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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00AR/LSC/2016/0039**
Property	:	**The Railstore, Kidman Close, Romford, Essex RM2 6JN**
Applicant	:	**Manoj Peiris (and 40 others)**
Representative	:	**Manoj Peiris (not appearing at the hearing)**
Respondent	:	**Adriatic Land (GR2) Limited**
Representative	:	**Simon Allison, counsel, instructed by JB Leitch**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Judge Hargreaves** **Michael Cartwright FRICS**
Date and venue of hearing	:	**10 Alfred Place, London WC1E 7LR** **18th May 2016**
Date of decision	:	**2nd June 2016**

DECISION

Decisions of the Tribunal

(1) The Tribunal determined that it was appropriate to proceed with the hearing pursuant to Tribunal Rule 34 in the absence of Mr Peiris or any other representative Applicant.

(2) The Tribunal had jurisdiction to determine the application because no settlement had been concluded prior to the hearing.

(3) The Tribunal determines that in respect of the year 2014-2015 the sums of (i) £354.45 in respect of insurance premiums (ii) £83.34 in respect of communal electricity bills (iii) £100 in respect of roof repairs (iv) £100 in respect of a management fee are reasonable and payable by the Respondents.

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

(5) The Tribunal does not make an order under section 20C of the Landlord and Tenant Act 1985.

(6) Any application for Rule 13 costs by the Respondent should be filed and served on Mr Peiris by 5pm 17th June, and the Applicants have until 5pm 1st July to file and serve their response.

REASONS

The application

1. The Applicants (described in the application at p77 received in January 2016 as Mr Manoj Peiris and about 40 other leaseholders who signed a separate sheet attached to the application indicating their participation) seek 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 them in respect of buildings and terrorism insurance for the year 1st January 2016-31st December 2016. The application was brought on the grounds that the Respondent failed to deal with the Applicants' concerns in a *"timely, polite manner demonstrating a genuine willingness on their part to resolve the dispute"*.

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

3. Page numbers refer to those in the trial bundle prepared by the Respondent.

4. At the hearing Mr Allison appeared for the Respondent but no-one appeared for any of the Applicants.

The issues

5. The **first issue** therefore was whether to proceed in the absence of any Applicant. Though this is related to the second point (whether the application was compromised), the Tribunal concluded that it was appropriate to proceed in the absence of any Applicant, pursuant to Tribunal Rule 34, because (i) we were satisfied from the documents on the court file that not only was Mr Peiris (the contact for the Applicants) well aware of the hearing time and date, he was also well aware that his application for the hearing not to proceed had been refused by a procedural Judge the day before. As it followed (from the emails on the court file) that he or any other Applicant knew that despite his application the Tribunal expected the parties to appear at the hearing (on the grounds that his argument that the case had settled required to be determined as it was by no means clear cut), it follows that it was (ii) in the interests of justice to proceed with the hearing. There was no good reason why in the light of the communications on the court file, Mr Peiris decided not to explain his position; he took a risk in not appearing and it was plainly in accordance with the overriding objective to proceed.

6. The **second issue** was whether the Tribunal had any jurisdiction in any event: if Mr Peiris was correct, the application had settled and there was nothing for the Tribunal to decide. If Mr Allison was correct, the application had not been settled, and the application remained to be dealt with by the Tribunal.

7. The Tribunal decides the second issue in favour of the Respondent for the following reasons. As usual with these cases there (and particularly where there is no appearance by one of the parties), it is necessary to describe the relevant sequence of communications in order to explain this conclusion, particularly where the Applicants are in person. That involves untangling various email chains which are not contained in the trial bundle.

8. On 1st May 2016 Mr Peiris wrote to the Tribunal seeking an extension of time to comply with the directions made on 16th February 2016, requiring the Applicants to submit a bundle of documents by 6th May, on the grounds that the Respondent had submitted a proposal for settlement on 29th April, which required him to consider the proposal on 3rd May at the earliest. That request was repeated on 6th May on the grounds that by then there was no agreement. By the 9th May (it appears) the Respondent's managing agents (Home Ground) had made certain proposals to Mr Peiris. Meanwhile the Respondent's solicitors (JB Leitch) were writing to the Tribunal on 9th May indicating that unless the Applicants produced a satisfactory bundle by close of

business on 10th May, the Respondent would prepare the bundle itself. Mr Peiris responded by asking for a copy of the proposal to review (1.11pm 9th May). He must have received a letter because on 9th May at 21.43 he sent Home Ground an email containing tracked changes to its letter, so there was clearly a dispute of substance at that stage. He chased a response at 13.26 on 10th May and 16.12. By email sent at 17.14 on 10th May Home Ground replied to the proposed amendments, and rejected them. Mr Peiris fired off an email at 17.29 which was less than complimentary about the Respondent's approach and then added *"I have been instructed by the majority[1] of the Applicants to accept the terms of the settlement that you have put forward to enable them to pursue their own course of action ... Please forward to me immediately a signed copy of the Settlement Letter. Further, kindly inform me when payment will be made ... I will not inform the FTT that we have agreed the Settlement until you have the decency to provide the information requested above immediately."*

9. Home Ground set out the terms in a letter headed *"Without Prejudice"* dated 10th May which was attached to an email at 18.20. It starts *"Ref: Settlement Letter: .... Please accept this as our letter in settlement of the case named above. Thank you for agreeing the terms named below. As a final step we kindly request you to forward this letter to the tribunal confirming your agreement to settle.[2] [Terms set out.] Thank you for confirming the terms above are acceptable and therefore you will inform the Tribunal that this case has been settled."*

10. Again, Mr Peiris sent a response (11th May at 7.58) which was highly critical of the Respondent and claiming that it had lied about the proposals made in a conference call, adding *"Whilst the Applicants **may**[3] agree to the terms of Settlement relating to this specific matter, [they] do not preclude any Applicant from pursuing alternative courses of action ..."*. Not unreasonably Home Ground asked for clarity at 12.01 and *"requested your express confirmation that the letter in settlement of the claim has been accepted by the Applicants."* Mr Peiris replied at 12.18 and said given the behaviour of the Respondent *"I have no obligation to co-operate with you"* to which, in the absence of a firm confirmation as requested, Home Ground emailed back at 13.19 saying *"Unfortunately, it is clear that we have not reached settlement. We are therefore going to prepare for this hearing ... you will be hearing from JB Leitch ..."*. Yet again Mr Peiris failed to provide the requested confirmation, and sent another email at 13.51 containing further criticism of the Respondent, *"refusing to cede to your demands"*, and claiming that his 7.58 email was clear (which it evidently was not, because of the clarification reasonably required by Home Ground/the Respondent): furthermore, he was also going to block emails from JB Leitch. Objectively, Mr Peiris' email of 7.58 was confusing and

[1] This is problematic for the concept of a settlement purporting to bind all parties

[2] This was not in fact done

[3] Our emphasis

inflammatory and ambiguous: the request for clarification and confirmation was met with a barrage of obfuscation rather than an affirmative response which was what was required to confirm that a settlement was agreed.

11. While Mr Peiris took this stance with Home Ground, he emailed the Tribunal at 9.00am on 11th May attaching a letter *"from me on behalf of all Applicants ... notifying you that the parties have reached a settlement."* The attached letter reads *"The purpose of this letter is to notify you that the Applicants have reluctantly agreed to a settlement with the Respondent by a settlement dated 10th May 2016. We therefore request that the hearing date be vacated and that proceedings cease."* From the evidence before the Tribunal Mr Peiris did not copy that letter to JB Leitch or Home Ground until 4.38pm on 17th May when he wrote *"As evidenced* [by the email and letter he sent to the Tribunal on 11th May, attached] *I informed the Tribunal as requested by your client that the terms were acceptable and that we had withdrawn our application. Your client did not in their letter of 10th May request a copy of my correspondence to the Tribunal ....".* Whilst it is accurate to say that Home Ground did not seek confirmation of the acceptance if any sent to the Tribunal, it is also true that as far as Home Ground was concerned, it had asked for express confirmation that the deal was accepted, and did not receive it. It had also requested that Mr Peiris send a particular letter to the Tribunal, not the one he sent. Furthermore, Mr Peiris had said he had no obligation to co-operate with the Respondent.

12. The Respondent's conclusion was as pointed out in JB Leitch's email to Mr Peiris on 17th May at 16.41: *"My client approached you with terms of settlement on a without prejudice basis. You were asked specifically if you agreed to the same and you failed to confirm. You were advised specifically that the matter was therefore to proceed and I in turn advised you that bundles were to be prepared ... You did not accept the terms of settlement ..."*

13. We should add that the question whether or not the Respondent withdrew in accordance with Tribunal Rule 22, which was raised on 17th May, is arguably not directly relevant now: if the parties had settled, then the Tribunal would have no jurisdiction. Settlement is not necessarily the same as withdrawal, and there was no Rule 22 withdrawal here.

14. The course of the correspondence set out above records an unhappy and bitter relationship which prompted Mr Peiris to write to the Tribunal confirming settlement but to fail to provide confirmation to the Respondent when reasonably asked to do so. Whilst he was not, arguably, required to do so by the strict terms of the letter dated 10th May (which was not as well drafted as it might have been), he was required to do so in the course of subsequent correspondence because

he had not clarified that the offer was accepted, and took every opportunity not to co-operate (and said so expressly). In the circumstances the Applicants failed to communicate their acceptance to the Respondent. It is, as Mr Allison submitted, an objective test: *"An acceptance is a final and unqualified expression of assent to the terms of an offer"*[4]. Another way of putting it[5] is to *"seek to identify a definite offer by one party and a definite acceptance of that offer by the other party"*. The correspondence above does not satisfy that basic test. It follows that the Respondent is correct: no settlement was finalised and the Tribunal has jurisdiction to hear the application, having already determined that it can proceed in the absence of the Applicants.

The insurance charge

15. This is a dispute about insurance charges for 2016. We should add that there is no suggestion that demands have not been made properly, and it appears that the Applicants have paid the insurance rent (precise details were not supplied). A standard lease is at p2 of the bundle. See for example clause 1.1.6 and 1.1.17 for a definition of *"Insured Risks"* ie *"risks to the extent insurable on reasonable commercial terms .... as may from time to time be required by the Landlord .."* and 1.1.18 being the definition of *"Insurance Rent"*. Clause 1.1.19 defines *"Insurers* [as] *such reputable insurance company or underwriters as the Landlord may from time to time nominate"*. The Applicants' statement of case is at p238. Bearing in mind the remit of *s27A*, it is a lengthy document (including a section on anti-competitive conduct which adds nothing relevant to the dispute) but the core points include (i) the relationship between the Landlord and the insurance broker is not at arms' length (ii) the buildings are not being insured on reasonable commercial terms (iii) alternative quotes provided by the Applicants show lower premiums are available in the market (iv) commission levels are too high (v) the Landlord is failing to make full disclosure of the process adopted in placing the insurance and all in all, the Landlord is not applying the *"reasonable commercial"* approach required by the Lease. As Mr Allison submitted, not all the points pleaded by the Applicants or referred to in the application itself, can be said to be relevant to the question of reasonableness which is the point of a *s27A* application. See the Applicants' list of questions for the Tribunal at p85, for example (and the Respondent's detailed response at p532). It is not the Tribunal's function to determine issues beyond what is a reasonable charge for the insurance (it not being alleged, of course, that an insurance rent is itself unreasonable).

16. Mr Peiris explains what his concerns are in a witness statement at p579, the question whether the insurance rent actually charged for 2016 by the Respondent was unreasonable, arguably taking a back seat to his

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[4] Chitty on Contracts 32nd ed 2-026

[5] Foskett on compromise 8th ed at 3-22

concerns about how the premium was negotiated (see also Mr Putnam's statement at p608). As a result of his actions, the premium was reduced: see p604, but the Tribunal application was issued nevertheless. As Mr Allison submitted, the question is not what the charge might have been, but what has been charged for 2016. On the Applicants' evidence, there is no credible evidence to suggest that the amount charged in unreasonable, and the Applicants' legal challenges are met in full by the Respondent's legal submissions and evidence.

17. By comparison with the Applicants' case, the Respondent's case is succinctly pleaded in its statement of case at p523, and also (and primarily) at p101 (both with attached relevant documents to which reference should be made). The Respondent's core point is that Forte Freehold Management arranges insurance for the Respondent, as its duly appointed agent (as well as collecting the ground rents). Forte instructs an independent broker, James Hallam Estates Limited (since December 2014), and is an appointed representative of James Hallam (and therefore authorised to arrange insurance) (p210). James Hallam negotiates the policies and premiums for the Respondent's portfolio, and the detailed evidence that it did so (independently) is available (Annex 4, Respondent's statement of case, see also p226). The relevant policy chosen for 2016 was the cheapest offered (by TMK – Tokio Marine Kiln). Steps were taken to ensure the correct valuations were provided for insurance purposes: p228.

18. The relevant invoices are at p120 and 121. To the extent required, these charges as passed on to the Applicants, are reasonable.

19. Evidence in support of the Respondent's case is comprehensive and includes (in addition to the formal pleadings) the statement of Diane Fletcher of Forte (p613), and Andrew Dischamps of James Hallam Real Estate Ltd (p620). Their evidence deals with the Applicants' points and answers them in full, emphasising the point – accepted by the Tribunal in the absence of any contrary evidence from the Applicants – that the premium charged by TKM is reasonable.

20. Mr Allison made the following brief oral submissions in response to the Applicants' case in addition to the matters pleaded in the Respondent's statement of case, to which reference should be made for the full detail. As to their case on alternative quotes (p241), he submitted that the quote provided by Cactus Cover was not accepted as being like for like, the Clear Insurance Management quote was provided via one of the Applicants, and the Ecclesiastical quote was higher than the final TKM premium. As for commission rates, the Respondent's evidence is that the rates paid by the Respondent at 22.5% were well within the range put forward as acceptable by Mr Peiris (25-30%). The fact that TKM was the chosen insurer for 2013-2016 was not evidence of complacency when the broker had changed in 2014 and evidently gone to the market to check rates on offer. As for the assertion that the Respondent and

Forte were not acting at arm's length, they had different owners (though he accepted that the owner of Forte had once, but no longer, had shares in the Respondent).

21. The Respondent's position on the legal points raised by the Applicants is set out at paragraph 12 onwards of its statement of case (p525). It is clear on the evidence provided by the Respondent that the TKM premium was negotiated and obtained at arm's length in the market. As a matter of construction of the lease, we agree that *"reasonable commercial terms"* relates to the terms of the cover, not to the agreement between (eg) the Respondent/Forte/James Hallam.

22. Mr Peiris raised numerous issues challenging the reasonableness of the insurance rent charged for 2016. Those challenges fail both on the facts and the legal points relied upon by the Applicants, which are answered in full (on the evidence and the law), by the Respondent. As Mr Allison submitted, the terms of the leases would make it difficult to challenge the insurance premiums charged, particularly where there is no convincing case on the available evidence.

Application under s.20C and refund of fees

23. In the light of the above it would be plainly wrong to make a *s20C* order in favour of the Applicants, or to refund any of their fees.

24. Directions are given as the Respondent indicated that it wished to seek Rule 13 costs against the Applicants if successful.

Judge Hargreaves

Michael Cartwright FRICS

2nd June 2016

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).