12281

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AF/LSC/2017?0039**
Property	:	**25 – 40 Moliner Court, Brackley Road Beckenham BR3 1RX**
Applicant	:	**The lessees listed in the schedule to the application**
Representative	:	**Mr Simon Simpson Secretary of the Brackley Road (Beckenham)Management Company**
Respondent	:	**Wallace Estates**
Representative	:	**Mr Stevenson of Stevensons Solicitors**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Carr** **Mr M Cairns**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**19th July 2017**

DECISION

Decisions of the tribunal

(1) The tribunal determines that the sums payable by the Applicant in respect of the insurance charges for the years ending 2012 to 17 are as follows

2011 -12 £4,448.33 – 20% commission = £3812.85

2012 -13 £1,426.39 – 20% commission = £1222.62

2013 – 14 £3,747.26 – 20% commission = £3211.94

2014 – 15 £3693.74 – 20% commission = £3166.06

2015 – 16 £4195.83 – 20% commission - £3596.43

2016 – 17 £3173.69 tbc – no change.

(2) The tribunal makes the determinations as set out under the various headings in this Decision.

(3) The tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985

(4) The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicants in respect of the service charge years 2012/ 13 – 2016/17.

2. The relevant legal provisions are set out in the Appendix to this decision.

The hearing

3. The Applicants were represented by Mr Simon Simpson Director and Secretary of the Brackley Road (Beckenham) Management Company at the hearing. Mr Simpson was accompanied by Ms Jane Rogers, a fellow Director of the Management Company. The Respondent was represented by Mr Stevenson, Solicitor. Mr Canvin from Cox Braithwaite, the Insurance Brokers for the Respondent gave evidence for the Respondent. .

4. Immediately prior to the hearing the Applicant sought to hand in further documents, namely a statement in reply to the Respondent's statement and a further insurance quotation. The Respondent objected to the submission of these documents which Mr Stevenson submitted should have been produced earlier. The Tribunal considered whether the documents should be submitted. The Tribunal determined that the statement could not be submitted, but that the quotation could be, although the weight the Tribunal would give to the quotation would take into account the fact that the Respondent had not had a proper opportunity to consider it.

The background

5. The property which is the subject of this application is a a purpose built block of 16 flats comprising four two bedroom and twelve one bedroom flats.

6. Neither party requested an inspection and the tribunal did not consider that one was necessary, nor would it have been proportionate to the issues in dispute.

7. The Applicants hold a long lease of the property which requires the landlord to provide services and the tenant to contribute towards their costs by way of a variable service charge.

The issues

8. At the start of the hearing the parties identified the relevant issues for determination as follows:

   (i) The payability and/or reasonableness of service charges for 2012/ 13 – 2016/17. relating to insurance charges

   (ii) Whether an order should be made under s.20C of the Landlord and Tenant Act 1985.

9. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations as follows.

The argument of the Applicants

10. The Applicants argue that the Respondent has been overcharging for insurance.

11. The principal argument in support of the Applicants case is that Mr Simpson has obtained two alternative quotations which are

significantly lower than the charges demanded by the Respondent, - although the cover provided is on a like-for-like basis, or in some respects better than the cover provided by the Respondent.

12. The first quotation is from Covea Insurance which would charge £2024.99 inclusive of tax plus a charge of £395.80 for terrorism cover which would be a total cost of £2420.79p.

13. The second quotation, which the Tribunal notes has only just been put to the Respondents, is from Zurich Insurance plc and is for a total of £2,629.15p.

14. The Respondent arranged insurance through their brokers, Cox Braithwaite Insurance Brokers, with Aviva, for a total of £3173.68 p.

15. The Applicants pointed out some of the advantages of the alternative quotes. With Zurich the excess was £250, compared with £350 for Aviva, with Zurich the commission was 20% compared with 40% originally charged with Aviva. The Applicants accepted that following them raising concerns the level of commission had been reduced, for the year 2016 – 17, to 20%. They also pointed out the cover for alternative accommodation was beter with the Zurich policy and that the property owners liability is limited to £10 million, as opposed to the £5 million cover provided by Aviva.

16. The charge for terrorism cover with Covea was only £395.80 compared with £927.47 charged by both Zurich and Aviva.

17. The second point made by the Applicants was that the Broker was insufficiently independent of the Respondent and was unlikely to obtain the mort reasonably priced insurance cover appropriate to the property and the stipulations of the lease. Mr Simpson provided extensive evidence that the parties were interconnected, which was not in substance objected to by the Respondent.

18. The third and final point made by the Applicant is that the commission charges should be limited to 20% as this represents the industry average. The evidence Mr Simpson provided was an article downloaded from the internet authored by a partner from Pinsent Masons on the out-law.com website. This suggested that 'typically, mid sized commercials insureds (sic) believe commission is around 10% when it is nearer 20%'.

19. The Tribunal asked the Applicants what would be the benefit to each leaseholder of accepting the Zurich quotation. The Applicant suggested that on average (because of the different apportionments) the gain for each lessee would be around £37.

The argument of the Respondent

20. Mr Canvin from Cox Braithwaite provided evidence for the Respondent. Mr Canvin has a lifetime's experience of insurance, he is an Associate of the Chartered Insurance Institute and joined the Wallace group in 2011.

21. The Respondent's principal argument is that it is not obliged to take the lowest quote but to ensure that charges are reasonable. It considers that the insurance charges are reasonable.

22. Mr Canvin argues firstly that the quotations provided by the Applicants cannot be taken at face value because both are likely to be reduced as inducements to change insurers and enter into new business. The Applicants agreed that might be the case but suggested that these reductions would be available on a yearly basis. However Mr Canvin suggested, from his experience that if properties are put on the market every year insurers lose interest, and he also suggested that having some loyalty to an insurer provides some advantages.

23. The Respondent made some specific points in relation to the Zurich quote. Firstly it was pointed out that the quote was not for the current year but for insurance to commence in September 2017, secondly there was some contradictory information in the quote as in the table property owners liability was not included although it was included in the details of the policy. When the Respondent asked the Applicant, it was confirmed that the quotes were provided following disclosure of the claims history of the property.

24. In response to the Applicants' argument that the brokers were insufficiently independent Mr Canvin said that they generally, but not always, deal with the five insurance companies who are the market leaders – Aviva, Zurich, Axa, Alliance and Ageas. He explained that when a policy comes up for renewal they will seek alternative quotes when the quote provided by the existing insurer falls outside of the market norms, and that when lessees, as in the current application, make it clear they are concerned at the level of the quote, the broker will negotiate with the insurer to reduce the premium.

25. Mr Canvin explained that basically there are two possible charges made for terrorism cover. One is with Pool Ree, which is effectively the government as insurer of last resort, and which is the company that Zurich and Aviva use. The charge there is always the same, around £900. There is no possibility for negotiating this. If Pool Ree are used, then all properties in the portfolio must be covered. The alternative is provision through Lloyds, which is the cover that Covea uses. Mr Canvin said that it is a reasonable decision by a broker, and indeed a freeholder, to use Pool Ree.

26. Mr Canvin told the Tribunal that 40% commission was the industry norm. When the Tribunal asked Mr Canvin if the broker or the freeholder profited from this commission charge, Mr Canvin told the Tribunal that the commission was not shared with the freeholder and that the broker did make some profit out of the commission.

27. Mr Canvin referred the Tribunal to his statement which made it clear the range of services that were provided to the lessees and which justified the commission charges. The services included not charging for copy documents, not charging administration fees for the organisation of insurance, not charging for supplying information to solicitors acting on the sale of the leasehold property, dealing with enquiries in writing, by phone and email as quickly as possible and as comprehensively as possible, managing risk for the benefit of the leasehold, revaluing the property regularly, complying with the insurance requirements of the lease including appropriate apportionment of premiums, managing health and safety risks, having senior contacts with head offices of insurers, proving summaries of cover without request from lessees and providing high quality and highly qualified staff.

28. When asked by the Tribunal it became clear, that because the property is managed by the leasehold management company, health and safety and risk management is provided by the management company.

29. Mr Canvin also informed the tribunal that of the 500 properties in the Respondent's portfolio, 200 had commission rates of 25% or less.

30. As the hearing had only been listed for two hours, and because neither party had referred to Williams v Southwark (CH 1997 W No 5383), the tribunal gave both parties the opportunity to make submissions on Williams and Southwark and to make any final submissions they wished to make. The parties should note that these submissions were to be limited to these matters, and no new arguments made in the submissions have been taken into account in reaching the final decision.

31. In relation to Williams and Southwark, the Applicants argue the decision does not give landlords carte blanche to make a 20% charge in respect of the provision of insurance cover. They say that 'this is to misinterpret Justice Lightman ruling and takes it out of its context where a specific service is contracted and paid for through the commission paid to the landlord.

32. The Respondent argues that the case has no direct relevance to the decision needng to be made by the Tribunal. The decision was essentially based on a point of contract. The insurance company in the Williams case expressly agreed to assign to the Council responsibility for local claims handling and to pay the Council 20% of the premium in

returen for those services. The Court not surprisingly decided that the Applicants should pay, as port of the insurance amount payable that 20%, given that it was a payment for services and contractually agreed. The Respondent also points out that the case does not determine that a Leaseholder should never have to contribute to commission.

The tribunal's decision

33. The tribunal determines that the amount payable in respect of insurance premiums for the years in question is reasonable, but that commission charges of more than 20% in any of those years is not reasonable.

Reasons for the tribunal's decision

34. The Applicant has only provided evidence of a premium for the year 2017 -18. There is therefore no evidence on which to base a determination that premiums charged in previous years are unreasonable.

35. Moreover the alternative quotations do not substantially differ from the cost of cover provided by the Respondent and the Tribunal accepts the argument of the Respondents that those charges are likely to be lower than the general market charges because they are for new business.

36. The Tribunal considers that it is reasonable for the Respondent not to market the insurance of the property each year.

37. The Tribunal, however, having taken into account all the evidence and submissions including the written submissions on Williams v Southwark, considers that any commission charged of more than 20% is not reasonable for this property for any of the years in dispute. This is because there are a limited number of services provided and that the Respondent has admitted that the broker makes a profit, which the Tribunal does not consider reasonable. The Tribunal also notes that once the premium level was challenged by the lessees it was lowered to 20%.

Application under s.20C and refund of fees

38. The Applicant made an application for a refund of the fees that he had paid in respect of the application/ hearing[1]. Having heard the submissions from the parties and taking into account the determinations above, the tribunal orders the Respondent to refund any fees paid by the Applicant within 28 days of the date of this decision.

39. In the application for the Applicant applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, the tribunal determines to make no order under section 20C of the 1985 Act.

Name: Judge Carr **Date:** 19th July 2017

[1] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 SI 2013 No 1169

Appendix of relevant legislation

Landlord and Tenant Act 1985 (as amended)

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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section "relevant contribution", in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(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 to pay 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.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Commonhold and Leasehold Reform Act 2002

Schedule 11, paragraph 1

(1) In this Part of this Schedule "administration charge" means an amount payable by a tenant of a dwelling as part of or in addition to the rent which is payable, directly or indirectly—
- (a) for or in connection with the grant of approvals under his lease, or applications for such approvals,
- (b) for or in connection with the provision of information or documents by or on behalf of the landlord or a person who is party to his lease otherwise than as landlord or tenant,
- (c) in respect of a failure by the tenant to make a payment by the due date to the landlord or a person who is party to his lease otherwise than as landlord or tenant, or
- (d) in connection with a breach (or alleged breach) of a covenant or condition in his lease.

(2) But an amount payable by the tenant of a dwelling the rent of which is registered under Part 4 of the Rent Act 1977 (c. 42) is not an administration charge, unless the amount registered is entered as a variable amount in pursuance of section 71(4) of that Act.

(3) In this Part of this Schedule "variable administration charge" means an administration charge payable by a tenant which is neither—
(a) specified in his lease, nor
(b) calculated in accordance with a formula specified in his lease.

(4) An order amending sub-paragraph (1) may be made by the appropriate national authority.

Schedule 11, paragraph 2

A variable administration charge is payable only to the extent that the amount of the charge is reasonable.

Schedule 11, paragraph 5

(1) An application may be made to the appropriate tribunal for a determination whether an administration 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) Sub-paragraph (1) applies whether or not any payment has been made.

(3) The jurisdiction conferred on the appropriate tribunal in respect of any matter by virtue of sub-paragraph (1) is in addition to any jurisdiction of a court in respect of the matter.

(4) No application under sub-paragraph (1) 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or

(b) on particular evidence,

of any question which may be the subject matter of an application under sub-paragraph (1).