10496

FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/OOMC/LSC/2014/0069**
Property	:	**Regent Court, Great Knollys Street, Reading, Berkshire RG1 7HW**
Applicants	:	**(1)Mr Peter Glass and Pimjai Glass Mr K Kondopoulos and Ms Y Zhang Mr A Keenan and the Applicants shown on the application in respect of the s27A claim (2)Regent Court (Caversham) Residents Association Limited**
Representatives	:	**Mr Glass and Mr Kondopoulos**
Respondent	:	**G & O Rents Limited**
Representatives	:	**Mr J Demachkie, Counsel Mr O'Dell of G & O Rents Limited**
Attendees		**Mr Keenan, Mr Bird and Ms Gowans**
Type of Application	:	**(1) Section 27A of the Landlord and Tenant Act 1985 (2) An application to vary leases under Part IV of the Landlord and Tenant Act 1987**
Tribunal Members	:	**Tribunal Judge Dutton Tribunal Judge Oxlade Mrs S Redmond BSc Econ MRICS**
Date and venue of Hearing	:	**Holiday Inn, Reading, Berkshire on 29th September 2014 and on 1st December 2014 At Reading County Court**
Date of Decision	:	**30th December 2014**

DECISION

DECISION

1. The Tribunal dismisses the application by Regent Court (Caversham) Residents Association Limited (the company) for a variation of the lease pursuant to Part IV of the Landlord and Tenant Act 1987 for the reasons set out below.

2. The Tribunal finds that the insurance premiums charged for the years 2008 onwards are reasonable and are recoverable from the Applicants save that the Applicants are entitled to a share in the credit in the sum of £2,664.40 being the commission paid in respect of the buildings element of the insurance for the period June 2014 to 2015. Such sum to be credited against any demands made against the Applicants in respect of insurance by the Respondent for this period.

BACKGROUND

1. On 23rd June two applications were made to the Tribunal involving the property Regent Court, Reading, Berkshire RG1 7HW (the property). Both were brought by Mr Glass. The first under Section 27A of the Landlord and Tenant Act 1985 (the 1985 Act) was made on his behalf and two others. This sought to challenge the insurance arrangements from 2002/03 through to 2014/15.

2. The second application brought by Regent Court (Caversham) Residents Association Limited (RCCRA) sought a variation of the lease to the various flats in the building to change the insurance arrangements. The application although brought in the name of the residents association sought to vary the lease under Section 35 of the Landlord and Tenant Act 1987 (the 1987 Act).

3. Prior to the Hearing we received a substantial bundle of documents containing copies of the applications and directions order, a sample lease, witness statements from Elaine Gowans on behalf of the Applicants and Mr O'Dell and Mr Meur on behalf of the Respondents, insurance information and other relevant documents which we will refer to as necessary during the course of this decision.

THE HEARING

4. The Hearing started after we had inspected the subject premises on 29th September 2014 continuing on 1st December 2014. Such inspection added little to the information other than to confirm that there were two blocks close to Reading centre, one built at the turn of the 20th Century and the other in the late 1980s. There was car parking and some lawned area. The development was sited relatively near to the main railway station in Reading and adjacent to commercial premises. The older building fronted a busy main road that passed through the centre of Reading.

5. At the commencement of the Hearing on 29th September 2014 we raised certain preliminary matters relating both to the lease variation and the application for the determination of service charges. On the question of the lease variation, Mr Glass said that the matter was presented in the name of RCCRA but had adduced no evidence to show that this application had the support of all residents. He said

that he wished to proceed with the application under Section 35 of the 1987 Act and the Respondents confirmed that they would wish to proceed with the matter that day.

6. Insofar as the application under the 1985 Act was concerned, Mr Glass confirmed that he wished the Tribunal to determine the reasonableness and payability for service charge years 2002 to date in respect of insurance premiums claimed during that period. The question of limitation was discussed and the difficulty of providing evidence that went that far back in time. The Respondent's position was that they considered there was a six year limitation period and that accordingly the relevant period for determination was 2008 onwards. Mr Glass, pragmatically and sensibly we consider, accepted that the claim should be limited to 2008 onwards and that the earlier years would not be pursued. We agreed that the Section 27A application would be considered after we had heard evidence on the lease variation.

7. The Application made by RCCRA referred to a number of other decisions which appeared to involve G & O Rents although copies of those decisions were not in the bundle before us. The application went on to say that the Applicant "*considered that the insurance provision of the leases are inadequate in that whilst the drafting of the lease stipulates the clear intent that the company should obtain the building insurance cover, the additional provisions placed to safeguard the landlord's interest inhibit the actions of the company to carry out its obligations to the leaseholders.*" Further explanations were given. The relevant clause of the lease is to be found at page 70 of the bundle being clause 5 which says as follows:

"The company will at all times during the said term adequately insure the freehold premises including the buildings, (and any contents of the freehold premises which the company thinks ought to be insured) in the full rebuilding costs thereof including the cost of complying with local authority and other statutory requirements, fees and associated costs against all risks as are usual and necessary and including all liability to third parties, such insurance to be obtained through the landlord's agents or such agent as he may from time to time appoint, and whenever so required, will produce to the tenant the policy or policies of such insurance and the receipt for the last premium of the same and will in the event of a freehold premises or the building or any part thereof being damaged or destroyed by fire or otherwise as soon as reasonably practicable apply the insurance money paid in respect thereof in the rebuilding or reinstatement thereof and this paragraph shall be binding on the company whether or not the tenant has carried out his obligation under clause 2 (n) of this lease."

8. The variation that the Applicant sought is as follows:

"The company will at all times during the said term adequately insure the freehold premises including the buildings, (and any contents of the freehold premises which the company thinks ought to be insured) in the full rebuilding costs thereof including the cost of complying with local authority and other statutory requirements, fees and associated costs against all risks as are usual and necessary and including all liability to third parties, such insurance to be obtained through the landlord's approved insurance agents or such agent as he may from time to

time appoint, and whenever so required, will produce to the tenant the policy or policies of such insurance and the receipt for the last premium of the same and will in the event of a freehold premises or the building or any part thereof being damaged or destroyed by fire or otherwise as soon as reasonably practicable apply the insurance money paid in respect thereof in the rebuilding or reinstatement thereof and this paragraph shall be binding on the company whether or not the tenant has carried out his obligation under clause 2 (n) of this lease."

9. Within the papers was a document headed "the Applicant's case", which set out the overview and confirmed that the landlord's agent, Urbanpoint, dealt with the insurance providing the information to John Mortimer Property management, the managing agents instructed on behalf of the Applicant residents association. There was concern as to what was meant by the term "landlord's agent" and there was also uncertainty, until more recently, as to who should actually be handling the insurance arrangements. Somewhat unusually within the papers we had a note of advice from Counsel, Mr Demachkie, which had been provided in June of this year. We noted what was said but not think in truth that the advice given by Mr Demachkie was challenged by the Applicants. Insofar as the Respondents were concerned in a skeleton argument presented to us on the morning of the Hearing, Mr Demachkie argued that none of the grounds put forward by the Applicant RCCRA were appropriate grounds for varying under the provisions of Section 35. As was said by Mr Demachkie "*it is hard to see how this application has any merit whatsoever in light of the admission at page 671 of the bundle that whilst the current lease provisions without question do allow adequate insurance cover to be obtained for the building the wording of the lease insurance clause does not adequately provide for the directors' to obtain building insurance cover at a reasonable cost without having to keep returning to the Tribunal to seek redress*". Further it was said that the proposed amendment insofar as it sought to limit the landlord's discretion as to which agent he may appoint was contrary to Section 28(7) of the 1987 Act.

10. In submissions made to us on the first day of the Hearing, Mr Glass said that the Residents Association sought to have a say as to what insurance was being chosen for the residents. He accepted that the lease required the company to insure and in essence they were really seeking to have involvement as to who should be appointed as the landlord's agent and that that should in fact mean that the landlord's insurance agent not just the managing agents. Mr Demachkie said on behalf of the Respondents that they would be content to read the lease to the effect that the landlord's agent is indeed the insurance agent and indeed the insurance had been effected through brokers at all times.

11. It appears that the residents association have in fact taken out their own cover and that the property, therefore, is concurrently covered by two insurance policies which is not a satisfactory position.

12. Having considered the position with regard to the variation we then moved on to hear evidence in respect of the application under Section 27A of the 1985 Act. Mr Glass's submissions were as set out in the statement of case and supported by a witness statement of Elaine Gowans. We noted all that was said. Mr Glass posed the question as to whether or not the block policy that the residents had in place was reasonable. One of the concerns raised by Mr Glass was whether or not AXA

was properly allocating the premiums they charged the Respondent to the property. The letter that was sent by Mr Meur, the Managing Director of Genavco Insurance Limited who arranged the block policy for G & O Rents Limited said this in part *"Genavco Insurance issue all documentation on behalf of AXA Insurance for properties that are insured under the AXA block policy numbered LP COM 6017335 including Regent Court. For the avoidance of any doubt, I can confirm the details shown on the certificates we issue accurately record the risk information and premiums declared to AXA under the terms of our delegated terms of authority."* It was Mr Glass's case that there appeared to be no documentation which showed what element of the premium was allocated just to Regent Court.

13. As well as this concern, there was concern on the part of the leaseholders who brought the application under Section 27A, that the premiums being sought were too high. This referred not only to the general premium for the property but also the need and or cost of the terrorism cover. For example Mr Glass had obtained from CHU residents line on 9th February 2012 an additional insurance cover for terrorism at a price of £1,656. This contrasted with the insurance obtained through AXA for the period March 2012 to 2013, page 641 in the bundle which showed terrorism cover of up to £1,584.04 but a total insurance policy cover including tax and a policy tax of £14,347.22. It was said by Mr Glass that at that time for a period of 5 years prior to the placement of that insurance there had been no claims made but the premium was still in his words 'sky high'. He sought to contrast this with "evidence" of insurance placed through brokers' Landsdown Insurance showing premiums of £3,349 or slightly below. Mr Glass said that he had pointed out to the landlord that he could get much cheaper insurance but notwithstanding this the premiums had increased. In a table that he had prepared at page 465 of the bundle, he showed the relevant costs of insurance but for reasons that became apparent later at the Hearing this table of insurance quotes was somewhat unhelpful.

14. Mr Glass told us that he had become a director of the residents association in 2013 and that the three named on the application were at the vanguard but 12 leaseholders had now joined the application as set out at page 30 of the bundle. He said that there had been a history of endeavouring to deal with the insurance issues going back to 2005. He took us to a series of emails that he had exchanged with a Denise Keith, a member of John Mortimer Managing Agents, concerning claims made for an insurance levy. However, this contact seemed to come to a halt after 2005.

15. He told us that he had gained experience from being a director of another management company at a property owned by his Mother. This gave him more experience to be able to pursue the insurance issue. He told us of the difficulty in challenging the insurance premiums and the difficulty in obtaining meaningful communication with the landlord's insurance agent. He did confirm that he received a copy of the insurance schedule each year and the annual accounts and that there were two points, at least, in each year that enabled the leaseholders to challenge the insurance claim. The question of the delay in challenging the insurance claims was raised and confirmed Mr Glass's acceptance that the review of the insurance should only be from 2008 onwards.

16. At this point the Respondents commented on the claims history which Mr Glass had set out in his submissions. There appeared to be no dispute on the information contained at page 446 of the bundle but the Respondents pointed out that there was a further potential claim in respect of flat 26 which had not been included within the latest comparables obtained by Mr Glass. It was at this point that the table at page 465 came under scrutiny and was found to be somewhat wanting. It was made clear that the figures shown for earlier years did not reflect the state of the market at that time. It merely reflected premiums using today's figures and today's market and claims history. It also was commented upon that Mr Meur was not able to attend the hearing on the first day due to business trip but it is hoped that in fact he will be able to be present when the matter reconvened, as were not able to conclude the taking of all evidence during the first day.

17. Just before the luncheon adjournment, it was clarified that as well as the level of the premiums other issues that needed to be considered were the need for terrorism cover, whether or not there was insurance cover for people who rented out their flats and some uncertainty as the appropriate/declared value.

18. After the luncheon adjournment the question of sub-letting was raised. Mr Glass's view was that they did not require any extra provision. However, it was clear that the leaseholders could not police who the sub-tenants might be and the comparable quotes obtained by Mr Glass from CHU indicated that cover would not be available for a certain type of tenancy. It appears that the description of the tenants had been limited to professional. However Mr Glass conceded that it was not possible to show who those tenants in the property might be nor was there any provision in the lease which gave the company power to review the nature of any tenant that a leaseholder might decide to let into occupation.

19. On the question of the sum insured Mr Glass took us to certain pages in the bundle which indicated in his view that the sum insured on the comparable quotes was comparable to that which was set out on the AXA schedule.

20. On the question of terrorism he thought it was unreasonable to insure the flat for this. There was no history of terrorism in Reading and he produced a copy of a letter from Mortgage Express which confirmed that there was no requirement by them to obtain anti-terrorism cover for the property. Such letter was produced to rebut a suggestion that mortgagees would require insurance cover for terrorism. Mr Kondopoulos said that he had telephoned his own mortgagee Santander who had indicated that as far as they were concerned he did not require terrorism cover for the building. There was also a challenge to the commission which was 20%.

21. Mr Glass then answered questions by Mr Demachkie and in response to matters he confirmed he had always paid his insurance in full and that there had been little communication directly with the mortgage brokers until more recently concerning the level of insurance. Indeed it appeared that there was evidence of communication from 2011 onwards only.

22. He accepted that the residents association was acting in breach of the lease by placing their own insurance. He also confirmed in respect of the quotes obtained that the potential claim in respect of Flat 26 had not been referred to the quoting

company. The estimate obtained was in June 2014 before the Genavco letter to Mr O'Dell of 15th July 2014 which was contained at page 301 onwards in the bundle. Mr Glass did confirm he knew there were problems with Flat 26 but nothing more than that. He accepted also that there was no ability on the part of the company to impose any particular requirements as to the identity of the tenants or the information that should be provided by any leaseholder should they sublet.

23. We then heard from Mrs Gowans who had provided a document headed 'Witness Statement of Fact' which contained no statement of truth and was dated 4th September 2014. We noted all that was said in the statement. She read this out to us confirming that she had been an employee of John Mortimer Property Management since 2007. She said that it had been the managing agent's view that the building insurance for the property was arranged by the landlord. Having read her statement she confirmed she was not aware that any tenants had acted in an adverse manner but she could not tell us whether they were professional people or fell into some other category of tenant. She confirmed that the lease did not appear to have been read but she now accepted that the insurance should be arranged by the company through the landlord's insurance agents which is what would happen.

24. At the conclusion of the Hearing on the first day we issued certain directions to enable us to clarify certain evidential matters. The Respondents were asked to obtain a breakdown of the premium from AXA so that we could be certain it was properly allocated in respect of the property. The Applicant was asked to contact the company from whom comparable quotes had been obtained to see what impact the status of the tenants might have and also the pending claims in respect of one of the flats in the property so that a true like for like comparable could be produced. The Respondents also agreed to provide a quote for a stand-alone policy for the year and to confirm the position with regard to commission which could be dealt with in more detail in the statement from Mr O'Dell. The matter was listed for a reconvene on 1st December 2014.

25. The reconvene took place on 1st December at the Reading County Court. Prior to the reconvene Hearing Mr Glass had presented us with a further bundle of documents which contained a further overview and details of the quotations that he had obtained for the years commencing June 2011, 2012, 2013 and 2014. Also within the bundle was certain correspondence passing between the parties, comments by Mr Glass on the information required to be produced in the directions issued following the first day of the Hearing, a further letter from G & O Rents of 2nd October 2014 which dealt in detail with certain matters and subsequently under a cover of a letter written on 26th November 2014 some data obtained from the AA. G & O Rents Limited had written to the Tribunal on 20th November including a review of the evidence produced by the Applicants, such review carried out by Mr Meur of Genavco Insurance and a document headed 'Comments on Evidence', which although not bearing Mr Demachkie's name we were told had been prepared by him. This was dated 19th November 2014.

26. At the start of the Hearing Mr Glass took us through the documentation contained in his additional bundle but stated in his view the information he had obtained in respect of the insurance commencing in the year 2011 was not comparable as no attempt had been made to include the provisions for letting as currently existed in

the landlord's policy. In 2012, however, greater effort was made to obtain comparable evidence from the broker that he was using at Towergate (Mr Thatcher) who informed him in an email that the cover he could obtain from NIG as a comparable indicated that they would be happy with DSS and Housing Association tenants up to a maximum of 50% and 20% in respect of student lettings.

27. At this point he told us that a request had been put to the tenants to let RCCRA know whether or not their tenants were non-professional. It appears, however, that only one response had been received which was included in the original bundles indicating that whilst the original tenant had been in full time employment, he had lost his job and was at that time, that is to say July 2014, in receipt of Housing Allowance. It did not appear that any other leaseholder had responded and we were told that only some 35% of the flats were owner occupied.

28. He then took us through the NIG comparable for 2013 which he said was appropriate as there had been no claims and the proposals in respect of insurance for 2014 from QEB. He also provided us with a document from CHU Residents Line headed 'Indicative Quotations for Regent Court'. These covered the years 2012, 2013 and 2014. It seems for the two earlier years the sum insured was incorrect, being too low. However, Mr Glass had appended handwritten alterations to this with changes to the premiums that he thought would be payable in those two earlier years. However, it appeared from questioning, that it was not wholly clear what ratio there was between the sum insured and the premium payable and it was equally clear that Mr Glass had dealt with the matter on a simplistic basis of dividing the sum insured by the premium and using the same relationship between the two to uplift to the actual sum insured for those years. He did not ask CHU to recalculate their figures on the changed sum insured. It was also noted by us in his overview that he confirmed he had not been able to find an insurer that would offer *"carte blanche, ie would allow any use for all of the 28 flats, potentially at the same time with non-professional tenants in residents."* In questioning from us, Mr Glass confirmed that he had no comparable evidence that matched the landlord's policy and that what he had were approximations which show the premiums that he believed could be achieved. The main purpose of the evidence that he put before us was to show that the gap between the premiums charged by the freeholder and the quotes he had obtained showed that the insurance premiums being sought by the Respondent were excessive. As to the graph he produced from the AA, he confirmed that he had no information as to the data that lay behind the information shown on the graph and could not say whether the properties in question were flats or blocks of flats, although he probably thought it did not include blocks.

29. On the question of the commission paid to the Residents, which is 20% of the premiums, he had nothing really to add other than he said that he had been a Director of the Applicant Company for some 18 months and that insurance claims had been handled through their managing agents John Mortimer.

30. Ms Gowans who was at the second day of the Hearing confirmed with us that when she handled the claims this was via Urban Point who were the managing agents for the Respondents and she was aware they were the Respondent's agents.

31. We asked Mr Glass whether he was aware of any relationship between G & O Rents and Genavco and he accepted that they were two distinct companies.

32. The Respondent's case was then put initially by relying on the evidence of Mr O'Dell. He had produced a witness statement which was available at the first Hearing and confirmed that it was his signature and that the contents of same were correct. He confirmed that the Respondents and Genavco were not part of the same group and that he was a director and shareholder of the Respondent Company. He told us that the Respondents and Urbanpoint were owned by the same holding company and that Urbanpoint were property managers who dealt with property issues for G & O Rents.

33. He explained the work that was undertaken to justify the commissioned earned. He said that every time Urbanpoint received a claim there would be work to be done by him to provide the necessary information for the matter to be progressed. He said that there were meetings between the Respondents and Urbanpoint on a regular basis and in respect of insurance it was his responsibility to provide information as to the lease terms and the extent of the property. In addition also, he had had meetings with Genavco and insurers seeking to minimise claims and improve the cover. Indeed he told us he was at the moment in the process of planning and designing a designated policy booklet.

34. Asked why the landlord had taken over the insurance when the lease provided for the Applicant Company to deal, he told us that the company had always been involved but that there had been an historic arrangement following acquisition from the receiver whereby the Respondents undertook to deal with the insurance of the property. No approach had been made until recently, indeed since Mr Glass became involved, for this position to change. If an approach had been made by the Applicants or an individual leaseholder to the Respondents expressing concern about the insurance cover, the matter would have been looked into. He told us that the Respondents had proceeded on the basis that it was considered the company accepted the position. He did confirm, however, that he accepted that it was the company that should have arranged the insurance going forward.

35. He was then asked to explain how the premium was apportioned to the property given that the property formed part of a block policy arrangement. He told us that the broker dealt with this and in a letter written by Mr Meur to Mr O'Dell on 17th October 2014 Genavco said this *"I confirm that the allocation of policy premium to which individual properties is provided by the insurer previously AXA and now NIG. Whilst we administer the insurance on behalf of our clients the rate of premium charged for individual properties is determined by the insurance company underwriter and not Genavco."* This was not challenged by Mr Glass. No other evidence had been produced notwithstanding the directions requesting written confirmation from the insurance company.

36. After a luncheon adjournment Mr Glass was asked whether he wished to raise any points concerning the terrorism cover which he had not included in his morning's submission. His query was why was insurance for terrorism required? Mr O'Dell's response was that in the present climate it would be wrong not to include insurance cover. Indeed in respect of those properties covered on the block policy

terrorism was automatically included. He thought that it was vital even if it did cover remote possibilities.

37. Mr O'Dell then returned to the commission point indicating that G & O Rents spend something in the region of £1m on insurance each year generating a commission of some £200,000. He told us that he probably worked for some ten hours a week and this was for 52 weeks of the year. They provided a 24/7 cover to deal with insurance and other arrangements as necessary. As to the insurance being placed by the landlord he said that there had been no breach of the lease by the residents' company which on the face of it would have allowed the landlord to take on the insurance arrangements. As to any commission that might be generated for the company, that he said was a matter for the company to agree with the brokers being used. On further questioning as to the breakdown of time spent on insurance, he told us that it included correspondence, time spent with the managing agents Urbanpoint and time spent negotiating the insurance contract on an annual basis. He told us that Urbanpoint managed the property portfolio for G & O Rents and that although there was no management agreement they were rewarded financially by G & O as and when required.

38. Asked why there was an apparent disparity in the premiums that the landlord sought to recover and those which were on the face of it available for comparable properties he told us that he had little alternative but to obtain insurance cover which gave suitable protection for the underletting. The insurance contract was one of utmost disclosure and with an inability to confirm the status of a sub-tenant there was no alternative he said but to proceed with the insurance as was being done. He told us that he had tried to set up some form of mechanism to obtain details as to the identity of various sub-tenants but the information had not been provided. He thought that if there was a mechanism in place that could be relied upon then that may have an impact in respect of the premiums ongoing but there was nothing available to date.

39. He was then asked why there had been such a delay in responding to letters sent by the company's managing agent John Mortimer concerning the insurance for the year 2014/15. In early February 2014 John Mortimer had written to Genavco and to Mr O'Dell raising the position with regard to insurance and the fact that it was the company's obligation to undertake that arrangement and not the landlord. These letters were replied to by Genavco on 17th February 2014 indicating they would be obtaining quotations and they wrote again on 2nd May again indicating that they were obtaining quotations. It seems that Mr O'Dell did not respond to the February correspondence until June 2014. Genavco did not write a substantive letter until 12th June 2014 but a few days before the insurance for the year 2014/15 had to be renewed. Mr O'Dell conceded that the delay by him in responding was inappropriate.

40. Finally, at the conclusion of his evidence he told us that he would like a meeting with the residents to resolve the outstanding issues and that also steps needed to be taken to discontinue one of the policies as it was inappropriate that it had been insured twice. He told us that they had not received any contribution towards the insurance premium from the company for the year 2014/15. In re-examination he confirmed that no commission was paid on the terrorism cover and reiterated the

time spent in respect of work on this building which he thought was 10 to 11 hours a year.

41. The only other evidence relied on by the Respondents was the statement of Mr Meur but despite having two chances to attend before us he had not done so.

42. Mr Demachkie then made brief submissions to us. He asked us to bear in mind the terms of his skeleton argument which had been produced at the first Hearing which dealt with both the application for variation of the lease and the insurance issues.

43. He asked us to consider whether payment that had been made in respect of insurance without complaint or protest limited the period for which we could consider the reasonableness and payability of the insurance premiums. He told us that the earliest complaint appeared to be in 2011 and that prior to that, insurance premiums had been paid without objection and without duress. If protests had been made at that time steps could have been taken to review the matter but it was now harder for the Respondents to do this and indeed to respond to the allegations raised given the passage of time. He accepted that if there be a burden of proof the issues having been raised by the Applicant, the Respondent must provide a reply to enable the Tribunal to determine the issues. The evidence of Mr Meur did not disclose that any payment made had been under protest or that there had been any challenge to the insurance at that time. He also asked us to consider the Comments on Evidence that had been produced for the second day of the Hearing.

44. As to the comparable evidence, he drew to our attention that there appeared to be no clear understanding as to the sub-letting situation and that no comparable had been provided on a like for like basis. Mr Meur had undertaken the exercise of considering stand-alone cover, that is to say insuring the buildings separately by way of their own policy, which did not indicate that there was any particularly saving to be made. He also asked us to bear in mind that if we were to make an order for re-payment of any monies taken by the Respondent, the matter would have to be pursued in the County Court and he queried whether there was in fact a valid cause of action and whether limitation periods in relation to restitution claims would fetter the Applicant's ability to recover monies. The crux he said was reasonableness. It that regard he referred us to the authority of *Avon Estates (London) Limited vs Sinclair Garden Investments (Kensington) Limited [2013]UKUT0264(LC).* At paragraph 30 of the judgment Her Honour Judge Walden-Smith said "*The LTV was dealing with the evidence it had before it and properly directed itself to the relevant and correct law setting out the principle that the landlord is not obliged to shop around and find the cheapest insurance. So long as the insurance is obtained in the market and at arm's length then the premium is reasonably incurred. There is nothing to suggest that the insurance arranged otherwise in the normal course of business, any appellant did not seek to adduce evidence to support such a contention. The appellant's complaint is that it might be possible to obtain a cheaper rate but it is not for the landlord to establish (as he has been expressly found in Berrycroft) that the insurance premium was the cheapest that could be found in order for the costs to have been reasonably incurred. The words "properly testing the market" used by Mr Francis in Forcelux in 2001 does not in any way detract from the decision of the court of appeal in Berrycroft and Havenridge that the landlord must prove either*

that the rate is representative of the market rate or that the contract was negotiated at arm's length and in the marketplace." Mr Demachkie said that the Respondents had done the best they could and it was difficult to prove a negative. The Respondent was on the back foot as they did not know what information Genavco kept and there was no further information available other than that produced by Mr Meur in his witness statement.

45. On the question of risks he indicated that under the terms of the lease the phraseology was 'usual and necessary'. There was he thought no meaningful distinction between the two words. Terrorism he said could include use of a flat for terrorist purposes. In support of the need for insurance to cover terrorism he referred us to the case of *Qdime Limited vs Bath Building (Swindon) Management Company Limited [2014]UKUT 02621(LC)* where the question of terrorism cover was considered by the Upper Tribunal. We noted all that was said which supported Mr Demachkie's view that the terrorism cover was a matter for discretion by the landlord and did not depart from the RICS code as to what was a reasonable exercise of discretion. The question really is was it reasonable to insure against terrorism in respect of a block of flats in Reading.

46. On the question of commission, he referred us to a further case of *Williams vs Southwark London Borough Council* a Chancery Division matter which supported the landlord's right to obtain commissions where works were undertaken which justified the fee paid. Mr Demachkie's view was that it did not seem that 20% was in dispute. It was accepted also that Urbanpoint were G & O agents and it was not challenged that G & O Rents carry out works in relation to the insurance both for the portfolio and for this specific property which does have a claims history. Mr Demachkie confirmed that there would be no claim for costs by the Respondent.

47. Mr Glass made a brief response indicating that any complaints that might have been made by the Respondent might have been via John Mortimer and that leaseholders were not in a position to question the insurance premiums. Insofar as the Qdime case was concerned, he did not think that this was a case where discretion was involved. He confirmed that there was no application for fees paid or for costs.

THE LAW

48. The relevant law is set out below.

DECISION

49. We will deal firstly with the question as to the payability of the insurance premiums charged by G & O Rents Limited from 2008 onwards. We were impressed by the time and effort put into research and the presentation of his case by Mr Glass. The leaseholders have been well represented. Unfortunately, we fear that the hard work and time spent has come to nothing save for a matter which we will refer to in due course.

50. We quoted above the extract from the Avon Estates case and the judgment of Her Honour Judge Walden-Smith. That encapsulates the difficulties that any

leaseholder has in seeking to challenge the level of insurance premium charged by the landlord and that we have in assessing the reasonableness of such premiums.

51. The first matter that we will address is the landlord's right to insure. Under the terms of the lease the insurance should have been effected by the company. There appears to have been some apathy on the part of the company to deal with this aspect. At no point until 2011 did any leaseholder or the company or indeed the managing agents raise any concerns about the insurance position. It was only in 2014 that the mater was strongly pursued and insurance put in place by the company. The matter was accepted, the premiums were paid and the parties lived in harmony. Subsequently, Mr Glass has taken a great interest in the insurance arrangements and has raised concerns that the premiums being claimed by the Respondent appear to be excessive when compared with the comparable evidence that he has adduced. We accept that whilst the Respondents technically were not entitled to effect insurance unless the company was in breach, in the absence of the company taking on the responsibility for the insurance of the property the landlord had no choice but to undertake that role. The lack of complaint by the leaseholders and the company leads us to the conclusion that although the lease provided for the company to insure, it did not appear to be taking on that responsibility and the landlord was therefore entitled to take on the insurance mantle as it did. Circumstances changed in 2014 and we will return to that matter later in the decision. Accordingly we do not propose to order any return of premiums on the basis that it was for the Applicants to insure and not the Respondents.

52. We then turn to the level of the premiums for the period 2008 onwards. As we indicated earlier, Mr Glass conceded that it would be inappropriate to deal with the earlier years (2002 to 2007 inclusive) and the evidence he was able to adduce at the first day of the Hearing was uncompelling and of little assistance to us.

53. In respect of the later period, unfortunately we find that the comparable evidence just is not available. Mr Glass indicated in his latest overview that he could find no insurance company that was prepared to provide the unfettered insurance in respect of the tenancy position. Some 65% of the properties in the two buildings are sub-let. Clearly, therefore, it is important to ensure that there is suitable insurance cover in place to enable a claim to be made irrespective of the background or identity of the tenant. There appears to be no mechanism in the lease which would allow the managing agents of the company, or the company, to police the identity of the tenants or their status and accordingly insurance must be in place that does not impose any restrictions in this regard. That seems to us to be the nail in Mr Glass's coffin. He could not produce any comparable insurance provision. The best he can say is that he might be able to persuade an insurance company to accept 50% of sub-tenants who are in receipt of benefits and a small percentage of student lets. We have no idea of the make-up of the sub-tenants and nor indeed does Mr Glass, the company or the managing agents. Unless, therefore, some cast iron arrangement can be put in place where the identity of the sub-tenants can be established on an annual basis, it seems to us that this is always going to be a difficulty insofar as insurance is concerned. In addition we also noted that one or two of the comparable insurance proposals it was unclear whether this covered interested parties such as mortgagees and leaseholders and of course the insurance must cover G & O Rents Limited not the company.

54. To an extent the problems lay in the Applicant's own hands. They have been seeking only to challenge the insurance arrangements for the last 18 months or so and have therefore effectively deprived themselves, and the Respondent, of evidence which could be adduced to go further insofar as the insurance premiums are concerned. For those reasons, therefore, we find that the insurance premiums for the years in dispute, which includes the period 2014/15, are reasonably incurred and are payable. If the insurance is to continue under the Respondent's block policy we would expect a proper declaration of the apportionment of the block costs to be provided to the Company.

55. Insofar as terrorism is concerned, we take the view that the use of the word 'usual' means that it is not unusual. In today's world unfortunately the consideration of terrorism must arise. It was not so long ago that terrorist activity in High Wycombe was in the news. We do not consider that Reading is immune from these difficulties. Terrorism takes many forms. It could include, for example, the use of a flat for terrorist purposes which results in damage being caused. With the Applicant being unable to determine the nature of any tenant this is not an impossibility. We accept and hope that the chance of terrorism matters arising is minimal. However, on the latest premium it seems to us that terrorism cover only adds a further £50 or so to each leaseholder's insurance liability and in those circumstances we would venture to suggest that any tenant would be prepared to pay that additional annual sum to ensure that they are safeguarded. In those circumstances we consider that the inclusion of terrorism cover is a reasonable discretion to exercise on the part of the landlord and is reasonable to include. Indeed the level of premium attributable to the terrorism element is not so dissimilar from the insurance premiums obtained by the Applicant on a comparable basis.

56. Insofar as the commission is concerned, we find that that is allowable. It is clear to us that work is undertaken by Mr O'Dell and Urbanpoint to deal with insurance claims and the insurance generally. The 20% was not challenged.

57. We do, however, disallow the insurance commission for the year 2014/15. We find it unacceptable that both Genavco and Mr O'Dell should take so long to meaningfully respond to enquiries raised by the Applicant's managing agents in respect of insurance. Indeed they left it so late that it would have been impossible for the Applicants to have challenged the Respondent's insurance arrangements. In any event, it seems that the Applicants, because of the lack of response by the Respondent and its representatives, have proceeded to insure themselves. Clearly it is inappropriate for there to be two insurance policies in place and we would suggest that this year the Applicant's policy is cancelled and there be a refund of premiums. The landlord's insurance policy should remain in place but we see no reason why they should receive any commission for this period and accordingly we order that the Applicants should receive a rebate/credit of their due proportion of the sum of £2,664.40 being the commission for this year which excludes the terrorism cover element and tax.

58. We should also in passing make known our views of the involvement of Genavco and Mr Meur. Mr Meur in his witness statement indicates that he is making it to support the objections raised by the Respondent to the Applicant's case. We find it somewhat surprising that a broker who is supposed to be providing independent

advice to his client should be so quick to take sides. In addition also, his unwillingness to attend the Tribunal and the delay in providing information to the Applicant when requested, causes us to cast some doubt as to his suitability to be the Applicant's insurance agent for the purposes of insuring this development. The future insurance arrangements are fraught with difficulty. It seems to us, however, that if the Applicants are going to take on the placing of the insurance which they are entitled to do, they must ensure that it has cover for any form of letting, in the absence of being able to substantiate who the sub-tenant may be. There were little differences with regard to the remainder of the insurance cover. In addition also, it seems perfectly reasonable that there should be terrorism cover. With this in mind, they can now proceed to obtain quotations for insurance for the year 2015/16 which may or may not be cheaper that those which the landlord has previously sought to recover.

59. Insofar as the variation of lease is concerned we think we can take this matter quite shortly. It seems to us that the application being made would require each lease in the building, of which there are some 28 units, to have the same terms. An application under Section 35 made by the residents association would not appear to meet these criteria. It seems to us that the only application that could be made under Section 35 would be 35(1)(b), but on the admission of Mr Glass it does seem that the insurance provisions are workable. There has been a misunderstanding as to who should handle the insurance arrangements, but there is no doubt in our mind that the insurance should be placed in the name of the Respondent G & O Rents Limited but dealt with by the residents association, the company named in the lease. They will need to use the landlord's insurance agents but there appears to be no particular concern in that regard and if they wished to make use of other agents provided the landlord was content with those replacement agents, then the matter can proceed. It is certainly inappropriate for the company to be insuring the premises in its own name. It would not seem to us to have an insurable interest. Furthermore, the application must fail because as we have indicated above, to be effect it would be necessary to amend all leases and there is no application by the Respondents to do so. No application is made under Section 37 for the variation of all leases and certainly no evidence has been shown to us that the requisite number of people as required under Section 27(5)(b) has been obtained. In addition, it is arguable that the provisions of Section 38(7) would inhibit our ability to make the variations sought in any event. In those circumstances we must dismiss the application in respect of the variation of the lease.

Judge: *Andrew Dutton*

Andrew Dutton

Date: 30th December 2014

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.

PART IV
VARIATION OF LEASES
Applications relating to flats

S35 Application by party to lease for variation of lease.

(1) Any party to a long lease of a flat may make an application to a leasehold valuation tribunal for an order varying the lease in such manner as is specified in the application.

(2) The grounds on which any such application may be made are that the lease fails to make satisfactory provision with respect to one or more of the following matters, namely—

(b) the insurance of the building containing the flat or of any such land or building as is mentioned in paragraph (a)(iii);

S38 Orders varying leases.

(7) A tribunal shall not, on an application relating to the provision to be made by a lease with respect to insurance, make an order under this section effecting any variation of the lease—

(a) which terminates any existing right of the landlord under its terms to nominate an insurer for insurance purposes; or
(b) which requires the landlord to nominate a number of insurers from which the tenant would be entitled to select an insurer for those purposes; or
(c) which, in a case where the lease requires the tenant to effect insurance with a specified insurer, requires the tenant to effect insurance otherwise than with another specified insurer.

(e) the recovery by one party to the lease from another party to it of expenditure incurred or to be incurred by him, or on his behalf, for the benefit of that other party or of a number of persons who include that other party;

(f) the computation of a service charge payable under the lease;

(g) such other matters as may be prescribed by regulations made by the Secretary of State.

(3) For the purposes of subsection (2)(c) and (d) the factors for determining, in relation to the occupiers of a flat, what is a reasonable standard of accommodation may include—

(a) factors relating to the safety and security of the flat and its occupiers and of any common parts of the building containing the flat; and

(b) other factors relating to the condition of any such common parts.

(3A) For the purposes of subsection (2)(e) the factors for determining, in relation to a service charge payable under a lease, whether the lease makes satisfactory provision include whether it makes provision for an amount to be payable (by way of interest or otherwise) in respect of a failure to pay the service charge by the due date.

(4) For the purposes of subsection (2)(f) a lease fails to make satisfactory provision with respect to the computation of a service charge payable under it if—

(a) it provides for any such charge to be a proportion of expenditure incurred, or to be incurred, by or on behalf of the landlord or a superior landlord; and

(b) other tenants of the landlord are also liable under their leases to pay by way of service charges proportions of any such expenditure; and

(c) the aggregate of the amounts that would, in any particular case, be payable by reference to the proportions referred to in paragraphs (a) and (b) would either exceed or be less than the whole of any such expenditure.

(5) [Procedure regulations under Schedule 12 to the Commonhold and Leasehold Reform Act 2002] [FN2] shall make provision—

(a) for requiring notice of any application under this Part to be served by the person making the application, and by any respondent to the application, on any person who the applicant, or (as the case may be) the respondent, knows or has reason to believe is likely to be affected by any variation specified in the application, and

(b) for enabling persons served with any such notice to be joined as parties to the proceedings.

(6) For the purposes of this Part a long lease shall not be regarded as a long lease of a flat if—

(a) the demised premises consist of or include three or more flats contained in the same building; or

(b) the lease constitutes a tenancy to which Part II of the Landlord and Tenant Act 1954 applies.

(8) In this section "service charge" has the meaning given by section 18(1) of the 1985 Act.[...] [FN3]

[FN1] modified by Commonhold and Leasehold Reform Act (2002 c.15), Pt 2 c 5 s