In the FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Tribunal Case Reference	**:**	**LON/00BG/LSC/2023/0479**
Property	**:**	**The Bagel Factory, White Post Lane, Medola Yard, Rothbury Road, London E9**
Applicants	**:**	**(1) Various leaseholders as listed in the appendix to the application** **(2) Home Group Ltd**
Representative	**:**	**Jobsons Solicitors**
Respondents	**:**	**(1) Aitch Investments Properties Ltd** **(2) 52-54 White Post Lane LLP** **(3) Rothwick LLP** **(4) HWFI Management Company Ltd**
Representative	**:**	**Seddons**
Type of Application	**:**	**Payability of service charges**
Tribunal	**:**	**Judge Nicol** **Mr S Mason FRICS**
Date and venue of Hearing	**:**	**26th-27th November 2024** **10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**12th December 2024**

DECISION

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(1) The costs taken into account in determining the amount of the service charges for 2020-21, 2021-22 and 2022-23 and challenged in these proceedings were reasonably incurred and so the service charges are payable, save for:

(a) The insurance commission paid to Mura is reduced by half;

(b) The landscaping charge in 2020 is reduced to the same amount as in 2021;

(c) The charge for the gym while closed for COVID, being one quarter's rent of £18,999.90, was not reasonably incurred.

(2) The Applicants shall, by **10th January 2025**, notify the Tribunal and the Respondent whether they wish to withdraw or continue with their applications under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002 ("the costs applications").

(3) If the Applicants wish to continue with the costs applications, they must, by **24th January 2025**, send to the Tribunal and to the Respondents, their written submissions in support.

(4) The Respondents shall, by **7th February 2025**, send to the Tribunal and to the Applicants, their written submissions in reply.

(5) The Tribunal will determine the costs applications on the papers, without a hearing, on or as soon as possible after **17th February 2025**.

(6) If either party requests a hearing for the costs applications, the Tribunal will issue amended directions, including for the hearing.

Relevant legislation is set out in the Appendix to this decision.

Reasons

1. The Bagel Factory is a mixed-use development located near Victoria Park in East London. It was completed in 2019 and contains 211 apartments in 6 blocks and 15 commercial units, as well as estate roads and amenities such as a concierge and a gym. The blocks are:

   (a) Block A (51 flats), also known as 1 White Post Lane and part of 24-26 White Post Lane and what is known as Bagel Factory West, in respect of which the First Respondent is the freeholder and landlord.

   (b) Block B (30 flats), also known as 11 Meldola Yard and again part of 24-26 White Post Lane and Bagel Factory West, in respect of which the First Respondent is also the freeholder and landlord;

   (c) 13-15 Rothbury and 3 Meldola Yard (22 Flats), again part of 24-26 White Post Lane and the third block forming part of Bagel Factory West, in respect of which the First Respondent is again the freeholder and landlord;

   (d) Cores A to D (55 flats), also known as 52-54 White Post Lane or Bagel Factory East, in respect of which the Second Respondent is the freeholder and landlord;

   (e) Block E, 17-19 Rothbury (23 flats on shared ownership leases), known as 25-37 Rothbury Road or 19 Rothbury or Bagel Factory Central, in respect of which the Third Respondent is the freeholder and landlord and where the Home Group, one of the Applicants, holds a head lease. The lessees acquired the Right to Manage the block on 4th August 2023; and

(f) Stonemason's House, 3 Hepscott Road, E9 5HB (30 flats) in respect of which the freeholder is 1-2 Hepscott Road Ltd which retains ownership of all the flats therein.

2. The leases other than the shared ownership leases are tripartite in which the Fourth Respondent is named as the management company.

3. The Applicants are lessees of a number of the flats, some of them under shared ownership leases in Bagel Factory Central with the others on standard leases in other blocks. The Applicants' witness, Mr Lamy, lives in Bagel Factory Central and has a shared ownership lease.

4. The Applicants have applied under section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act") for the determination of the payability and reasonableness of certain service charges for the four years from 2019 to 2022.

5. The Applicants have also applied for costs orders under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002. Since the Tribunal's decision on the substantive issues would inform the parties' submissions in relation to costs, the Tribunal has given separate directions for their determination.

6. The hearing took place on 26th and 27th November 2024. The attendees were:

- Mr Mark Loveday, counsel for the Applicants
- Mr Ben Lamy, lessee and witness for the Applicants
- Mr Paul Letman, counsel for the Respondents
- Mr Chandra Patel, Head of Property & Asset Management for the First Respondent and witness for the Respondents
- Mr Daniel Robin, solicitor for the Respondents.

7. The documents before the Tribunal consisted of:

- A Bundle of 2,427 pages;
- A Supplemental Bundle, expanded from around 200 pages to 633 pages just before the hearing;
- A version of the Scott Schedule, summarising each party's position on each issue, revised with cross-references to the Respondent's submissions (the previous versions were in the main Bundle); and
- Skeleton arguments/opening submissions and bundles of authorities from each counsel.

Witness statements

8. The Tribunal has comments to make about the parties' witness statements. Mr Lamy's was 45 pages long and Mr Patel's was 30 pages long. Despite the fact that both parties would have known when compiling the witness statements that all relevant documents would be before the

Tribunal in a bundle, both statements had extensive exhibits. The documents within the exhibits were not separated out into any logical order or fully indexed in the hearing bundle. Such length and poor organisation make it much more difficult for the Tribunal to prepare for the hearing and for relevant evidence to be identified. The courts keep tight control over the length of witness statements but it should not be thought that the Tribunal's lack of formality is some kind of invitation to break free of such restrictions.

9. Mr Lamy has an excuse, to a degree. He described in his witness statement how the rising service charges (in paragraph 24, My Lamy pointed out how the service charges for his building had risen from around £50,000 in 2020 to around £90,000 in 2023) and perceived poor services at the property led him to take the greater part of the burden of challenging them and then preparing the Applicants' Tribunal case, not least because he and many of his fellow lessees would struggle to afford legal representation throughout the proceedings. Of course, he wanted to put forward the detail which explains the problems of the lessees at the Bagel Factory and did not want to miss anything but too much detail risks drowning out the most important points.

10. The parties' solicitors should take on board the need to focus their clients' case better in future. It may also help to follow the guidance as to what should be in a witness statement in *JD Wetherspoon plc v Harris* Practice Note [2013] EWHC 1088 (Ch); [2013] 1 WLR 3296.

Limiting of issues

11. On the other hand, the parties are commended for narrowing the issues during the proceedings. Those issues which were discontinued, such as an alleged failure to note properly the lessees' interest on the buildings insurance, are not considered in this decision. The remaining issues are considered in turn.

Preliminary Issue

12. At the commencement of the hearing, Mr Letman sought a preliminary ruling in relation to two issues in respect of which he submitted that the Applicants were relying on antecedent breaches for which any legal remedies lay elsewhere, as considered by the Upper Tribunal in *Continental Property Ventures v White* [2007] L&TR 4:

    (a) The Bagel Factory benefits from a communal heating system. Unfortunately, the individual heating units have required a high level of maintenance which is reflected in the service charges. The Applicants alleged that, if the Respondents had arranged for remedial works to be carried out during the currency of a guarantee which ran for 2 years from 7th December 2018, the works themselves and/or the resulting costs would have been covered by the guarantee and later maintenance costs incurred in 2021 and 2023 could have been avoided. In the Tribunal's opinion, this clearly falls within the principles enunciated in *Continental Property Ventures v White*. The Applicants have their legal remedies in

the courts for any losses arising from any failure of maintenance during the period of the guarantee but there is no suggestion that the maintenance carried out in later years was not required at the time it was carried out. The challenge to the costs of maintaining the heating system is struck out.

(b) Mr Letman understood the Applicants to be arguing that the cost of the communal electricity supply was higher than it should have been due to a failure to use pumps for the heating system for longer periods. In the event, Mr Loveday eschewed this point and asserted instead that the electricity charges were so high as to require an explanation. Mr Letman objected that this point had not previously been raised. The Tribunal held that, on the material available to the Respondents, they had a fair opportunity to rebut this point (as considered further below) so that it would not be struck out as a preliminary matter.

Building insurance premiums

13. The Respondents place insurance each year through brokers, Marsh, part of Marsh McLennan, the largest insurance brokers in the world. In theory, this is done through Mura Estates LLP, a company comprised of and acting on behalf of the Respondents, although, in his oral evidence, Mr Patel said he was the person who did the work in relation to insurance for the Respondents, despite working for the First Respondent, not Mura. The Respondents and Mura are all associated companies and it seems that some work was done without observing any strict demarcation between each legal entity.

14. The buildings insurance policy covers the Respondents' portfolio, save for any building which the brokers advise should be excluded due to an exceptional risk profile which could adversely affect the premium. The Respondents claim that there are advantages to a portfolio policy, including a lower overall price and less claims sensitivity. The Bagel Factory was included on the Mura portfolio in 2018, save for Bagel Factory Central which was added in 2019. Initially, the insurance was placed with MS Amlin but they withdrew from the market in early 2020, since when the insurance has been placed with RSA.

15. The building insurance premiums for the whole of the Bagel Factory were:

- 2020 £138,244
- 2021 £143,661
- 2022 £116,867
- 2023 £67,964 (one block is missing from this figure)

16. The Applicants asserted that these sums were not reasonable in amount. In *Cos Services Ltd v Nicholson* [2017] UKUT 382 (UT); [2018] L&TR 5 the Upper Tribunal held that whether insurance premiums are "reasonably incurred" and therefore payable as service charges under the Act depends not only on the rationality of the landlord's decision-making but also on whether the sum being charged is in all the circumstances a reasonable charge.

17. The Applicants did not challenge the rationality of the decision-making process for the buildings insurance but rather the outcome. In *Cos Services*, the Tribunal held that the premium charged was around 4 times as much as would be expected in the market on the evidence before it. The Upper Tribunal held that this required an explanation but the discrepancy remained a mystery so that the landlord had failed to satisfy the Tribunal that the charges were reasonably incurred. The Applicants sought to follow a similar process by claiming that there was a discrepancy which the Respondent had failed to explain.

18. In particular, the lessees at Bagel Factory Central acquired the Right to Manage during the period covered by the existing insurance for 2023. The premium charged to the building by the Respondents was £24,884 whereas the RTM company had obtained insurance for the same period at a premium of £20,091, a 19.3% reduction. They extrapolated this across all blocks at the Bagel Factory and demanded an explanation for the difference in the amount of the premium.

19. The Respondents' response, with which the Tribunal agrees, is that the insurance obtained by the Applicants is not comparable with the insurance obtained by the RTM company and it certainly cannot just be applied across the Bagel Factory as if all relevant matters were identical. There is simply no discrepancy to explain.

20. This is supported by differences between the policies. When the RTM company placed the insurance, they specifically requested that the insurance should not include loss of rental income, which the existing policy did include. There were also other differences, including:

    (a) The Respondents' policy had £40m cover for property owners' liability whereas the RTM company's had £10m.
    (b) The vacant parts excess was restricted in the RTM company's policy but not in the Respondents'.
    (c) The Respondents' policy required an extra premium for works costing over £500,000 whereas the RTM company's was for works costing over £250,000.

21. Mr Lamy accepted that whether to go one way or the other in each instance was a matter of judgment. Neither party adduced any expert evidence as to the difference which would be made to the premium by any of these matters.

22. The Applicants also pointed out that, in the 2021 service charge year, the insurance for Bagel Factory Central was £30,249 rather than £15,859 in 2020 and £21,857 in 2022. By email dated 29th April 2024, Mr Nick Bastian of Marsh sought to explain this:

> We were asked to add this property in 2019. At the time we were advised it was a vacant risk, to be let to a housing association. Insurers tend to charge higher rates on this type of risk compared to standard residential as claims experiences are usually worse and Amlin duly provided a rate of 0.17%.

> With MS Amlin withdrawing from the market during 2019/2020 policy period, we had no choice but to remarket the portfolio. This was when the market was at its hardest and insurers were only providing capacity at high premium rates. The only terms available in the market were RSA's and these were 83% more expensive than the expiring Amlin terms. This 83% increase was then applied to all assets across the portfolio increasing the rate to 0.32% in respect of Rothbury Road.
>
> When the 2021 renewal came round, another market exercise was undertaken. Despite the market still being tough, Marsh were able to demonstrate to RSA that the rating of certain assets was out of kilter with the market, Rothbury Road being one of them. Despite the portfolio receiving an overall premium increase again, RSA allowed certain rates to be corrected provided this premium was redistributed elsewhere across other areas of the portfolio. This was not available in 2020 as the increase had to be spread fairly across all assets. Its important to say that this is not correcting a mistake, the overall pricing has remained the same, it's redistributing the overall premium.
>
> In addition to this, another key difference is that assets that attach at different times in the property cycle will attract different premiums due to the state of the market. An example of this is the recent petrol crisis a couple of years ago when the price was much more expensive than it is now. The property market is similar and this particular asset attached when property pricing was at its peak.

23. In the Tribunal's opinion, this is an adequate explanation. Mr Bastian did not give a witness statement or attend for cross-examination but his explanation is inherently credible and internally consistent. The Applicants provided no reasoning, let alone evidence or expert opinion, to refute it.

Building insurance commissions

24. It is not in dispute that Marsh pay to Mura part of the commission they receive from the insurers. The Applicants complained that the Respondents had not been transparent about the precise amounts but they were set out in a table in the bundle showing the amounts for each block for both the main insurance and the terrorism insurance, equating to around 10% of the premiums.

25. The lessees' contributions to the buildings insurance are described in their leases as "Insurance Rent" and the primary definition is in clause 1.1:

> a fair and reasonable proportion of the cost of any premium (including IPT) that the Landlord expends (after any discount or commission is allowed or paid to the Landlord) in effecting and maintaining insurance of the Building in accordance with its obligations in this lease;

26. Both parties have maintained throughout these proceedings that the words in the second parenthesis meant that the lessor was permitted to include commission on the insurance premium in the service charges. Indeed, the Applicants argued that, in contrast, the absence of such words in the shared ownership leases meant that the Third Respondent was unable to do the same. The Tribunal put to the parties that the more natural meaning of the words was that the Insurance Rent is a proportion of the premium which remains after any commissions have been paid. Mr Loveday was understandably attracted by that proposition but the Tribunal agrees with Mr Letman that it is too late in the proceedings to change the common basis on which both parties had sought to argue their respective cases.

27. In any event, in the Tribunal's opinion, the lease provision is a red herring. It is irrelevant whether there is an express provision for commissions. The issue is whether the insurance premium is reasonable. If commissions are deducted from the premium, the question is simply whether the lessees are getting something in return for that payment. The Respondents allege that the commissions have been paid to Mura in exchange for the work that they do in:

(a) liaising with the insurance broker concerning renewal options,

(b) reviewing and considering the policy options and quotations from the market,

(c) instructing the broker to place the insurance policies,

(d) reviewing and updating the construction and occupancy data,

(e) updating the brokers of changes,

(f) meeting with brokers to review and explain any claims history,

(g) holding discussions to progress and oversee matters,

(h) considering alternative broker options,

(i) pursuing options for savings to be passed on the leaseholders,

(j) placing insurance,

(k) responding to leaseholder queries concerning the insurance.

28. At first glance, this is an impressively long list of work. However, on closer inspection, it does not consist of as much as it might seem. Many items contain little actual work, if any. As was pointed out, most, if not all, managing agents who handle the buildings insurance would include much of this work within their standard fee. Notably absent is the claims handling which justified the commissions paid in *Williams v Southwark LBC* (2001) 33 HLR 22. Mr Patel was not very clear on how claims would be handled but he suggested that Marsh's own claims handling department would be involved rather than Mura.

29. In the circumstances, the Tribunal is not satisfied that Mura's share of the commissions is justified and a reasonable amount would be half of that.

Landscaping

30. The Respondents charged nothing under the service heading of "Landscaping" for 2019 but then £16,928 in 2020, £6,944 in 2021 and £3,386 in 2022. The contractor was Jo Maintenance.

31. There is no specification for the relevant work but the Applicants have understandably assumed that "Landscaping" is principally concerned with maintaining the outside areas of the estate, particularly the areas with plants at ground floor and roof levels. Mr Lamy's evidence, supported by a number of photos, is that the planted areas have not been maintained, with plants going brown and dying off across the estate. Mr Lamy went as far as to say that he and other lessees did not think the contractors came to the site because they did not see them.

32. Having said that, the Respondent's evidence, also supported by photos, is that Landscaping included other responsibilities such as washing the common paved areas using a hose. It is understandable that the lessees would not always see the contractors as their own busy lives may not coincide with opportunities to observe them. No evidence was provided from any lessee who could counteract this understanding by explaining how they could have observed the contractors.

33. Whether a charge is reasonable depends to a large extent on whether the service is proportionate to the cost. The charge for a service which is not as extensive as promised may still be reasonable if it is low enough. The reduction from 2020 to 2021 is apparently due to the contractors providing a refund for their work to date. In the Tribunal's opinion, the 2020 charge should be reduced to the same sum as 2021 to take account of the inadequate service in relation to the planted areas but, otherwise the charges are reasonable for the service provided.

Gym

34. There is a gym on site, although it is not available to the shared ownership lessees in Bagel Factory Central. A lease was entered into between two of the Respondents' companies, Rothbury Road Ltd and the Fourth Respondent, and the rent is part of the service charges for the rest of the lessees. When the COVID pandemic hit, the gym had to be closed down as part of the social distancing restrictions imposed by the Government. The Respondents carried on charging the gym rent on the basis that the lease was ongoing. There was talk of a discount but none materialised. The Applicants argue that it is not reasonable to charge them one quarter's rent of £18,999.90.

35. The Respondents can't have it both ways. As already noted in relation to insurance, the Respondent companies are so closely inter-twined that Mura is paid for work done by an employee of the First Respondent. It is the Respondents' choice how to cover the cost of the gym provision but it is not reasonable for them to choose a method which allows them to continue to charge for a service when it is not delivered. They point out that the lack of service is not their fault but that is irrelevant – someone

has to bear the loss but there appears to be no good reason as to why the lessees should be the ones to do so rather than the Respondents.

36. The Applicants had a further argument that the charge came too late, contrary to section 20B of the Act. The Tribunal was not satisfied that this argument was correct but, in any event, the first point addresses the gym charge fully so that it is not necessary to rule on this additional argument.

Communal electricity

37. The Applicants objected to the cost of communal estate electricity rising from £1,900 in 2020 to £14,345 in 2021 and £79,795 in 2022. In a letter dated 13th December 2022, Hawk Block Management stated,

> The electricity contract was tendered by energy broker, Full Power during the summer of 2022. Pozitive Energy, SSE and UGP quoted, and the contract was awarded to Pozitive Energy as they provided the most competitive cost.
>
> As result of the national energy crisis, the cost of electricity has gone up substantially and this has been reflected within the 2023 service charge estimate. The sum included is based on Pozitive's estimated cost provided by Full Power, plus a 20% allowance for a further increase in energy cost expected in April 2023. …
>
> As advised in the 2021 year-end account cover letter sent out in May 2022, when the 2022 service charge estimate was being created it became apparent that the invoices we were receiving from the supplier were not clear in terms of which building and equipment on the development they were supplying, and as a result investigations were completed across the Bagel Factory to understand exactly what each meter was serving and to ensure that all bills received were being apportioned correctly. Whilst these investigations were underway, we kept the provisions for the electrical supply at the same level as the 2021 estimate, this and the energy crisis has resulted in a vast variance between the figures in the 2022 and 2023 estimates.

38. The Tribunal is satisfied that this is an adequate explanation. As well as the well-known effects of the energy crisis, circumstances conspired to shift costs from one period to the next. This is unfortunate but the only effect of the latter problem is that the Applicants paid for the electricity charges later than they should have done.

39. Again, it would be correct to point out that the above explanation was not in the statement of a witness who could be cross-examined about it but this is understandable given that the Applicants had not raised their challenge to this item on this basis until Mr Loveday's skeleton argument (see paragraph 12(b) above). Further again, the explanation is inherently credible and is supported by an email dated 12th July 2022 from Full Power Utilities.

40. Therefore, the Tribunal is satisfied that the charges for the communal electricity are reasonable.

Conclusion

41. The Tribunal has concluded from the material available that the service charges challenged by the Applicants are reasonable and payable, subject to the exceptions discussed above. Directions have been given for the separate determination of the Applicants' further applications under section 20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 of the Commonhold and Leasehold Reform Act 2002.

Name: Judge Nicol **Date:** 12th December 2024

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent -
  (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the landlord's costs of management, and
  (b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable.

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

Section 19

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

and the amount payable shall be limited accordingly.

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

Section 27A

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to -
  (a) the person by whom it is payable,
  (b) the person to whom it is payable,
  (c) the amount which is payable,
  (d) the date at or by which it is payable, and
  (e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -
  (a) the person by whom it would be payable,

(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.

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

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