12782

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/BE/LSC/2017/0400**
Property	:	**Flats 2, 4, 7 and 16 High Trees Mansions, 28 Crescent Wood Road, SE26 6RU**
Applicant	:	**George Shiakallis**
Representative	:	**None**
Respondent	:	**1. Tapestart Limited** **2. High Trees Mansions RTM Company Limited**
Representative	:	**Mr McCarry, Compton Group**
Type of application	:	**For the determination of the reasonableness of and the liability to pay a service charge**
Tribunal members	:	**Ruth Wayte (Tribunal Judge)** **Duncan Jagger MRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of decision	:	**1 May 2018**

DECISION

Decisions of the tribunal

(1) The First Respondent is barred from taking further part in these proceedings pursuant to Rule 9 (3)(a) and (b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the Rules").

(2) The tribunal determines that the sum of £644.76 is payable by the Applicant to the First Respondent in respect of the insurance contribution for his flats for the service charge year 2017, ending on 22 January 2018 when the Second Respondent acquired the right to manage.

(3) The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the First Respondent's costs of the tribunal proceedings may be passed to the lessees through any service charge.

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 the insurance premium payable by the Applicant to the First Respondent in respect of the period from 1 July 2017 to 22 January 2018 when the Second Respondent took over the management of the block. The basis of the application was that the Applicant had obtained alternative quotes which indicated that the premium charged by the First Respondent under its block policy was 40% higher than the market value. The Applicant considered that this was due to the commission received by Compton Insurance Services (CIS) Ltd, an associated company of the First Respondent.

2. Initial directions were given on 25 October 2017. Paragraph 7(g) required the First Respondent to disclose to the Applicant "*any remuneration, commission and other sources of income and related income or other benefits in connection with placing or managing insurance received by the Respondent/associated Respondent, its broker or other agents re insurance.*"

3. The Applicant had already indicated that he would be content for the matter to be dealt with as a paper hearing and in the absence of any request for an oral hearing from the First Respondent, the case was considered by the tribunal on the papers on 20 December 2017. On that day the tribunal considered it required further information to determine the case and letters were written to both parties.

4. In particular, the First Respondent had prepared a Statement of Case in accordance with the directions. At paragraph 6 it stated: "*The RICS Code of Practice requires commissions or financial gains to be disclosed to the lessees only where a managing agent arranges the insurance. In this case the Landlord has passed the insurance obligations to CIS (which is not a managing agent) and does not wish to make any disclosure.*"

5. The tribunal wrote to the First Respondent in the following terms, reiterating paragraph 7 of the directions: "*For the avoidance of doubt, this information is required in respect of any commission whatsoever, whether it is paid to CIS or any other person. You are required to produce this information by Thursday 11 January 2018. Please note that any failure to comply with this direction may lead to you being barred from taking any further part in these proceedings and a determination of issues against you pursuant to Rules 9(7) and (8) of the 2013 Rules.*"

6. Mr James McCarry, solicitor, of the Compton Group replied on 2 January 2018 stating: "*My client, the First Respondent declines the Tribunal's invitation to disclose any remuneration or commission referred to in the letter.*"

7. That letter was referred to the Tribunal Judge who gave further directions on 23 January 2018. By that date the First Respondent had requested a hearing as it wished to take issue with the Applicant's evidence. Noting the breach of directions by the First Respondent on two occasions, the tribunal confirmed that in addition to the application the tribunal would consider whether the First Respondent should be debarred from defending the application and a determination made against it under Rule 9. The tribunal would also consider whether an order for costs in respect of that hearing should be made against the First Respondent in accordance with Rule 13 (unreasonable conduct).

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

The hearing

9. The Applicant was represented by Mr Edwards and the Respondent was represented by Mr John McNae, both barristers. The Applicant was also in attendance and Mr McCarry attended on behalf of the First Respondent.

The preliminary issue: Rule 9

10. On 13 February 2018 Mr McCarry wrote to the tribunal in the following terms:

> *"I wish to inform the Tribunal of my instruction from my client, Tapestart Limited, the First Respondent and with reference to the direction which required disclosure of any commission or remuneration received.*
>
> *The explanation is that my client instructs me that no commission or remuneration was received in respect of the insurance policy for High Trees Mansions which will be the subject of a submission by my client in relation to the two directions in which the matter is to be dealt with as a preliminary issue in the Case Management Conference in 11 April 2018.*
>
> *I also have to correct my use of the word "invitation" as written in my letter which was an error on my part. I intended to write "direction" and apologise for any oversight in not correcting it before signing and sending the letter."*

11. On 26 February 2018 Mr McCarry made a supplemental statement on the disclosure issues. That statement, which included a Statement of Truth, stated that the First Respondent could not comply with the direction because it had no received any commission. It stated that CIS was an independent corporate body and was neither an associated company nor agent of the First Respondent. It claimed that "*CIS would like to disclose any commission but for commercial reasons a decision has been made that such disclosure in the public domain (as this case will be recorded) will be detrimental and adverse to the commercial and business interests of the First Respondent and CIS.*"

12. The statement claimed that the direction to disclose the commission was unfair and unjust and that it was beyond the power of the tribunal to make such a direction. At the hearing Mr McNae submitted that he didn't represent CIS who had refused to provide details of any commission and it would be unfair to debar the First Respondent for something which was beyond their control. He stated that in the absence of a request made directly to CIS, the tribunal was unable to punish the First Respondent for failing to provide disclosure of the commission, relying on Rule 20 of the 2013 Rules, which refers to the summoning of witnesses and orders to answer questions or produce documents. He also relied on the case of *Summers v Fairclough Homes* Ltd [2012] UKSC 26 as authority that the power to strike out a claim should only be exercised where it is just and proportionate to do so, which is likely to be only in very exceptional circumstances.

13. The Applicant had provided copies of the accounts for CIS from 2016. Mr Edwards took the tribunal to the notes to the financial statements which referred to the First Respondent as an associated company under common control. During that year the accounts stated that CIS had made to or received payments from the First Respondent of over £1m. The ultimate controlling party was the W Ballard Discretionary (no 2) Trust. Mr McCarry had written to the tribunal in the guise of "Compton Group" and conceded that both entities were based at the same address and shared the same director, Mr Ballard. He maintained that the companies had separate members.

The tribunal's decision

14. The directions were made under Rule 6 which sets out the case management powers of the tribunal in broad terms, including at paragraph 6(3)(d) the power to permit or require a party or another person to provide or produce documents, information or submissions. The directions dated 25 October 2017 contained a clear warning that if the respondent failed to comply with the directions the tribunal may bar them from taking any further part in all or part of these proceedings and may determine all issues against it pursuant to rules 9(7) and (8) of the 2013 Rules.

15. That warning was repeated by the tribunal in its letter dated 20 December 2017. The various reasons given by the First Respondent for non-compliance are disingenuous at best. It is simply not credible that the First Respondent is unable to persuade CIS to provide details of its commission. Quite apart from the fact that they share the same director and are part of the same group of companies, CIS is acting as the agent of Tapestart in placing the insurance. The real reason for the breach is that it has been decided by someone, presumably Mr Ballard, that to disclose the commission would be against the company's commercial interests. Therefore non-compliance is a deliberate decision.

16. This case is based on some 40% difference in the price of insurance and a suspicion on the part of the Applicant that the commission may be the reason for the higher cost. The amount of any commission is clearly a relevant consideration and the tribunal acted within its powers in requesting information in respect of that commission. Rule 20 is of no relevance. The tribunal considered whether it was sufficient simply to draw an adverse interest from the failure to disclose the commission. Having considered the full circumstances of the breach as set out above, the tribunal decided it was not. The First Respondent has failed to co-operate with the tribunal on repeated occasions, with ample warnings of the consequences. The breach was entirely deliberate and based on the First Respondent's commercial interests, ignoring its duty to co-operate with the tribunal. In the circumstances, the tribunal considers

that it is in accordance with the overriding objective that the First Respondent is barred from taking any further part in the proceedings.

The insurance premium

17. As stated above, the management has now been taken over by the Second Respondent. They do not have any interest in the case but have insured the Property with Aviva, using the quote which the Applicant relies on to prove his case. The premium for a full year is £8,472.43 compared to £13, 365.03 sought by the First Applicant under its block policy with LV (Liverpool Victoria), a difference of 36.61%. Mr Edwards took the tribunal through both policy schedules to establish that the policies were indeed like for like. In fact, he submitted that on balance Aviva had the better policy – pointing out the smaller excesses for claims in relation to water and other damage compared to LV.

18. On 20 December 2017 the tribunal had also written to the Applicant with queries as to whether cover would include tenancies as well as residence under long leases, confirmation that the insurer was aware of the substantial works carried out in 2014 and clarity as to the directors of the Second Respondent – all issues raised by the First Respondent. Mr Edwards pointed to correspondence between the Applicant and Aviva which dealt with these issues. He relied on the Upper Tribunal case of *Cos Services Ltd v Nicholson* [2017] UKUT 382 as authority that when considering whether a cost has been reasonably incurred the tribunal is required to go beyond the issue of rationality of decision making and consider whether the sum being charged is, in all the circumstances, a reasonable charge. That decision also considered a block policy, His Honour Judge Stuart Bridge stating at paragraph 49 that "*It is however necessary for the landlord to satisfy the tribunal that invocation of a block policy has not resulted in a substantially higher premium that has been passed on to the tenants of a particular building without any significant compensating advantages to them.*"

19. Mr Edwards submitted that a difference of almost 40% was so substantial as to require an explanation, with the most likely cause the commercial arrangements between the First Respondent and their associate CIS. The Aviva policy was better than the block policy and the other quotes provided by the Applicant were for an even lower amount, providing further evidence that the LV premium was excessive.

The tribunal's decision

20. The tribunal was satisfied that the Aviva policy was like for like and in some respects a better policy from the leaseholders' perspective, given the lower excess in respect of the most frequent type of claim. Given that the First Respondent had been prevented from taking any further part in the proceedings, the tribunal was entitled to decide the issue against them in accordance with Rule 9(8). In any event, the tribunal

agreed with the Applicant that the most likely explanation for the 36.61% difference between the two was some form of commission for CIS. Whereas some commission may have been reasonable, such a significant difference was not and therefore the cost was not reasonably incurred.

21. In the circumstances the tribunal determined that the service charge for insurance should be the same as the Aviva quote. Applying the percentage reduction to each flat gave the following amounts: £214.13 for flat 2, £166.54 for Flat 4, £140.37 for Flat 7 and £123.72 for Flat 16, making a total of £644.76.

Costs

22. At the start of the hearing the Applicant had produced a schedule of costs for consideration by the tribunal in respect of the Rule 13 hearing. Following the ruling on Rule 9 the parties reached an agreement as to costs and therefore the tribunal was not asked to make a determination on the issue.

23. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. Taking into account the determinations above, the tribunal determines that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act, so that the First Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: Ruth Wayte **Date:** 1 May 2018

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28 day time limit, such application must include a request for an extension of time and the reason for not complying with the 28 day time limit; the tribunal will then look at such

reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).

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 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.