FIRST - TIER TRIBUNAL

PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**BIR/47UG/LSC/2022/0005**
Property	**:**	**1, 2, 3, 4 and 6 Hillgrove Court, Mill Street, Kidderminster, DY11 6XD.**
Applicant	**:**	**(1) Maygate Developments Ltd** **(2) Walter Richard Barry Onslow**
Respondent	**:**	**R & D Aggregates Ltd t/a R & D Properties**
Type of Application	**:**	**Landlord & Tenant Act 1985 – Section 27A(1)** **Commonhold and Leasehold Reform Act 2002 – Paragraph 5A of Schedule 11** **Landlord & Tenant Act 1985 – Section 20C**
Tribunal Members	**:**	**Judge C Kelly** **Mr D Satchwell**
Date of Decision	**:**	**5 January 2023**

DECISION

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1. This is an application made by Application Notice dated 9 May 2022 by Dr Ronald James Onslow ("Dr Onslow"). Dr Onslow is a Director of Maygate Developments Ltd ("Maygate Developments"). The Respondent is R&D Aggregates Ltd ("the Respondent"). The Respondent is the freehold owner of properties at Hillgrove Court, Kidderminster, DY11 6XB whereas the Applicant was said to be the leasehold owner.

2. During the hearing, it became apparent that the Applicant, as set out on the Application Notice, was the wrong party. Mr Onslow, who appeared for the Applicant, advised the position (which was accepted by Mr Mole, of the Respondent) that:

   (a) Mr Barry Onslow ("Mr Onslow") is the owner of Apartment 2, at Hillgrove Court, and not R & D Aggregates Ltd as per the Application Notice (it was explained to the tribunal that a power of attorney has been granted to Ms Lesley Onslow, who appeared at the hearing on behalf of Mr Onslow);

   (b) Apartments 1, 3, 4 and 6 Hillgrove Court, are owned by Maygate Developments Ltd ("Maygate Developments") rather than R & D Aggregates Ltd.

3. Mr Mole confirmed that he agreed the position set out by Mr and Ms Onslow and that he consented to a direction being made by the Tribunal, pursuant to Regulation 10 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the Rules"). Accordingly, the Tribunal is content to provide an appropriate direction in order to regularise the position of the parties in the application.

4. There are, therefore, two applicants in these proceedings: (1) Maygate Developments Ltd and (2) Walter Richard Barry Onslow, in place of Dr Ronald James Onslow. The Applicants shall be referred to jointly as "the Applicants".

The Background

5. The background to the position is straightforward.

6. The property is a mixed-use development, comprising three commercial, and six residential properties, situated at Hillgrove Court, Mill Street, Kidderminster, DY11 6XB. The Applicants together owned five of the six residential properties. The form of lease produced to the Tribunal, and which is materially the same for all properties we understand, is that dated 2 November 2009 between (1) Clive Nicholas Fletcher and (2) Walter Richard Barry Onslow ("the Lease"). For the sake of convenience, the Tribunal simply refers to "the Lease" as being that form of lease in situ between each of the respective properties. Although the Tribunal did not inspect, having not been provided with, any of the other leases concerning the other residential properties, it is understood that they are materially in the same form.

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7. The key issue in these proceedings, relates to the sum chargeable by the Respondent to the Applicants in respect of their contribution towards the insurance premium for their premises.

8. The Respondent owns a number of properties, including industrial/commercial premises elsewhere, are unrelated sites, which feature within a schedule of various premises taken out under a block policy arrangement by its insurance brokers. On 8 September 2021, there was a fire at the unrelated site, causing a claim to be made by the Respondent, in which it is said that losses, as yet unquantified, are likely to exceed c. £2 million. Mr Mole explained that he had only been able to obtain, as a consequence of that claim, insurance through Lloyd's of London, which resulted in a policy premium of £16,123.98 (to include commission fee and insurers fees, and insurance premium tax).

9. The Respondent explained that it sought to pass on the cost of £249.54, calculated as follows:

   (i) The sum rated in respect of the properties at Hillgrove Court was £2217.60 (to include residential and commercial premises);

   (ii) That sum was divided by the overall policy premium amount, of £11,941.05 (without IPT/commissions etc. added on);

   (iii) The sum of £16,123.98 (being the overall sum paid for insurance, taking out of commission etc.) was multiplied by the result of (1) £2,217.60 being divided by (2) the sum of £11,941.05, and multiplied by the figure in the Lease of 0.083333; and

   (iv) This provides an annual contribution of £249.54.

10. No specific issue was taken by reference to the process of calculation, and identifying the annual figure of £249.54 by the Applicants, although the principal objection was two-fold:

   (a) The sum of £249.54 was too high a contribution, that being unreasonable, and that an alternative policy should have been identified by the Respondent;

   (b) The Applicants have been able to secure insurance in relation to their particular flats, such that it was not necessary, nor reasonable, for the Respondent to secure an insurance policy at the sum he did.

11. In addition to the above, applications were made pursuant to section 20C of the Landlord and Tenant Act 1985 (to limit costs recoverable via the service charge), and an application made pursuant to Schedule 11(5)(a) of the Commonhold and Leasehold Reform Act 2002 (in respect of limiting litigation costs).

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12. Those two applications can swiftly be dealt with, because Mr Mole confirmed, at the conclusion of the hearing, that he had no costs whatsoever to pass on in relation to this matter and had no intention of doing so. Accordingly, Mr Mole was prepared to accept that an order in those terms has no practical effect and that he would consent to them and, given that, such orders will be made in the terms sought by the Applicants.

The Law

13. This is an application made pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"). The relevant part of that section is as follows:

> *(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.*

14. By Section 18 of the 1985 Act, service charge is defined in the following way:

> *(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.*

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15. There is no doubt, therefore, that in so far as the insurance sums seek to be recovered by the landlord, pursuant to any provision of the Lease, they fall within the statutory definition of "*service charge*". Accordingly, the Tribunal's jurisdiction under Section 27A of the 1985 Act is invoked.

16. The relevant provisions of the Lease can be briefly summarised as follows:

"1.1.9 'The Landlord's Expenses'

'The Landlord's Expenses' means the costs and expenditure – including all charges, commissions, premiums, fees and interest – paid or incurred, or deemed in accordance with the provisions of Schedule 7 paragraph 7-2.3 to be paid or incurred, by the Landlord in respect of or incidental to all or any of the Services or otherwise required to be taken into account for the purposes of calculating the service charge, except where such cost and expenditure is recovered from any insurance policy effected by the Landlord pursuant to Schedule 8 paragraph 8-2

...

1.1.7 'The Service Charge Percentage'
'The Service Charge Percentage' means 8.3333 %.

....

2 Demise
The Landlord demises the Flat to the Lessee with full title guarantee, together with the rights specified in Schedule 2, but accepting and reserving to the Landlord the rights specified in Schedule 3...and paying to the Landlord without deduction or set-off:

...

2.2 By way of further rent the Service Charge payable in accordance with Schedule 7 and insurance premiums and expenses in accordance with Schedule 8.

...

Schedule 8: Insurance

8-2 Covenant to Insure
The Landlord covenants with the Lessee to ensure the Building capital, the interest of the Lessee and of his chargee or mortgagee being noted on the policy (where possible) unless the insurance is vitiated by any act of the Lessee or anyone at the Building expressly or by implication with his authority.

...

8-3.3 Risks Insured
Insurance must be effected against damage or destruction by any of the Insured Risks to the extent that such insurance may ordinarily be arranged with a substantial and reputable insurer for properties such as the Building, subject to such excesses, exclusions or limitations as the insurer requires.

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8-5.5 Tenant's Insurance Covenants
The Tenant covenants with the Landlord:
to pay us rent to the Landlord within 14 days of a demand and (if so demanded) in advance of the dates of renewal sums equal to:

- *The Service Charge Percentage of the premium paid or to be paid by the Landlord for insuring the Building and the adjourning or nearby carparking areas and access thereto from the highway in accordance with this lease including any premiums required as a result of the Tenant's use of the Flat or anything brought into the Building or Flat by the Tenant or any alteration carried out to the Flat by the Tenant.."*

The Parties' arguments and the Tribunal's conclusions

17. The Applicants' positions were set out by Dr Onslow. Although Dr Onslow represented Maygate Developments, Ms Onslow confirmed she wished to simply adopt the arguments he raised.

Can insurance be taken out without the consent of the Lessee?

18. The first argument raised was that the effect of clause 8-2 of Schedule 8 of the Lease. Insofar as relevant, it states:

"The Landlord covenants with the Lessee to insure the Building the interest of the Lessee and of his charge or mortgagee being noted on the policy (where possible) unless the insurance is vitiated by any act of the Lessee or by anyone at the Building expressly or by implication with his authority"

19. The clause, said the Applicants, when properly construed, means that if the Applicants objected to insurance being put in place, there was a "*vitiation of consent*", such that no insurance could then be obtained and the premium recovered via the service charge.

20. The Respondent said that it was entitled to insure the Building, to include the properties demised to the Applicants, and to seek to recover the charge for that pursuant to the service charge provisions.

21. The Tribunal has no hesitation in accepting that the Respondent's position is correct.

22. The proper construction of clause 8-2, of Schedule 8 of the Lease, is to permit the Respondent to take out insurance in relation to the Building, which is defined as "*all that Building known as Hillgrove Court*", and which is not in any way restricted to certain parts of the premises. The clause requires the interests of the Lessee and any chargee/mortgagee, to be properly noted on

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the insurance policy where this is possible. The purpose of the refence to vitiation of the insurance is to absolve the Respondent of any obligation to insure where the insurance policy is rendered void by any act of the Lessee. It does not permit the Applicants to deny the right to the Respondent to take out a policy, nor does it prevent recovery of the premium paid via service charge.

Is the cost of the insurance premium recoverable?

23. It was accepted by the parties that the Lease permits recovery of insurance costs by polices properly taken out. This is permitted by paragraph 8-5.5, of Schedule 8 of the Lease.

24. The sole question therefore is whether the charge incurred is a reasonable one in the circumstances.

25. The Tribunal determines the question of reasonableness by reference to the material before it, using its expert knowledge to test that evidence.

26. The starting point is to recognise that the insurance sum incurred is an increase of £179.66 on previous years, it being accepted by both parties, that there would be an increase to the premium of the policy by reason of the significant claim sustained at an unrelated site. This is the nature of policies taken out on a block basis which in this case spanned several other sites.

27. Mr Mole gave evidence, on behalf of the Respondent that there had been attempts to obtain insurance policies for the Building from a number of other insurers. Mr Mole relied upon a letter of 31 May 2022 prepared by his broker, Lloyd Bolam. That letter indicated which markets were approached for alternative insurance, and this makes reference to no less than 20 insurers and a number of other brokers. Mr Mole said that no other providers approached were willing to provide insurance from the UK marketplace, although he accepted that there was potential for insurance to be offered by foreign insurance providers. However, Mr Mole explained his reluctance to permit insurance from non-domestic providers on advice from his insurance broker, given his concerns that such foreign providers might turn out to be unreliable not having the protections afforded by insurers in the UK marketplace.

28. The Applicants were keen to note that there was little by way of contemporaneous documentation, and documentation at all, explaining that no other UK (or non-UK) providers were willing to provide insurance. Mr Mole explained that in some instances he found it difficult to even obtain an acknowledgement that a request for cover had even been made.

29. Whilst the Tribunal recognises that there is a lack of documentation evidencing the absence of willingness to quote, the Tribunal accepts Mr Mole's evidence in relation to this in light of the supporting correspondence from Lloyd Bolam of 31 May 2022. Further, this is not a case in which Mr

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Mole is likely to have misremembered the position, the approach to markets was less than a year ago and would have been of significance to Mr Mole.

30. Accordingly, the Tribunal accepts that the only reasonable policy available for the entire property portfolio was from Lloyd's of London, which required a specialist policy resulted in an overall cost for the portfolio of properties as invoiced at £16,123.98.

31. The Applicants sought to rely upon their own insurance policies, obtained in relation to their specific flats, which were as follows:

    (a) In relation to Flat 2, and by Mr Barry Onslow, in the sum of £134.14 (including IPT);

    (b) Insurance in relation to Flats 1, 3, 4 and 6 owned by Maygate Developments, in the sum of £275.

32. The insurance relied upon was for the periods 28 February 2022 to 19 February 2023, in respect of Flat 2, and for the period 22 February 2022 to 19 February 2023 in relation to the other flats.

33. However, the difficulty with the Applicants' comparative evidence, is they relate specifically to the Applicants' demised premises. They make no account for the rest of the freehold premises at Hillgrove Court. They do not relate to the entire building, which is the insurance taken out by the Respondent (together with its other properties).

34. Furthermore, insofar as all bar Flat 2 were concerned, the insurance was taken out by Maygate Developments, which itself had no prior claims history, quite unlike the Respondent.

35. To the extent that the quotes therefore referenced are of assistance to the Tribunal, such assistance is very limited, but what they do arguably show is that:

    (a) There is likely to be an increase in the insurance premium by reason of the claim history, and
    (b) That a sum of £70 per annum per apartment appears to be achievable for the specific demise of each property owned by the Applicants.

36. The prior year's charges in respect of insurance have been c. £70. No issue was taken by the Applicants in respect of that, which they considered to be reasonable. However, the point remains, that the £70 notional value per apartment, reflected by the invoice to Maygate Developments for its insurance for the year ending February 2023, relates only to the specific demised premises.

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37. The Applicants accepted that, in reality, there is an interest which the Respondent has, quite beyond that insured by the Applicants in relation to their specific flats. At the end of any lease term, the premises would revert back to the freeholder, and furthermore, there are common parts that service the properties, which must be insured, together with the balance of the freehold building.

Decision

38. All things considered, the Tribunal is of the view that in the lack of available cover in the market to the Respondent, following the substantial claim the previous year, the efforts undertaken to obtain appropriate insurance, and the inability to compare like for like by the insurance invoices provided by the Applicants, that the sum sought by the Respondent is in the circumstances reasonable.

39. Pursuant to section 27A of the Landlord and Tenant Act 1985 the Tribunal determines that the sum of £ 249.54 (or £249.66 – there being some difference on the calculations provided) per apartment is reasonable and payable by the Applicants in relation to Apartments 1, 2, 3, 4, and 6 in respect of insurance premium for the service charge year 2022.

40. Pursuant to section 20C of the 1985 Act the Tribunal Orders that none of the costs incurred, or to be incurred, by the Respondent in connection with these proceedings are to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicants.

41. Pursuant to Paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 the Tribunal extinguishes the Applicants' liability to pay an administration charge in respect of litigation costs incurred or to be incurred by the Respondent in connection with these proceedings.

Judge C Kelly

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