FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**LON/00AX/LSC/2019/0019**
Property	**:**	**Flat B, 43, St James Road, Surbiton, Surrey KT6 4QN**
Applicant	**:**	**Mr Philip M Bazin (1)** **Mrs Georgia Bazin (2)**
Representative	**:**	**Mr P M Bazin**
Respondent	**:**	**Ian Humberstone Limited**
Representative	**:**	**Chestnut Tree Property Management Limited**
Type of Application	**:**	**S27A Landlord and Tenant Act 1985 – determination of service charges payable**
Tribunal Members	**:**	**Judge John Hewitt** **Mr Christopher Gowman BSc MCIEH** **Mr John Francis QPM**
Date of Decision	**:**	**7 March 2019**

DECISION

The issues before the tribunal and its decisions

1. The issues before the tribunal were:
   1.1 The reasonableness of the time for a demand for payment of £322 on account of the cost of insurance;
   1.2 The reimbursement of the application fee of £100; and
   1.3 The application for an order pursuant to s20C Landlord and Tenant Act 1985 (the Act) in relation to any costs which the respondent (the landlord) has incurred or might incur in connection with these proceedings.

2. The decisions of the tribunal are:
   2.1 It was unreasonable (and inappropriate) of the landlord to have served a demand for a contribution of £322 to the cost of buildings insurance in December 2018 when the landlord was not going to incur the expense of such insurance until some 9 or more months or after the date of the demand;
   2.2 The landlord shall reimburse the applicants (the tenant) with the sum of £100 by way of reimbursement of the application fee (such reimbursement may be affected by the application of a credit for £100 to the cash account as between the landlord and the tenant; and
   2.3 An order shall be made (and is hereby made) pursuant to s20C of the Act that none of the costs incurred or to be incurred by the landlord in respect of these proceedings shall be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant

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

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

Background

The parties

4. Dr Ian Philip Humberstone is the secretary of and a director of the landlord. His fellow director is Pauline Denise Humberstone. Those persons are also the officers of Chestnut Tree Property Management Limited, the landlord's managing agent. The registered office of both companies is at Chestnut Cottage, 1 Great Warley Street, Great Warley, Brentwood, Essex.

   The landlord appears to be a substantial property investor and claims to have 46 properties in a portfolio insured under a block policy

5. The tenant is also a substantial property investor and they conduct their business from Lee House, Northcote Lane, Shamley Green, Surrey. The subject Property, a flat is sublet by them.

The development – 43 St James Road

6. The development at 43 St James Road is registered at HM Land Registry with title number SGL251874. On 20 August 2012 the landlord was registered as proprietor. The Charges Register: Schedule of Leases records that three long leases have been granted out of the freehold:

43D (FFF)	Date: 5 October 1984	Term:100 years from 24.06.1984
43B (LGFF)	Date: 21 April 2004	Term: 170 years from 24.06.1984
43C (GFF)	Date: 17 June 2005	Term: 99 years from 17.06.2005

The lease of the Property and the service charge regime

7. Evidently, there are 5 flats within the development. The tenant says in its application form that there are 2 schedules to the service charge account:

   Schedule 4: Flats A and B which are both basement flats and which do not contribute to costs associated with a communal hallway; and

   Schedule 5: Flats C, D and E only.

8. The lease of the Property, which was granted in April 2004 [188], was granted pursuant to s56 Leasehold Reform, Housing and Urban renewal Act 1993. It recites the original lease was granted on 17 January 1985 for a term of 100 years from 24 June 1984, and that that lease was varied by a deed of variation dated 8 April 1988. Those dates appear to be incorrect.

   At [191] there is page 1 and at [192] page 12 of a document which states it is a lease. It is dated 17 January 1985.

   Starting at [193] there are very poorly copied pages of an undated lease which may have been granted in 1984. The pages provided are:
   Page 1 [193] – bears a certificate dated 16/1/85 that it is a true copy of the original!
   - the date is blank but the year 1984 has been typed in in words
   Page 2 [194] – grants a term of 100 years from 24 June 1984
   Page 4 [195] – commencement of clause 4 – tenant covenants
   Page 6 [196] – continuation of landlord covenants
   Page 8 [197] – not relevant
   Page 9 [198] – not relevant
   Leaseplan [199]
   Backsheet [200] undated

9. Evidently, both parties are of the view that the service charge provisions payable under the current 2004 lease are those set out in clause 4(ii) (a) and (b) of the 1984 lease.

   Clause 4, which starts on page 4 of the lease [195] sets out covenants on the part of tenant. At the foot of the page there is:

4(ii) (a) *Contribute and pay on demand 14% of the costs expenses and outgoings and matters mentioned in the Fourth Schedule*

We were not provided with a copy of page 5 of the lease. In the detailed further particulars attached to the application form the tenant says that clause 4(ii)(b) is in these terms:

"Pay on demand to the Lessor such reasonable sum as the Landlord shall request on account of expenditure to be incurred by the lessor on such matters"

We have not been provided with a copy of the Fourth Schedule. The tenant says it *"… refers to the usual insurance, repairs, roof etc."*

These extracts have not been challenged by the landlord and as the only complaint made by the tenant is the timing of the demand for the contribution to the cost of insurance, we proceed on the basis that they are broadly accurate.

However, we do wish to flag up to the parties, both of whom are substantial property investors that it would have been helpful to us if not only had we been provided with a full copy of the lease of the subject Property but also with an explanation of the service charge provisions of the other two long leases which have been granted and the arrangements for the contributions in relation to the two flats which do not appear to be the subject of long leases.

The issue raised in the application form

10. For a number of years the landlord has managed the development as if there were what might be termed a modern service charge regime of a set service charge accounting period with a budget, full payment on account at the commencement of the period and then at the end of the period, when actual expenditure is ascertained, a balancing debit or credit as the case may be. Until now the tenant has not objected to this approach.

The adopted service charge period (which may have been inherited from the previous freeholder) was 1 October to 30 September.

The previous freeholder effected buildings insurance on an annual basis 20 July to 19 July and so one year's premium was collected in each accounting period.

The tenant complains that the landlord changed the insurance period. Insurance was effected from 20 July to 29 September 2013 and since then the insurance period has been 30 September to 29 September. A consequence of that was that in the final accounts for service charge period 1 October 2016 to 30 September 2017 [055] the cost of insurance was claimed for two annual periods – a total of £3,833.43.

11. A further consequence of the change is that the landlord prepares a budget for each period commencing 1 October. Insurance is included in full even though the premium may not be paid by the landlord until the following 30 September – or even perhaps later because the insurers or the brokers appear to allow the landlord several days, if not weeks of grace.

    The annual budget shows the tenant's contribution to the various costs included within it and the landlord demands 100% payment of the contribution on account and appears to expect payment in full by the following 6 November at the latest. The tenant complains that the landlord thus demands funds on account to be paid, even though the insurance premium will not be incurred or expended by the landlord for some 11 or 12 months or so.

12. The budget for 2018/19 [061] includes £2,300 for buildings insurance. The tenant's contribution to that at 14% amounts to £322. The landlord asserts that there are arrears of service charges of £709.16 – which includes the controversial £322 towards insurance. The landlord demanded payment of £709.16 on 15 December 2018. Evidently the delay arose due to a re-issue of the budget/demand following the reallocation of an exterior light repair.

    The landlord threatened to commence legal proceedings against the tenant to recover the alleged arrears of £709.16. The tenant has made an application to this tribunal in which a determination is sought that the contribution of £322 towards insurance is not (yet) payable to the landlord.

13. Thus, the sole issue as regards insurance is whether the contribution of £322 is yet payable to the landlord.

The directions and the issues

14. Following receipt of the application form directions were issued on 16 January 2019 [001]. No oral case management conference was convened probably because the sole issue was the timing of the payment of the contribution of £322 on account.

15. The directions notified the parties that the tribunal proposed to determine the application on the papers and without an oral hearing, unless either of the parties expressly requested an oral hearing. The tribunal indicated that the paper determination would take place during week commencing 4 March and that if an oral hearing was requested it would take place on 6 March 2019. The tribunal has not received any request for an oral hearing.

16. In summary the directions required:

    16.1 The application form and the detailed Further Particulars attached to it to stand as the tenant's opening statement of case (This is at [005- 021);

16.2 The landlord to file its statement of case in answer by 1 February 2019
(This is at [022 – 073];

16.3 The tenant to file and serve their statement of case in reply by 18 February 2019
(This is at [074- 187].

17. As made clear above the only issue for determination raised in the application form was the timing of the advance or on account payment of £322 being the estimated contribution to the anticipated cost of insurance.

Unfortunately, perhaps due to a misunderstanding or misuse of standard directions on some types of insurance disputes, the directions included fairly standard directions applicable to a case where a tenant disputes the reasonableness of the cost of insurance actually incurred.

18. The landlord may have appreciated this error because in its statement of case in answer the focus is on the timing of the advance payment point, and the directions concerning the reasonableness of the historic or anticipated future cost of insurance have not been addressed.

19. In their reply the tenant addresses the timing for payment point and, in paragraph 9 attaches two quotes for insurance because: *"It is noted that the Tribunal have requested (b) alternative premium quotations …"*

20. Of course, the landlord will not have seen this material before and as the directions stand has no opportunity to address the matter. This reinforces our view that the directions concerning the cost of insurance were included in error. In these circumstances we do not propose to make a determination on the cost of insurance.

21. If the tenant wishes to challenge the reasonableness of the cost of block insurance effected by the landlord, the tenant will have to make a separate and specific application to raise that. In case it may be of assistance we observe that the tenant does not appear to have the claims record for the development which is usually fairly critical when considering the cost of alternative quotes on a like for like basis. Also the quotes obtained by the tenant are not like for like in a number of important respects, including building sum insured, nature and extent of cover and the amount of excesses. Also the brokers or insurers who prepared the quotes appear to have made a number of assumptions which may be questionable or inaccurate. Examples include the employment status/occupation(s) of the occupying tenants and the claims history.

The timing of the advance payment towards the estimated cost of insurance

22. The answer to the question lies in the proper construction of the terms of the lease. The lease was originally granted in 1984 and the wording set out in it has been adopted in both 1985 and 2004. The starting point is the words actually used by the parties in the context of the factual matrix which existed in 1984 when the lease was granted.

23. The wording of clause 4(ii)(b) as relied upon by the parties is plain enough *"Pay on demand to the Lessor such reasonable sum as the Landlord shall request on account of expenditure to be incurred by the lessor on such matters"* The sum payable on account must be reasonable in amount. We find it can properly be implied that the reasonable amount is payable in respect of a sum to be incurred within a reasonable time. In the context of the cost of insurance we find that a reasonable time would not be any longer than three months before the date on which the landlord proposed to pay the premium. In respect of other expenditure the reasonable period may be more or less than three months depending on the nature and the amount of the anticipated expenditure.

24. We have given careful thought to the rival contentions of the parties.

25. The landlord has adopted (perhaps inherited) an annual service charge period, with a budget and ascertainment of a contribution and has demanded the whole of that contribution upfront, such sums to be held by the landlord for a considerable period, potentially in excess of one year. The landlord appears to support that practice because it fits well with the regimes at other developments within its portfolio, eases administration and assists or secures cash-flow. Whilst that might be advantageous to the landlord it is plainly not the scheme envisaged by the parties in 1984 when the lease was granted. If it had been the lease would have spelled it out. Such regimes were quite commonplace in 1984 and it was one of the options readily open to the parties. But it was not was not what the parties embraced or agreed upon. Instead the parties agreed a much less formal ad hoc arrangement. It was quite simple. As and when the landlord proposed to incur expenditure within a reasonable period the tenant was obliged to pay a reasonable sum on account. Once the cost was incurred the landlord would account to the tenant and any balance would be payable or repaid as the case may be.

26. We find that it was not reasonable for the landlord to have made a demand in December 2018 for a contribution of £322 towards the anticipated cost of insurance when that cost was not to be incurred until late September 2019, or possibly a little later than that.

    The total sum demanded on 15 December 2018 was £709.16. The tribunal has not been asked to make any findings as to whether, and if so when, the balance of £387.16 might be payable and we do not do so.

27. The tenant has alleged that the landlord has deliberately manipulated the timing of the payment for buildings insurance in order to obtain

funds on account to which it was not entitled. No evidence to support that conjecture was provided and we reject it.

28. We find that given the size of the landlord's portfolio it was not unreasonable that the subject development was brought into line with the block policy.

    Given that the landlord adopted (or inherited) the practice of an accounting period commencing 1 October it was a one off accounting quirk that two payments for insurance fell into the account in 2016/17.

29. As mentioned we have no information about the service charge regimes for the other two flats let on long leases or the two flats which do not appear to be the subject of long leases. It may that there is mutual advantage to adopt a more modern service charge regime with budgets and perhaps quarterly payments on account to enable all parties to undertake financial planning and regulate cash-flow. If so, the best course will be to execute a deed(s) of variation to properly and formally adopted such a regime for the development.

Reimbursement of fees and s20C of the Act

30. The application form and the attached Further Particulars included an application for an order under s20C of the Act and a request for repayment of the application fee of £100. The directions invited the landlord to include representations on both matters in its statement of case. The landlord has not done so.

31. S20C of the Act provides that a tribunal may make such order on an application as it considers just and equitable in the circumstances.

32. Rule 13(2) provides that a tribunal may make an order requiring a party to reimburse to any other party the whole or part of the amount of any fee paid to the tribunal which has not been remitted by the Lord Chancellor. The rule does not stipulate any particular criteria for the tribunal to adopt when considering whether to make an order. In the circumstances of this case we consider it is appropriate to adopt the just and equitable criteria provided for in s20C.

33. The tenant has in effect succeeded in their case in which the application was made against the threat of legal proceedings by the landlord to recover alleged arrears.

    We thus find it just and equitable to make an order under s20C of the Act and we have done so. For the same reason we find that the landlord shall reimburse the application fee of £100. But, as there is or may be an issue of arrears and given that on any view further sums will become due by the tenant to the landlord in the not too distant future, the just and equitable manner in which to effect that reimbursement is by way of a credit to the cash account between the parties.

Judge John Hewitt

7 March 2019

ANNEX - RIGHTS OF APPEAL

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

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

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

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