain this.

13. Fourthly, following the settlement of a court case in 2011 between the parties relating to other issues, the Respondent states that a 20% surcharge was applied to the insurance premium because the landlords had claimed against the policy for their legal costs. The claim was noted in the claims history on the policy schedule. The Respondent's view is that the 20% surcharge should be borne by the landlords.

14. Fifthly, she contends that under the Lease the cost of insuring the building and the payment of service charges are subject to the provisions of clause 6(v) which refers to a deed limiting the usage of the Building. In her submission, the landlords have been, and remain, in breach of clause 6(v) by allowing the number of dentists to exceed 3 and permitting an unlimited number of patients. Insurance for the flat is required under clause 6(iv) to be *"for the full reinstatement cost thereof against loss or damage by fire flood subsidence and landslip and such other risks as are normally covered under a comprehensive policy"*, and she comments that clearly this applies to buildings insurance only by the qualifying statement *"and to cause all money received by virtue of such insurance to be forthwith laid out in rebuilding and reinstating the Building"* and not to surgery or commercial elements.

15. Sixthly, she states that after Bonsors produced their reinstatement valuation report a further premium increase of 43% was demanded and works were then carried out between 2018 and 2020 to create a fifth surgery in breach of clause 6(v) of the Lease. Seventhly, she states that Hawes – the managing agents between 2018/19 and 2021/2022 – did not include a service charge summary of rights and obligations with their demands for those service charge years.

16. The Respondent also states that in her letters of 16 February 2024 and 2 February 2024 to Mr Shaminur Rahman (one of the freeholders) she asked whether the premium amount contained any commissions to the broker, the landlords or the managing agents and whether any discounts had been applied but that her questions were never answered.

17. In relation to the Dyno-Rod invoice, in respect of which it is common ground that this was for clearing a blocked drain, the Respondent states that she is not liable for this cost. Prior to 2005, this drain was only used for two rainwater pipes; one from the front surgery roof gutters and the other being the overflow pipe from her patio. The water overflowing the drain was soapy kitchen water and not rainwater, and her kitchen is located on the other side of the Building and does not use this drain for discharging waste water. In any event she has never put grease or fat down her sinks or blocked the drain. The Respondent has included in the hearing bundle copy photographs purporting to show the drain full of fat and grease.

18. The Respondent has provided some documentation as her evidence of comparable quotations for building insurance. One is a quotation obtained by her for the Property from Nationwide Building Society in 2022, and the other two are insurance renewal details for two neighbours' houses.

19. The Respondent has also made follow-up comments on certain of the Applicant's submissions and these comments have been noted.

Applicant's submissions

20. The Applicant's written submissions take the form of a witness statement prepared following discussions with her solicitor. She states that on 13 January 2022 planning permission was granted for a Dentist Practice and the permission expressly stated that there was no limit on patients or practitioners.

21. The Applicant confirms that it was agreed that the Respondent's service charge percentage would be reduced from 25% to 20%, albeit that this has not yet been formalised by a deed of variation.

22. As regards the increase in building insurance premiums, she states that rates have increased throughout the insurance industry, and she has provided a copy email from Wesleyan confirming that this is their view. She denies that the Building has been over-utilised and states that in any event the Respondent has provided no evidence to support her assertion that it has.

23. The loss of rent cover and terrorism cover for commercial use has been excluded from the Respondent's contributions, and the hearing bundle contains an email to the Respondent dated 30 August 2018 breaking down the premium. Also, in an email dated 24 June 2024 the insurance brokers – Caithness & Co – have provided their own breakdown of the amounts not contributed to by the Respondent.

24. The Applicant does not agree that the amounts charged are unreasonable, particularly as the Property is within a mixed-use development and the Respondent will have known this when buying the Property. The Respondent has provided no evidence that the landlords are in breach of the terms of the Lease. No commission is paid to the broker, the landlords or the managing agent.

25. The Respondent's evidence on insurance premiums paid for neighbouring properties is not comparable in the Applicant's view because both of those properties are purely residential.

26. Regarding the drain, Dyno-Rod attended the Building and cleared out the drain. The drains from all units empty into this drain, and it had become clogged up over time at the point where there is a U-bend. The drains did not appear to have been misused.

Tribunal's analysis and determination

27. Whilst this case centres on the question of **how much** is payable in respect of the disputed items, it is first necessary to establish whether in principle these items are payable under the Lease. There are two categories of charge in dispute, namely (i) the cost of drain cleaning and (ii) building insurance premiums.

28. In clause 5(iii) of the Lease the tenant covenants to *"contribute and pay by way of service charge contribution one-fourth part of the costs and expenses reasonably and properly incurred by the Lessors and mentioned in the Fifth Schedule hereto in accordance with the provisions of the Sixth Schedule hereto"*. The Fifth Schedule includes in paragraph 1 *"The expense of maintaining [and] cleansing … where necessary … the pipes sewers drains … in under or upon the Building and enjoyed or used by the Lessee in common with the owners and occupiers of the remainder of the Building"*, and I am satisfied that this is wide enough to cover the cleaning of the drain by Dyno-Rod subject to the validity of any of the Respondent's arguments.

29. Paragraph 3 of the Fifth Schedule covers *"The cost of insuring the Building pursuant to Clause 6(v) hereof and effecting public liability insurance as required by the Lessors"*. The cross-reference to clause 6(v) of the Lease makes no sense but it is clear that this is just a typographical error and that the intention was to cross-refer to clause

6(iv), this being the clause containing the landlord's covenant to insure. Therefore, again, the Respondent is in principle obliged to contribute towards the cost of insuring the Building.

30. The Lease provides that the tenant is obliged to pay one-fourth (i.e. 25%) of the service charge, but the parties are in agreement that the Respondent's share should only be 20%, as noted earlier, and the Applicant is only claiming 20%.

31. Dealing next with the Respondent's submissions on the Dyno-Rod charge, she implies that the cause of the blockage was the commercial premises (or at least someone other than herself) but she has no evidence to support this implication. In any event, it is simply not the case that a leaseholder's service charge contributions are only payable if it can be established that the leaseholder in question has been at fault in some way. Whilst there will from time to time be circumstances in which a specific problem can easily be tracked down to a particular culprit or in which there is a repeat problem which merits further investigation which in turn can identify a particular culprit, that is not the position here on the evidence before me. It is perfectly plausible that over time material could have accumulated in a U-bend, and the Respondent has neither the expertise nor the evidence to demonstrate that this is not the case here. There is no challenge to the reasonableness of the **amount** of the charge, and therefore this charge is therefore payable in full.

32. In relation to the building insurance premiums, the Respondent submits that the landlords have been in breach of the terms of the deed referred to in clause 6(v) of the Lease and implies that this alleged breach should affect her obligation to pay the building insurance premiums. She does not, though, make it clear whether she believes that it should completely cancel her obligation to pay the building insurance premiums or just reduce the premiums and if so by how much and why.

33. Clause 6(v) of the Lease requires the landlords *"To observe and perform the terns covenants and/or conditions contained in a Deed dated 17th July 1990 between The Mayor and Burgesses of the Royal Borough of Kingston upon Thames (1) and … Leonard Adrian Sherski (2) under Section 52 of the Town and Country Planning Act 1971 (as amended) and at all times to indemnify and keep indemnified the Lessee from and against all liabilities claims damages expenses and costs in respect thereof"*. One point that is striking in the light of the Respondent's arguments is the complete **absence** of any linkage between this covenant and the tenant's liability to contribute towards the cost of building insurance. Clause **6(ii)** of the Lease, on the other hand, links the payment of the service charges (including building insurance premiums) and of the rents to the landlord's obligation to repair and maintain etc the Building. This linkage is actually the

opposite of that argued by the Respondent, because it is the **landlord's** obligations that are conditional here, but still there is some linkage, whereas the obligation to comply with the terms of the deed referred to in clause 6(v) is not linked in any way with payment of the insurance premiums by the tenant.

34. It is true that clause 6(v) gives the tenant a possible remedy for non-compliance with the terms of the deed to which the clause refers, but even if the Respondent could establish that non-compliance had occurred and that she had as a result suffered loss, this would still be a separate right unconnected to the payment of building insurance premiums. Also, the correct forum would be the county court, not this tribunal, unless some form of set-off right could be established that was within this tribunal's jurisdiction to deal with, but this point has certainly not been pleaded in this case and it is very hard to see why it would be successful if pleaded. As for the circumstances in which a claim might be possible in the county court, it is not for this tribunal to speculate save that it is just worth remarking that it is not all obvious that the purpose of the clause is to benefit the tenant in its use of the Property or to keep down insurance premiums.

35. In any event, I am not satisfied that the Respondent has demonstrated that the landlords are in breach of the deed or even that a breach of that deed necessarily has more than historic relevance given the subsequent variation and the later granting of planning permission expressly stating no limit on patients or practitioners.

36. The Respondent states that *"the overutilisation of the Building, ignoring the Deed, referred to in my Lease, will have inflated the premiums"* and that that public liability will have increased following a 40% increase in usage of the commercial premises, but she offers no evidence to support these assertions.

37. The Applicant has provided reasonable evidence that the loss of rent cover and terrorism cover for commercial use has been excluded from the Respondent's contributions, and she also makes the point – with some supporting evidence and with which I agree – that rates have increased in recent years throughout the insurance industry. It should also be noted that it is established law that building insurance premiums cannot be held to be unreasonable simply because they are not the cheapest available in the market. As regards commissions, the Applicant states that no commission is paid to the broker, the landlords or the managing agent. It is possible that this statement is untrue, but I do not have proper grounds for determining that the Applicant is lying. The Respondent's other submissions as to what the building insurance policy covers but should not cover are difficult to follow and are not argued in anything like sufficient detail or evidenced in any meaningful way.

38. It was open to the Respondent to demonstrate that the premiums are unreasonable through the use of comparable evidence, and this she has tried to do. However, such evidence generally needs to be 'like-for-like' evidence. The Respondent has offered the comparison of two neighbouring properties, but these are wholly residential and therefore not properly comparable. In addition, I do not have sufficient details of each property to make a meaningful comparison and it is very difficult to extrapolate between two very different types of property. There are also other missing details such as respective claims histories and other possible differences between the properties such as whether any have a flat roof, what building materials were used, what other property-specific risks there are, etc.

39. In relation to the Nationwide quotation, this has the merit of relating to the Property but the details provided are so sparse that it does not have much by way of evidential value.

40. Therefore, subject to the important point made below, the amounts charged by the Applicant (and the other joint landlords) by way of building insurance premiums are payable in full.

41. The Respondent states that the demands for building insurance premiums for the 2018/19, 2019/20, 2020/21 and 2021/22 years were not accompanied by a service charge summary of tenant's rights and obligations and the Applicant has not countered this point, and this is a point that the Applicant's legal advisers will or should have understood. Therefore, on the basis of the evidence before me no summary of tenant's rights and obligations was served in any of these years.

42. Under section 21B(1) of the 1985 Act *"A demand for the payment of a service charge must be accompanied by a summary of the rights and obligations of tenants of dwellings in relation to service charges"*. Under section 21B(3) *"A tenant may withhold payment of a service charge which has been demanded from him if subsection (1) [i.e. section 21B(1)] is not complied with in relation to the demand"*. Under section 20B(4) *"Where a tenant withholds a service charge under this section, any provisions of the lease relating to non-payment or late payment of service charges do not have effect in relation to the period for which he so withholds it"*.

43. Therefore, in relation to the building insurance premiums for the 2018/19, 2019/20, 2020/21 and 2021/22 years the Respondent may withhold payment (or, in this case, withhold payment of the balance due) until the landlords have complied – retrospectively – with this requirement.

44. However, the other point that needs to be considered is the relationship between section 21B and section **20**B of the 1985 Act. Section 20B states (to paraphrase) that a service charge will not be payable at all if

the landlord fails to make a service charge demand within 18 months of the relevant costs having been incurred and fails to notify the tenant within that 18-month period that such costs had been incurred. The question therefore arises as to whether sending out a defective service charge demand – in this case one not accompanied by a summary of rights and obligations – is equivalent to not sending out a service charge demand at all.

45. In the Upper Tribunal case of *Parmar v 127 Ladbroke Grove Limited [2022] UKUT 212 (LC)*, Martin Rodger QC held – in line with previous authority – that where a demand is invalid under the contractual provisions of the lease itself it does not constitute a demand for the purposes of section 20B(1) and that therefore if no fresh valid demand is issued and no valid notification made within 18 months after the relevant costs have been incurred the landlord will lose its right to recover the tenant's contribution to those costs. However, the earlier Upper Tribunal case of *Johnson v County Bideford Ltd [2012] UKUT 457 (LC)* concerned a situation in which demands were invalid by virtue of their failure to comply with section 47(1) of the Landlord and Tenant Act 1987 in that they gave the name and address of the managing agents rather than those of the landlord. George Bartlett QC held that by serving fresh demands containing the correct information the landlord could validate the demands retrospectively. The original demands therefore still constituted demands for the purposes of the time limit contained in section 20B of the 1985 Act.

46. Applying the distinction between the above two decisions to our case, the issue in our case is not one of the demands being contractually invalid but rather of their falling foul of a statutory requirement for specific information to be supplied. As such, the defect can be cured in each case by the service of a fresh demand accompanied by a summary of rights and obligations, and the demand will be deemed for the purposes of section 20B to have been served when originally sent out. However, because the demand was not valid at the time when it was sent out, for the purposes of section 21B(4) the landlords are not entitled to charge interest on late payment of the balance or to pursue any other remedies for late payment or non-payment until after valid demands have been sent and a new remedy has arisen in connection with the validly demanded sums.

47. In conclusion, therefore, the Dyno-Rod charge is payable in full, as are the building insurance premiums for the 2022/23 and 2023/24 years. In relation to the earlier years, the building insurance premiums are not currently payable but will become payable once the Respondent has been served with valid demands accompanied by valid summaries of the tenant's rights and obligations.

Cost application

48. The Respondent has applied for a cost order under paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 ("**Paragraph 5A**"). The relevant parts of Paragraph 5A read as follows:-

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

49. The Paragraph 5A application is therefore an application for an order that the whole or part of the costs incurred by the landlord in connection with these proceedings cannot be charged direct to the Respondent as an administration charge under her lease.

50. The Respondent has been almost wholly unsuccessful in her main application and there is therefore no proper basis for making a Section Paragraph 5A cost order in her favour. The Respondent makes some observations about case management issues, but these observations have not been tested in a hearing and are not compelling enough to reverse the presumption that the cost provisions contained in the Respondent's lease should take effect.

51. If, as the Respondent suggests, the Applicant's litigation costs are covered under an insurance policy then there should be no reason for the Applicant to seek recovery from her, but the existence of an insurance policy is not itself a proper ground for making a Paragraph 5A cost order. The application is therefore refused, although it should be noted that this does not mean that these costs are necessarily recoverable by the landlord as a matter of interpretation of the Respondent's lease.

Name: Judge P Korn **Date:** 23 August 2024

RIGHTS OF APPEAL

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

B. 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.

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

D. 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.