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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/26UB/LSC/2015/0093**
Property	:	**58-65 Landau Way, Broxbourne EN10 6LP**
Applicants	:	**(1) Ms Ellen Goodchild 58** **(2) Mr Neil Porter 59** **(3) Mr Jeff Stevenson 60** **(4) Ms Ann-Marie Doocey 61** **(5) Mr Roger Coulson 62** **(6) Ms Abbygail Feltham 63** **(7) Miss Chapman & Mr Hallinan 64** **(8) Ms Alison Seeman 65**
Representatives	:	**Ms Ellen Goodchild and Mr Roger Coulson**
Respondent	:	**Sinclair Gardens Investments (Kensington) Limited**
Representatives	:	**Mr Paul Lettman Counsel** **Mr Mark Kelly Managing Agent**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 – determination of service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mr David Brown FRICS MCI Arb** **Mr John Francis QPM**
Date and venue of Hearing	:	**Tuesday 9 February 2016** **Cheshunt Marriott Hotel** **Broxbourne EN10 6NG**
Date of Decision	:	**24 February 2016**

DECISION

Decisions of the tribunal

1. The tribunal determines that each of the applicants is obliged to contribute to the respondent's costs of insurance as follows:

30 September 2011	£302.28	[158]
9 October 2012	£358.94	[162]
4 October 2013	£369.81	[166]
3 October 2014	£377.93	[168]
5 March 2015	£ 13.21	[169]

2. The tribunal declines to make an order pursuant to section 20C Landlord and Tenant Act 1985 (the Act) in connection with any costs which the respondent has incurred or may incur in connection with these proceedings because it was not in dispute that the leases vested in the applicants do not provide for a service charge regime to which the applicants must contribute and thus there is no service charge regime through which the respondent landlord can pass any such costs, so that the respondent has to bear such costs itself in any event.

3. The reasons for our decisions are set out below.

NB Later reference in this Decision to a number in square brackets ([ ]) is a reference to the page number of the hearing file provided to us for use at the hearing.

Procedural background, inspection and hearing

4. On 16 November 2015 the tribunal received an application from Ms Ellen Goodchild of 58 Landau Way pursuant to section 27A Landlord and Tenant Act 1985 (the Act). The gist of the application concerned the amount of contributions to the insurance premium claimed by the respondent landlord.

5. 58 Landau Way is a flat within a block of eight modest one-bedroom flats (58-65) all of which have been sold off on long leases. Some flats are owner-occupied and some are sub-let. Subsequently, the other seven long lessees applied to the tribunal to be joined as applicants and an order was made to this effect. It also became apparent that the demands for insurance contributions in issue were those dated:

30 September 2011	£302.28	[158]
9 October 2012	£358.94	[162]
4 October 2013	£369.81	[166]
3 October 2014	£377.93	[168]
5 March 2015	£ 33.52	[169]

6. 58-81 Landau Way comprises of three adjacent blocks of flats owned by the respondent. On 1 December 2014 a right to manage company controlled by the applicants acquired the right to manage the block known as 58-65 Landau Way and thus as of that date the RTM company was obliged to effect buildings insurance which the terms of the leases oblige the landlord to effect.

7. Prior to 1 December 2014 the respondent had effected a single policy covering its three blocks (being a part of its extensive portfolio of properties) and sought to recover from each lessee a contribution of 4.1667% (Mr Kelly's witness statement [61]), or sometimes 4.17% (demand for payment - see sample at [56A]).

8. Pursuant to directions [12] both parties have served witness statements and documents which were placed in a file for our use at the hearing, page numbered 1- 262.

Witness statements (two) of Ms Ellen Goodchild on behalf of the applicants are at [33 and 209] to which a number of documents were attached.

Witness statements (two) of Mr Mark Kelly are at [58 and 149] to which a number of documents were attached.

We were told that the eight leases are in common form so far as material. We were provided with a sample, that for plot 82 Turnford Court, evidently now known as 58 Landau Way and it is at [15].

9. On the morning of 9 February 2016 we had the benefit of a site inspection. Present were Mr Roger Coulson (flat 62) for the applicants and Mr Paul Lettman (counsel) and Mr Mark Kelly (managing agent) for the respondents. The parties had the opportunity to draw to our attention any physical features of the development which they would wish to refer to at the hearing but, in the event, neither of them wished to do so.

10. The hearing got underway at 11:07. Ms Goodchild (58) joined Mr Coulson to present the case on behalf of the applicants. Mr Lettman presented the case on behalf of the respondent. Just prior to the commencement of the hearing Mr Lettman handed in a written skeleton argument on behalf of the respondent, which is a common and permitted practice in this tribunal.

Oral evidence was given by Ms Goodchild and Mr Kelly and both witnesses answered a number of questions put to them.

The lease

11. As mentioned above a sample lease is at [15]. It is dated 25 March 1983 and was granted by McLean Homes North London Limited to Mark Lawrence Beugnies. It granted a term of 99 years from 1 March 1982.

The reddendum clause reserved:

11.1 A ground rent of £40.00 per year (rising to £80.00 per year during the course of the term) payable by equal half yearly payments in arrear on 24 March and 29 September in every year; and

11.2 An insurance rent of a yearly sum which the landlord shall from time to time pay by way of premium for keeping the flat insured pursuant to power in that behalf contained in the lease, such insurance rent to be paid on the date for payment of rent which shall next occur following the date of the payment of such premium.

12. Clause 4(d) of the lease is a covenant on the part of the landlord [24]:

"To keep the demised premises and other premises on the estate insured for their full value as at the date of completion on an inflation index-linked policy against loss or damage by fire or such other risks as it thinks fit in some insurance office of repute and ... to produce evidence of the existence of such policy and the payment of the current premium therefor"

13. It was not in dispute that the lease does not enable the landlord to impose a service charge regime or oblige the lessee to pay a service charge to the landlord.

14. It was also not in dispute that a contribution to the cost of insurance by way of an insurance rent falls within the wider definition of a 'service charge' as set out in section 18(1)(a) of the Act and thus is subject to the limitation provisions of section 19 of the Act and so that on an application pursuant to section 27A of the Act the tribunal has jurisdiction to determine whether the cost was reasonably incurred and is reasonable in amount.

The insurance effected by the landlord

15. The evidence of Mr Kelly was that he was a director of First Management Limited which had been appointed by the respondent as its managing agent and that he was also a director of Cullengrow which had been appointed by the respondent as its insurance broker.

It was not in dispute that the respondent, First Management and Cullengrow are all wholly owned by Forbes Corroon (Holdings) Limited.

16. In Appendix A [65] to his witness statement Mr Kelly set out a detailed explanation of his understanding of the buildings insurance market over the years in question and the perceived advantages to the respondent in insuring its substantial portfolio of properties by way of a portfolio policy. Mr Kelly said that in addition to buildings insurance the respondent also took out cover related to terrorism. Mr Kelly drew attention to the fact that prior to renewals of the policy in November 2011, 2012, 2013 and 2014 there had been no premium rate increases, although there had been adjustments to the building sum insured from time to time which resulted in modest increases to the premiums payable. Mr Kelly also drew attention to a market test exercise undertaken at the respondent's request by Stackhouse Poland prior to

the November 2012 renewal [128-131] and a similar exercise undertaken by H W Wood, an independent broker, in July 2014 [133-146]. In general terms that evidence was not challenged by the applicants.

17. Despite the simplicity of the lease as regards the insurance rent the paperwork generated by Mr Kelly's office was unnecessarily complex and confusing employing inaccurate and inappropriate terminology. The insurance arrangements were made more difficult to follow because the annual certificates of building insurance issued by the insurer did not specify the period of cover and the one date they did specify was not the date of the issue of the certificate but evidently the date on which the policy was due for renewal.

18. Mr Kelly took us carefully through the documents relating to insurance for each of the periods in question and explained and supported them.

19. It will be remembered that the payment scheme for the insurance rent was that once the landlord had paid the premium it could demand the lessees' share on the next date for payment of ground rent, namely 24 March or 29 September as the case may be.

20. Mr Kelly told us that the policies were renewed in November of each year at which time the premium was paid. Thus, on the provisions of the lease it was open to the respondent to demand the lessee's contribution the following 24 March. It did not do so. Instead, Mr Kelly's office chose to adopt an accounting period with a year end of 29 September in each year. The insurance rent was termed 'Excess Service Charge' and was collected in arrear.

An example of the paperwork is as follows:

[159] The certificate of insurance for the insurance year 20 November 2011 to 20 November 2012. Premium paid (incl IPT):

Buildings	£8,352.34
Terrorism	£ 261.21
Total	£8,613.55 x 4.1667% = £358.18

[161] Invoice dated 29 September 2012 issued to the respondent for year ended 29 September 2012. (It is not clear by whom it was issued but that does not appear to be material)

Terrorism Insurance	£ 261.21
Buildings Insurance	£8,352.34
Reserve Fund Contribution	£ 5.78 cr
Excess Service Charge	£8,607.77

[162] Demand for payment sent to Ms Goodchild included:

"29 Sep 2012 Excess Service Charge £358.94" (This appears to have been calculated as being 4.17% of £8,607.77. Mr Kelly explained that the expression 'Reserve Fund Contribution' is a misnomer; there is no such fund but was adopted to enable an adjustment to be made to compensate for the overpayment arising from the decision to round up the contribution payable from 4.16667% to 4.17%.).

21. It appears that the subject application was prompted by a perception on the part of Ms Goodchild that the insurance rent was paid in advance rather than in arrears. The insurance policy was due for renewal on 20 November 2014. The RTM Company was due to acquire the right to manage on 1 December 2014 from which date it was obliged to effect the buildings insurance. By letters dated 4 September and 2 October 2014 [39 and 40] Ms Goodchild requested that the RTM Company be allowed to effect the building insurance from 20 November 2014. This was refused by Mr Kelly and by a letter dated 14 November 2014 [43] Mr Kelly stated any refund of insurance premium would be by way of a cheque in favour of the RTM Company.

22. By a demand to Ms Goodchild dated 3 October 2014 [168] the respondent claimed, amongst other sums, *"29 Sep 2014 Excess Service Charge 29 Sep 2014 £377.93"*. Ms Goodchild had assumed that was the cost of insurance for the insurance year commencing 20 November 2014 and thus assumed that upon that policy being cancelled on 1 December 2014 there would be substantial refund due and that assumption was fuelled by Mr Kelly's letter dated 14 November 2014. By letter dated 14 February 2015 [44] Ms Goodchild pressed for the refund but it was not forthcoming and there does not appear to have been any response from the respondent to that letter.

23. By a demand dated 5 March 2015 sent to Ms Goodchild [169] the respondent sought a further £35.52 being *"8 Dec 2014 Excess Service Charge 1 Dec 2014"*. It does not appear that at that time any explanation was given as to how that sum had been arrived at.

24. In paragraph 1.22 of his witness statement Mr Kelly, for the first time, explains how that sum was arrived. In essence it was £13.21 being the cost of insurance 20 November – 1 December 2014 and £21.67 being a share of an insurance revaluation fee of £520.00 said to have been incurred on 28 November 2014 [121].

25. At the hearing Mr Kelly conceded that the revaluation fee should not have been charged to the applicants and that the fee was not payable by them. Also at the hearing Ms Goodchild and Mr Coulson accepted the explanation of Mr Kelly that the cost of insurance was billed to them in arrears and not in advance such that there was not any refund due in respect of the premium paid on the renewal on 20 November 2014. We consider it most unfortunate that at no time prior to the issue of these proceedings had Mr Kelly's office explained to the applicants how the arrangements for collecting contributions to insure worked. Mr

Lettman conceded that, in the event, Mr Kelly's letter of 14 November 2014 implying that a refund would be made was less than helpful.

26. In the circumstances we find that cost of insurance payable by each of the applicants for the period 20 November – 1 December 2014 is £13.21.

The prior years

27. The applicants incorporated into the application the reasonableness of the cost of insurance in the prior years – those noted in paragraph 5 above. It was not in dispute that the cost of insurance was reasonably incurred because it was accepted that the respondent was obliged under the terms of the leases to effect buildings insurance. What was in challenge was the reasonableness of the amount of the cost of insurance.

28. The gist of the applicants' case on this point was that upon the RTM Company acquiring the right to manage it had effected insurance as follows:

01.12.2014		
Buildings insurance (NIG)	£756.29	[46]
Terrorism (Caitlin)	£ 87.24	[48]
	£843.53 x 12.5% = £105.44 per flat	
01.12.2015		
Buildings insurance (Zurich)	£686.01	[49]
Terrorism (Zurich)	£ 58.47	[49]
	£744.48 x 12.5% = £93.06 per flat	

Further a quote given by brokers, Towergate, for the 2015 renewal was:

Buildings insurance (NIG)	£807.31	[50]
Terrorism (Caitlin)	£109.13	[51]
	£916.44 x 12.5% = £114.55 per flat.	

29. Ms Goodchild invited us to compare these costs with the costs actually incurred over the years in issue which she submitted were broadly one third less than the respondent was able to achieve. Ms Goodchild did not have evidence to support much lower costs in the prior years and submitted that we could extrapolate and infer that the difference was so great we could conclude that the cost incurred in each of the prior years was unreasonable in amount. No alternative or different costs that we should adopt were put before us.

30. Mr Lettman relied upon the evidence of Mr Kelly as to the circumstances in which the respondent, as a substantial property company, effected insurance on a portfolio basis. He submitted that it

was reasonable for the respondent to do so. Mr Kelly also gave evidence as to an exercise he had undertaken to obtain comparisons using the website 'Gocompare'. For the reasons set out below we did not find such evidence, if that is what it was, to be of assistance to us. There were also issues as to whether the policies taken out by the RTM Company are like for like to the extent of cover previously effected by the respondent. Again for reasons which we shall explain the rival evidence/submissions on that issue were not of assistance to us.

31. In general terms we prefer the legal submissions made by Mr Lettman as to the approach we should adopt. The question is not what cost of insurance the RTM Company might have been able to achieve in the prior years if it had effected insurance, but was the approach adopted by respondent a reasonable one for the respondent to adopt, circumstanced as it was?

32. Mr Lettman drew attention to key authorities including:

Havenridge v Boston Dyers [1994] 49 EGLR 111;
Berrycroft Management v Sinclair Gardens Investments (Kensington) [1997] 29 HLR 444;
Forcelux Ltd v Sweetman [2001] 2 EGLR 173

Mr Lettman submitted that the respondent was not obliged to 'shop around' for the cheapest or cheaper insurance. The business of the respondent was that of a property investor and that in the ordinary course of that business it was reasonable for the respondent to insure its properties on a portfolio basis for the several reasons advanced by Mr Kelly in his evidence and competitive premiums had been obtained as evidenced by the 2012 and 2014 checks. We accept that evidence because it struck a chord with the accumulated experience of the members of the tribunal.

We are reinforced in that finding because that evidence was similar to that which arose in *Forcelux* where Mr Francis FRICS held:

"42. Regarding the insurance premiums, it would appear from the appellant's arguments that, in cost terms, the lessees are penalised because cover for commercial landlords is more expensive than that available to owner/occupiers. However, under the terms of the lease, it is for the landlord to insure, and the tenant does not have the option. I am satisfied from Mr Jakob's evidence that the landlord's block policy was competitively obtained in accordance with market rates, although I would have preferred to hear from a representative of Southern Insurance Brokers with details of the quotes received in its triennial trawl of the market. Although the comparative exercise carried out by Mr Jakob in April of this year provides little assistance as regards the applicable rates in the years in question, it did indicate that there is a limited pool of insurers prepared to underwrite commercial cover for commercial landlords, and this will undoubtedly have an upwards effect on premium rates."

33. Whilst we readily accept the evidence of Ms Goodman that the RTM Company has been able to effect insurance cover at quite modest rates there may be a number of reasons for that but paramount is that the RTM Company was effecting cover on a one-off basis and it is not a commercial landlord with a substantial property holding, effecting insurance on a portfolio basis.

34. On the evidence before us we cannot properly conclude that the cost of insurance effected by the respondent was excessive or unreasonable in amount given that the respondent is a property company effecting insurance on a portfolio basis.

35. We have therefore made the determinations set out in paragraph 1 above.

The section 20C application

36. Mr Lettman, rightly in our view, conceded that the leases do not impose a service charge regime under which the landlord is able to recover such costs as may be specified. The only service charge recoverable is the insurance rent. In these circumstances there is no proper basis on which the respondent can recover any of its costs of these proceedings through a service charge payable by any of the applicants.

37. Accordingly we have found it inappropriate and unnecessary to make an order pursuant to section 20C of the Act.

John Hewitt
Judge John Hewitt
24 February 2016

ANNEX - RIGHTS OF APPEAL

1. If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber) then a written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. 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.

3. If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application

for permission to appeal to proceed despite not being within the time limit.

4. 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.