1205

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	: CHI/00MR/LIS/2016/0002
Property	: Flats 1-19 Avalon House, 2, Surrey Street, Portsmouth, Hampshire PO1 1JT
Applicants	: Mr D Trapp and Mr M Bartolo
Representative	: Mr N Faulkner of Alexander Faulkner Partnership
Respondent	: Mr J F Call and Phoenix SCP Pensions Trustees Limited
Representative	: Mr D Robson of Clarke Wilmott, solicitors
Type of Application	: Service charges
Tribunal Members	: Judge D Agnew Mr D Lintott FRICS
Date and venue of hearing	: 17th January 2017 at Chichester Magistrates Court
Date of Decision	: 7th February 2017

DETERMINATION

Summary of decision

1. The Tribunal finds:-
a) that the Applicants should have been charged 61% of the premiums for the buildings insurance in respect of Flats 1-19 Avalon House, 2 Surrey Street (also known as 110-114 Commercial Road, Portsmouth, Hampshire PO1 1JT) (hereinafter referred to as "the Property") instead of 75% as actually demanded

b) otherwise the premiums demanded for the service charge years 2010 to 2016 inclusive were reasonable and payable

c) the landlord is not precluded by virtue of section 20B of the Landlord and tenant Act 1985 ("the Act") from recovering the correct apportionment of the insurance premiums.

The Application.

2. The Applicants are the long leaseholders of a block of 19 flats on the upper floors of the Property above two retail units situated on the ground floor.

3. The Respondents are the freeholders of the building. There was some confusion as to the correct identity of the joint owner with Mr Call. At the hearing Mr Robson on behalf of the respondents produced documents to show that the correct institutional landlord is Phoenix SCP Pensions Trustees Limited ("Phoenix"). Rowanmoor Trustees Limited place the insurance for the building on behalf of the Respondents under a power of attorney. Orbit Property Management Limited ("Orbit") are the current managing agents for the landlords. They were first instructed so to act in August 2015. Their predecessors were London and Capital PLC.

4. By an application dated 21st January 2016 the Applicant sought a determination under section 27A of the Act as to the payability and reasonableness of the element of the service charges levied from 2010 to 2015 relating to the buildings insurance premiums. As a further year's service charges have been demanded since the application was made the parties wished the Tribunal to consider also the insurance premium demanded for 2016 as well. The Tribunal acceded to this request.

5. Directions were issued by the Tribunal on 17th February 2016. These provided for the service of statements of case. These Directions were complied with by the applicants but not the Respondents. The Tribunal issued a Notice of Intention to debar the respondent from taking further steps in the proceedings. As there was no response from the Respondents a debarral order was duly made. The then managing agents responded by explaining why the original Directions had not been complied with and giving the gist of their response to the Application. The debarral order was then lifted and the case listed for hearing.

6. The Applicants' challenge to the premiums charged is threefold. First, they say that the landlord has not claimed the correct proportion of the buildings insurance for the whole building in accordance with the terms of the Applicants'

He referred to the case of Cain v London Borough of Islington [2015]UKUT 0542 (LC) in which HHJ Nigel Gerald had held "that an agreement or admission for the purposes of section 27A(4) may be express, implied or inferred from the facts and circumstances. The agreement must be clear, the finding based on the objectively ascertained intention of the tenant.....the making of a single payment on its own will never be sufficient, but the making of multiple unqualified payments even of different amounts over a period of time may suffice. The longer the period over which payments have been made, the more readily the court or tribunal will find an agreement or admission".

11. The Tribunal rejected the application that, in the circumstances of this case, the tenants had agreed or admitted the service charges claimed with regard to insurance premiums and was content that it had jurisdiction. At the end of the hearing Mr Robson asked that the Tribunal give further consideration to the matter when it had more time to do so before delivering its judgment in the case and when it had had the opportunity of considering the Cain case in greater detail. Whilst the Tribunal considered that this was a request to have a second bite of the cherry, the Tribunal said that if, in its more considered deliberations it might change its mind on the point, it would give Mr Faulkner the opportunity of making submissions in reply. Having now had the chance to reflect on the matter the Tribunal has not changed its mind on the point for the following reasons.

12. In Cain the period over which payment had been made without demur (12 years) was considerably longer than in the instant case (5 years at most). Secondly, the Applicants had no reason to suspect that the premiums had been apportioned other than in accordance with the lease terms until they inquired more deeply into insurance premiums for the building following what they considered to be a very significant increase in premium for 2015. The demands for payment received by them simply stated the amount of the premium attributed to the residential part of the building and so they had no indication as to the apportionment that had been applied to the total premium. Thirdly, the Applicants took quick action to challenge the charges once they were made aware of the situation including a timeous application to this Tribunal. Finally, unlike the situation in Cain, there had been no previous applications to either a court or Tribunal concerning service charges when this matter could have been raised because the Applicants had no concerns with any other service charge items. The Tribunal considers, therefore, that the instant case is distinguishable from the facts of Cain and does not consider that there is any clear agreement or admission on the part of the Applicants simply due to the passage of time between the previous demands and the number of payments made and the making of the application.

The lease terms

13. By clause 5.2.1 of the lease it is the landlord's obligation to insure the building.

14. Clause 3.3.1 of the lease states that the tenant covenants with the landlord "to pay to the landlord the due proportion of the insurance premiums". By clause

3.3.1.5 the "due proportion of the insurance premiums shall be determined in the same manner as applies to the due proportion of the service charge referred to in Schedule 4"

15. By paragraph 2.2 of Schedule 4 "the due proportion" of service charge "shall be calculated primarily on a comparison of the net internal area of the Leased Property with the net internal area of the Building....." However, paragraph 2.3 of the fourth Schedule provides that "In the event of such comparison being inappropriate having regard to the nature of the expenditure incurred or the premises in or upon the Building benefited thereby or otherwise the Landlord shall be at liberty in its reasonable discretion to adopt such other method of calculation of the due proportion of such expenditure to be attributed to the Leased Property as shall be fair and reasonable in the circumstances (including if appropriate the attribution of the whole of such expenditure to the Lease (sic) Property)".

The Applicants' case

16. The first point made by the Applicant was that the insurance premiums contained in the service charge demands from 2010 onwards had been apportioned by the landlord as to 75% to the Applicants and 25% to the commercial tenants on the ground floor. A report by Cluttons prepared for the landlords' managing agents, London and Capital, in 2011 stated the gross internal floor area as 11,958 square feet for the residential part and 7,527 square feet for the retail shops and basement. The Applicants accepted the accuracy of these measurements and considered that the difference between gross and net internal areas was not sufficiently significant to affect the calculations for the apportionment. This worked out at an apportionment of 61% for the residential part of the building.

17. Mr Faulkner contended that paragraph 2.2 of Schedule 4 should prevail to require the landlord to apportion the insurance premiums on the basis of the proportion of the area of the residential part to the whole of the premises unless this method of apportionment was "inappropriate". He contended that there was no reason to say that such a method was inappropriate.

18. Mr Faulkner's second argument was that the so called demands for payment of insurance premium were not demands at all, they were merely statements as to the amount payable. Furthermore, there were no summaries of rights and obligations served with these documents and the landlord's name on these documents had not been consistent with the legal position. Even if the service charge demands were to be amended following the Tribunal's determination in this case this would mean that all but the latest demands would fall foul of section 20B of the Act as no proper demand would have been made within 18 months of the expenditure on insurance premiums having been made for the earlier years. Accordingly, the demands for those years should be disallowed.

19. Mr Faulkner's third objection to the charges was that even if they did not fall foul of section 20B the amounts charged were unreasonable. In support of this contention he relied on a report he had obtained from Mr Glover and the fact

that when the amount of the premiums was challenged in 2015 a very significant reduction was secured.

20. Mr Glover's evidence was that his firm is based in London and has 28 years experience as insurance brokers. They act for 250 managing agents across the country and arrange insurance for over 15,000 properties. They have block policies with ten leading insurance companies.

21. On behalf of the Applicants he had approached one insurance company, Amlin, to provide a competitive quotation to cover Avalon House. In order to obtain the quotation he provided Amlin with a full claims history in respect of the building. Consistent quotations were obtained in July and November 2015 and in February 2016. The quotation received was £3,703.34 (including terrorism cover). He extrapolated from this information what he considered would have been the premiums extending back to 2010. In each instance, apart from 2015 when the premium was negotiated significantly downwards by the current brokers, the resulting figure was approximately half that charged. Based on an apportionment of 75% to the Applicants the difference was £43,524.20 charged as opposed to £22,936.06 on Mr Glover's figures. He considered, therefore, that the Applicants had been overcharged for insurance . He considered that the claims history for the building had been good and would have had a negligible effect on the premiums. He pointed out that after the cost of the premiums was challenged in 2015 a reduction was achieved of a significant 35%.

The Respondents' case

22. With regard to the apportionment figure Mr Robson argued that paragraph 2.3 of Schedule 4 gave the landlords more than adequate scope to adopt a different method of apportionment to that set out in paragraph 2,2. The 75% apportionment had been based on the respective re-instatement values of the residential part and the commercial part of the building as set out in the Cluttons report. He asserted that this was the "appropriate" method of apportionment. This was backed up by Ms Coglan in her written and oral evidence. In her view Square footage should not be used to apportion premium where there are different occupations within a building as the cost per square foot in respect of a reinstatement valuation will be different for each occupation." She disagreed, therefore, that the premium should be apportioned by square footage".

23. With regard to the section 20B point, Mr Robson pointed out that the documents setting out the amount of the premium for the residential part of the building were accompanied by a covering letter setting out payment details. The two documents read together did constitute a demand for payment. Mr Robson accepted that as the 2016 demand had not been paid it would and should be amended to comply fully with the statutory requirements. However, as the previous demands had been paid he argued that there was no need for these to be amended. This was because the omission of the correct information did not make the demands a nullity. All section 20B says is that payment need not be made unless or until there is full compliance with the statutory requirements. If the 2016 demand is corrected it will be well within the 18 month period and so

the amount will be payable when a corrected demand is made. For the previous demands, even if they were required to be amended the tenants have received in writing notification of the costs incurred within the 18 month period and therefore Mr Faulkner's point is not a valid one.

24. With regard to the reasonableness of the amount of the premium demanded, Mr Robson's first point was that the amount payable by the tenants did not have to be the cheapest but did need to be within a range of costs that was obtainable from insurers of repute. Ms Coglan's evidence was that Orbit took over management from London and capital in August 2015. When she became aware of the Applicants' challenge to the premium for 2015 she made enquiries of London and capital. She ascertained that London and Capital had carried out a full marketing exercise and had approached a number of specialist insurers of residential blocks of flats to review the level of cover and the premium. Ms Coglan did the same for 2016. She received quotations from Aviva and Zurich, both of which were higher than the premium being sought by the current insurers. Notwithstanding this, she managed to negotiate a considerable discount for the 2015 renewal from £7,179.95 to £4,642.63. The reduction was subject to review for 2016 but in the event, and despite there being two further claims on the policy, the premium terms for 2016 were maintained. Additionally, for the 2016 renewal a number of insurers, including Amlin, declined to quote.

25. In response to Mr Glover's evidence she said that Amlin was a fairly new company and has not been in existence for the whole of the period the subject of this application. She thought that the Amlin quote was probably as low as it was to attract new business and that it was likely that the premium required would have risen after the first year. It is prudent to take a longer term view tobuild up a relationship with an insurer as this reduces the risk of cover being declined should there be problems arising from claims being made. It was also significant that six leading insurance companies, including Amlin, declined to quote for 2016.

The relevant law

26. By Section 27A of the Act it is provided that:-

(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.

27. By section 20B of the Act:-

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the

tenant, then (subject to subsection (2), the tenant shall not be liable topay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge."

The determination

28. With regard to the correct apportionment, the Tribunal decided that the provisions of paragraph 2.2 of Schedule 4 to the lease should prevail. This means that, adopting Cluttons' measurements of the internal area of the residential part of the premises as a proportion of the whole building the apportionment of the total insurance premium attributable to the Applicants' property should be 61% and not 75% as the Applicants have been charged since 2010.

29. The reason why the Tribunal has come to this conclusion is as a result of a careful scrutiny of the wording of paragraphs 2.2 and 2.3 of Schedule 4 of the lease and the Tribunal's determination as to the intention of the parties when the lease was executed. Paragraph 2.2 states that the "due proportion" chargeable shall be calculated "primarily" on a comparison of the net internal area of the Leased Property with that of the building. Thus, this is the starting point for determining the appropriate apportionment to be applied. It is only where this method is "inappropriate" that paragraph 2.3 comes into play and the landlord can then exercise his discretion to apply a different method. Can it be said, then, that apportionment of buildings insurance premium on the basis of floor areas is "inappropriate"? The wording is not that the discretion can be exercised where a different method of apportionment may be "more appropriate". The wording is that paragraph 2.3 applies only where the primary method is not appropriate. The Tribunal did not consider that the primary method is "inappropriate". It is aware from its own general experience of leasehold properties that apportionment of service charges, including buildings insurance premiums, based on floor areas is often provided for in leases. Whilst it is logical to suggest that re-instatement value may be a more appropriate method as the cost of re-building or re-instating commercial premises may be less costly than for residential premises, that is not the only factor affecting premiums. There may be a risk loading due to the nature of the business being run from the commercial part of the building. There may be an increased risk of vandalism for commercial premises as opposed to residential premises. In those circumstances the Tribunal considered that it was not possible to say that the primary method of apportionment based on floor area is "inappropriate". It is one method of apportionment that was evidently within the contemplation of the parties when the lease was entered into. The composition of the building has not altered since that time. There have always been two commercial units on the ground floor during the currency of this lease. If the draughtsman and the original parties to the lease had intended that the buildings insurance should be apportioned differently from the primary method based on floor area then that

would have been set out in the lease. As it is, clause 3.3.1.5 of the lease merely states that the insurance premium shall be determined in the same manner as the service charge in accordance with Schedule 4. For the above reasons the Tribunal does not consider that paragraph 2.2 of Schedule 4 of the lease should be disapplied in favour of paragraph 2.3. Consequently, the apportionment of the premiums for the residential part of the building should have been 61% of the total cost and not 75% as charged and therefore the Applicants have overpaid as set out in the conclusion below.

30. With regard to the section 20B point, the Tribunal agrees with the Respondent's representative that taken with the covering letter there were demands for payment of buildings insurance premiums by the Applicants for all years from and including 2010. It would seem that the demands throughout the period have not complied with the statutory requirements of correctly stating the name of the landlord and, possibly, not including a summary of rights and obligations but the tribunal also agrees with Mr Robson when he says that the only consequence of this as provided for in section 20B is for the tenant to withhold payment until the matter is rectified. Thus, where payment has already been made, section 20B has no effect. Even if it did, in the circumstances of this case the Tribunal finds that the demands that were made did satisfy section 20(B)(2) in that the tenants had been notified in writing that the costs had been incurred and that they would be required to pay them by way of a service charge. This still leaves the premium for 2016 which has not yet been paid. The demand for this will need to be amended both as to the amount and in order to comply with the statutory requirements with regard to the identity of the landlord. If this is done expeditiously it will be well within the 18 month period provided for in section 20B.

31. With regard to the reasonableness of the premiums demanded, the Tribunal was troubled that once challenged the insurers agreed to a substantial reduction in the premium. It is not surprising that this led to the Applicants considering that they had been overcharged in the past and that had the level of premium been rigorously challenged in earlier years a lower premium could have been secured. This, however, is speculation as there is little real evidence that this is so. Mr Glover extrapolates back from the Amlin quote in 2015 but the Tribunal was not convinced that this was a sound exercise upon which to rely. The Applicants' evidence is based on one quotation obtained from a relative newcomer to the market. The Tribunal is aware from its own general experience that insurance companies do often quote a low figure to secure the business and accepts Ms Coglan's evidence that short-termism is not usually the best way to approach insurance cover. The Tribunal was left to wonder why Mr Glover had confined himself to providing one quote from a relatively new company. It was telling to note that Amlin was among the companies who declined to quote for 2016.

32. The landlord is not bound to obtain the cheapest insurance cover. There was evidence that when substantial companies in the market were approached to quote the result was a higher figure than the existing insurer had charged. Ms Coglan would appear to have done a stirling job in securing the reduction she did for 2015 and 2016 as a result, she says, of the relationship she has with the insurers. The Tribunal is driven to the conclusion that there is just insufficient

evidence to conclude that the premiums quoted for 2010 to 2014 inclusive were unreasonable. The premiums charged for 2015 and 2016 the Tribunal finds are reasonable.

Conclusion

33. The premiums charged for the years in question are as follows:-

2010: £4,906.88

2011: £5,273.36

2012: £6,513.59

2013: £6801.57

2014: £7103.10

2015: £4642.63

2016: £5745.76

As a result of the Tribunal's findings above the amount properly chargeable should have been:

2010: £3990.92

2011: £4288.99

2012: £5297.72

2013: £5531.94

2014: £5777.10

2015: £4642.63

2016: £5745.76

There has therefore been a total overpayment by the Applicants of £5,711.83.

Dated the 7th day of February 2017.

Judge D. Agnew.

Appeals

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.

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