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H M COURTS and TRIBUNALS SERVICE

LEASEHOLD VALUATION TRIBUNAL

In the matter of an application under Section 27A of the Landlord and Tenant Act 1985 (Service Charges)

Case No: CHI/43UJ/LIS/2011/0036

Property: **14 Heather Ridge Arcade, Camberley, Surrey GU15 1AX**

Between:

Hilary Barrett

(the Applicant/Lessee)

and

Ann Robinson

(the Respondent/Landlord)

Members of the Tribunal:	Mr MA Loveday BA(Hons) MCIArb	Lawyer/Chairman
	Mr NI Robinson	Valuer Member
	Mr P Letman	Member
Date of the Decision:	3 August 2012	

BACKGROUND

1. This is an application under Landlord and Tenant Act 1985 ("LTA 1985") s.27A for a determination of liability to pay service charges in relation to a flat above a shop at 14 Heather Ridge Arcade, Camberley, Surrey GU15 1AX. The Applicant is the lessee of the flat and the Respondent is the freehold owner of the flat and the shop.

2. By an application dated 13 March 2012, the Applicant sought a determination in respect of her liability to pay service charges for the years ending 2006/07 to 2011/12 inclusive, and for relevant costs to be incurred in the year ending 2012/13. The specific complaint related to the Applicant's contribution to insurance premiums. The applications also applied for an order in respect of costs under s.20C of the 1985 Act. Directions were given on 21 March 2012 and a hearing took place on 26 June 2012.

THE STATUTORY PROVISIONS

3. The general jurisdiction of the Tribunal is under LTA 1985 s.27A:

> **27A.** Liability to pay service charges: jurisdiction
> (1) An application may be made to a leasehold valuation 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 a leasehold valuation 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration agreement) is void in so as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.

4. "Service charges" are in turn defined by s.18 of the Act:

"18. Meaning of "service charge" and "relevant costs"
— (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 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."

5. The provisions applicable to reasonableness are at s.19:

"19. Limitation of service charges: reasonableness
(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 provision 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."

6. Section 20C of the Landlord and Tenant Act 1985 provides that:

"(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 or leasehold valuation tribunal, or the Lands 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.

...

(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."

THE PREMISES

7. On inspection, the tribunal found that Heather Ridge Arcade is a modern development of shops and flats c.1980 in a pedestrianised retail precinct including courtyards and a supermarket. The property at 4 and 14 Heather Ridge Arcade comprises a ground floor shop used as a beauty salon (No 4) with a first floor flat (No 14) in the centre of a parade of shops.

8. The shop is principally accessed from the east facing front of the parade although it has a rear door onto an internal common way shared with the flat above. The shop was also originally constructed with a rear loading bay. Various minor internal alterations have been undertaken to the shop over the years including creation of an internal treatment room and, to the original loading bay area, a small kitchen and sun bed room. The shop was in fair condition although signs of a leak through the ceiling into the rear lobby leading to the kitchen and sun bed room were noted.

9. Externally, it was noted that the flat oversails the shop at the front with a vertically tiled first floor elevation. At the rear, the ground floor including the old loading bay protrudes beyond the first floor flat. No measurements had been provided or were taken but it appeared that the floor area of the two units was roughly similar with the flat's overhang at the front matching the shop's greater depth at the rear.

10. To the rear of the parade there is a loading/unloading area which includes a parking area for the occupiers (in very poor condition) and this gives the only access to the flat. There is an entrance door for the flat at ground level (alongside the old loading bay) which is shared by two flats and the shop and then a staircase leading to the flats at first floor level. This staircase is rather unusual, in that half of it appears to be in the land owned by the freeholder of numbers 4 and 14 and half appears to be owned by the freeholder of numbers 3 and 13 - the adjoining shop and flat to the north. The staircase was in poor condition as was the rear exterior of the property. The various roofs are mostly flat with

a mineral felt covering. The roof over the bedrooms to the flat at second floor level was of mono pitch construction with the slope forming a feature of the rooms internally.

11. Internally, the flat has a corridor alongside a rear terrace over part of the shop, which leads to the living room. In turn, this leads to an internal hallway, with kitchen, bathroom and two bedrooms. Approximately half of each bedroom is cantilevered out over the front of the shop, forming a canopy to the front of the shop externally. The flat generally appeared in fair condition with modern replacement windows.

THE LEASE

12. By a lease dated 26 April 1991 the flat was demised for a term of 999 years from 1 June 1990. The lease was amended by a Deed of Rectification and Variation dated 12 December 1997. The relevant covenants in the lease are as follows:

(a) By clause 1(j) that the "insurance rent" means the sums which the lessor shall from time to time pay by way of premium for insuring the premises in accordance with his obligations contained in the lease.

(b) By clause 4(1) an obligation for the lessee "to pay the insurance rent herein reserved on the days and in the manner aforesaid".

(c) By clause 4(2) an obligation for the lessee "to pay and discharge all existing and future rates taxes duties charges assessments impositions and outgoings whatsoever ... now or at any time during the said term payable in respect of the demised premises or any part thereof by the owner or occupier PROVIDED ALWAYS that when any such outgoings are charged on the Lessor's property or any part thereof greater than the demised premises without apportionment between the demised premises and the remainder the Lessee shall be liable to pay such a proportion of such charge as the rateable value of the demised premises for the time bears to the aggregate rateable values of the demised premises and the said remainder".

(d) By clause 4(14) an obligation for the lessee "to pay all necessary costs charges and expenses (including Solicitors costs and surveyors fees) incurred by the Lessor in or in contemplation of any proceedings or the preparation of any notice under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court.

(e) By clause 5(3) that "in the event of the Lessee of the shop having to incur any proper expenditures (including professional fees) in the performance of his covenants as to

repair and maintenance regarding those parts of the shop as are or will be included in his demise ... or the use of which is in common with the demised premises then the Lessee will if called upon by the Lessee of the shop contribute one half of all such expenditure so incurred ..."

(f) By clause 7(c) that if the lessees incurred expenditure on parts of the building which were used "...in common with the shop the Lessor will if called upon to do so by the Lessee contribute one half of all such expenditure so incurred..."

(g) By clause 8 an obligation for the landlord "At all times during the said term to insure and ... keep insured the demised premises during the said term against loss or damage by fire storm tempest aircraft and such other risks as are included in a normal comprehensive risks insurance policy..."

THE APPLICANT' CASE

13. At the hearing, the Applicant appeared in person and relied on a statement dated 1 May 2012. In essence, she submitted that the service charges made for insurance were excessive.

14. The insurance taken out by the landlord in each of the relevant service charge years appears in the First Appendix to this determination. It was common ground that in each of the service charge years, the Respondent affected a single insurance policy for both the flat and the shop and the Applicant had been required to pay 50% of the premiums for these insurances.

15. The Applicant explained the background to the dispute. When the insurance rent was demanded on 11 February 2012, she had felt that her contribution was excessive. The Applicant had obtained separate insurance for the flat alone from SAGA and she produced a copy of the SAGA insurance schedule dated 24 January 2012. This gave a premium of £201.10 (which also reflected a 10% introductory discount). This was a considerable discount to the 50% share of the combined policy for the two units, but when the Applicant contacted the Respondent's solicitors, she was informed that she was not permitted to insure the flat separately. The SAGA policy had therefore been withdrawn.

16. The Applicant raised three principal arguments in her statement of case, which she elaborated on at the hearing:

a. The Respondent should not have apportioned the premium for the policy equally between the shop and the flat. She ought to have based the apportionment on the respective rateable values of the two properties. The Applicant referred to clause 4(2) of the lease. Whilst strictly speaking the clause referred to other outgoings, the formula should be used for determining the Applicant's share of the insurance premiums in the absence of any other mechanism for so doing: see para 11 of the Applicant's statement. The Applicant had obtained the rateable values used by South West Water for calculating water charges. The figures were £270 for the flat and £826 for the shop. An apportionment based on rateable values would be 25%/75%.

b. The combined insurance policies taken out by the landlord included loss of rent cover which was not recoverable under the terms of the lease. The insurance rent should not include any contribution to loss of rent cover.

c. The shop had a poor insurance claims history and the contributions were therefore excessive. A further discount should be given to reflect the increases in the combined insurance premiums for the building to reflect that claim history. The Applicant had little specific information about insurance claims made by the shop owner, but assumed that the increase in premium by £64.40 between 2007/08 and 2008/09 was attributable to this. The increase of £143.40 between 2010/11 and 2011/12 was down a claim by the landlord for damage to the window to the hairdresser which had been smashed just before November. The window had cost over £1,000 to replace.

The Applicant left it to the Tribunal to work out what discount should be made to the premiums to arrive at a reasonable figure for the insurance rent in each year. However, she confirmed that would be satisfied with anything less than 50% of gross premiums for the building.

17. In addition to the above, the Applicant drew attention to the sums insured. The Respondent had originally demanded an insurance rent of £324.22 for 2012/13, being 50% of the premium payable to Direct Line Insurance: see renewal notice dated 30 January 2012 and undated letter to the Applicant from the Respondent. However, it subsequently emerged that the premium had been based on an insured sum of £310,871 for each unit, which was a mistake. The insurer had refunded £237.86 in

premiums: see letter from the insurer to the Respondent dated 29 March 2012 and the attached adjustment schedule.

18. The Applicant was questioned by the Tribunal about this last point and a letter from the insurer dated 19 April 2012. The letter explained that the insured sum had been incorrectly calculated in each of the years 2009/10, 2010/11, 2011/12 and 2012/13. The letter also gave separate figures for the premium for insuring the "second address" (i.e. the flat), namely £211.23 in 2009/10, £219.30 in 2010/11 and £239.59 in 2011/12. The letter offered an ex-gratia payment of £344.51 (being 50% of the premium for the flat less 20% for the "claims load" in 2011/13 "as a result of a claim"). The Tribunal pointed out that in each case these figures amounted to between 46%-47% of the overall premium for the flat and shop. The Applicant indicated that she would not object to an apportionment of the combined premiums based on this percentage.

19. The Applicant was also asked by the Tribunal about the floor areas for the two units. She accepted that in broad terms the area of the shop and the flat were equal, with the flat enjoying a large terrace and the shop enjoying use of the forecourt beneath the bedroom of the flat. She did not consider that the insurance premium for a flat above a shop should be higher than the premium for a similar flat which was not above a shop.

THE RESPONDENT'S CASE

20. At the hearing, the Respondent was represented by Mr Andrew Sheftel of counsel. He relied on a statement from the Respondent dated 13 April 2012 and a skeleton argument.

21. The Respondent accepted that the Applicant should not be liable for the portion of the insurance premiums relating to rental income protection: see letter 24 February 2012. The Respondent also accepted that the Applicant should be refunded a proportion of the insurance rent which resulted from Direct Line's overvaluation of the property between since 2009/10 and 2012/13: see para 19 of the Respondent's statement. The Respondent's case was set out in a "Statement of Insurance Rent" dated 26 June 2012, which appears in the Second Appendix to this determination.

22. Mr Sheftel submitted that there were two remaining potential issues, namely the amount of the premium/insurance rent and apportionment of the relevant costs

between the shop and the flat. These two issues raised questions as to whether the relevant costs were "reasonably incurred" under s.19(1) of the Landlord and Tenant Act 1985 - or in the case of the 2012/13 insurance rent, whether the charge was "reasonable" under s.19(2).

23. As far as the amount of the insurance premiums is concerned, Mr Sheftel submitted that the adjusted figures in the schedule were reasonably incurred and/or reasonable. The allegation that the claims history for the shop had disproportionately increased the premium was highly speculative and there was no evidence to this effect. The SAGA insurance premium relied on by the Applicant was in fact evidence that the insurance rent claimed by the landlord in 2012/13 was reasonable. The premium agreed by the Applicant had been £201.10, which was close to the premium of £205.29 that the Respondent contended should be paid for 2012/13. Moreover, the SAGA insurance reflected a 10% introductory discount, so the Applicant's premium was higher than the insurance rent which the Respondent relied on. It could not therefore be said that the amount charged to the lessee for the flat was not a reasonable one.

24. The main issue was apportionment. Clause 4(2) of the lease related to "rates taxes duties charges assessments impositions and outgoings ... payable in respect of the demised premises". Insurance was dealt with under separate provisions and there was no reason why the Respondent should apportion insurance premiums using the formula in clause 4(2). In any event, clause 4(2) was not the only provision in the lease which dealt with apportionment in the lease. Clauses 5(3) and 7(c) specified a 50% contribution for the cost of "repair and maintenance" and "other expenditure" incurred by the lessor. It made a great deal of sense to apportion insurance costs in the same way as those costs. Moreover, the floor areas for the shop and the flat were broadly equivalent.

25. Mr Sheftel then dealt with how the apportionment of 50% should be applied to the landlord's relevant costs of insurance. The gross insurance premiums paid for the building (for example £461.72 for 2009/10 adjusted by Direct Line to £356.10) covered insurance of the flat and the shop, insurance of the common parts and rent protection cover. As far as the rent protection cover was concerned, there were no documents dealing with the element of the gross premium relating to this. However, Mr Sheftel adopted a percentage of 6.8% of gross premiums which appeared in the Statement of

Insurance Rent. Finally, Mr Sheftel produced a quotation for landlord's cover for from Morethan Business Insurance dated 7 February 2012 giving a premium of £807.93 for the building (the Applicant did not object to this late evidence). This suggested that the insurance rent claimed by the Respondent was not excessive.

REASONS

26. In this case, the obligation of the lessor under clause 8 of the lease is "to insure ... and keep insured the demised premises." The obligation plainly refers to insurance of the flat, not the building including the shop. However, there is nothing in the lease to suggest that the obligation cannot be satisfied by insuring the flat and the shop together. Indeed, there are very real advantages for the lessee if the landlord arranges either one policy for the property or (if there are separate policies) linked policies with the same insurer. In that way, problems will be avoided in the event of a claim relating to the roof, foundations or drains etc. The insurer could otherwise consider that there is a shared responsibility and attempt to apply averaging to any payment under the policy.

27. As far as the amount of the gross premium incurred by the Respondent in each year is concerned, the Tribunal is satisfied that the premiums in each year were reasonably incurred. There is no real evidence that the gross adjusted premiums in each year were reasonably incurred, and the quotations given by SAGA and Morethan Business suggest that insurance cover for the shop and/or the flat could not have been obtained more cheaply elsewhere. In addition, the Tribunal rejects the argument that the insurance rent payable by the Applicant should be reduced to reflect a poor claims history by the shop. It appears that there was only a single insurance claim for the window to the shop, there is no evidence that the Respondent acted unreasonably in making the claim for payment, and the risk of a claim loading of this kind is always present with any shared insurance.

28. The Tribunal further accepts that it is reasonable to adopt an apportionment of 50%. The reasons are as follows:
    a. In this case, there is no method of apportionment specified in the lease. The apportionment required here is simply a method for calculating the relevant costs in clause 1(j) of the lease, namely "the sums which the Lessor shall from time to time pay by way of premium for insuring the premises". In the absence of a specific

requirement in the lease, the Respondent is not required to adopt any method of apportioning costs. The requirement of s.19 is for the landlord to act reasonably when deciding to incur relevant costs, and for the costs incurred to be reasonable in amount. The landlord must adopt a reasonable method of apportioning the gross premium, but provided that the method adopted is objectively reasonable, it has a choice. A reasonable method of apportionment might well be based on the number of units in a building, floor areas for each unit or the rateable values for each property. Provided the landlord chooses a method which is reasonable, a Tribunal should not interfere with that decision.

b. In this case the landlord has (at least in part) based the apportionment on clauses 5(3) and 7(c) of the lease. Although the insurance premiums are not strictly speaking costs covered by clause 4(2), 5(3) or 7(c) of the lease, the Tribunal accepts that the premiums incurred by the landlord are a type of outgoing which is consistent with the nature of the landlord's general outgoings in clauses 5(3) and 7(c). Insurance is less consistent with the kind of expenditure in clause 4(2). It is therefore not unreasonable for the landlord to base the apportionment on clauses 5(3) and 7(c).
c. There are two units in the building. This points to a conclusion that it is not unreasonable to apportion the costs between the two units equally.
d. The floor areas of the two units are about the same size. Again, this points to a conclusion that it is not unreasonable to apportion the costs between the two units equally.

29. However, the apportionment does not provide a complete answer to this application. The Respondent accepts that the Applicant should not have to contribute to rent protection insurance because it is not a cost which is recoverable under the terms of the lease. Before applying the 50% apportionment, it is therefore necessary to ascertain the premium for insuring the building net of such premiums. The difficulty here is that there is little evidence of the precise element of the premiums paid in each year that relate to rent protection cover. In four years (2006/07, 2007/08, 2008/09 and 2012/13) figures have been given by insurers for the amount of cover provided for "rent receivable". However, the insurers do not give figures for the premiums payable for such cover. Mr Sheftel invited the Tribunal to attribute 6.8% of the gross premiums to rent protection cover as appears in the Statement of Insurance Rent. There figures in the Direct Line letter of 19 April 2012 give some support for a deduction of this nature. The Schedule

suggests that the premium for the flat between 2009 and 2012 was between 46 and 47% of the gross premium. On the assumption that the insurer apportioned the premium for building cover equally between the flat and the shop, the Schedule suggests a residual amount of 6-8% of gross premiums to cover rent protection cover.

30. In arriving at the insurance rent figures for each year, the tribunal therefore adopts the gross adjusted premiums paid by the Respondent, less an allowance of 6.8% for rent protection insurance and it then apportions 50% of the net premiums to the flat. The calculations appear in Appendix 3, and the resultant figures correspond to those given by the Respondent in the Statement of Insurance Rent subject to the 6.8% deduction for rent protection cover.

SECTION 20C

31. In para 9 of the application, the Applicant sought an order under s.20C to prevent the Respondent claiming any legal costs of dealing with the application through the service charge provisions of the lease. At the hearing, the Applicant suggested that if she succeeded it would be just and equitable to make an order under s.20C.

32. Mr Sheftel relied on clause 4(14) of the lease as entitling the Respondent to recover its costs from the Applicant in connection with the Tribunal proceedings. Such costs were incurred "in contemplation of any proceedings". However, this liability was not a "service charge" or a "relevant cost" of the landlord under s.18(1) of the 1985 Act and it followed that the Tribunal has no jurisdiction under s.20C of the Act. Any charge that the landlord made under clause 4(14) of the lease amounts rather to a variable "administration charge" under Commonhold and Leasehold Reform Act 2002 Schedule 11 para 1. In any event, there was no basis for making any order under s.20C since the landlord had conceded some of the issues and it had adopted a reasonable method of apportioning the insurance premiums.

33. The Tribunal's conclusions are as follows. The Respondent concedes that the only provision in the lease that might enable it to recover any of its costs from the Applicant appears in clause 4(14). This is not a provision which enables the Respondent to recover any charge which "varies or may vary according to the [landlord's] relevant costs" as required by s.18(1) of the 1985 Act. It follows that any demand for payment under

clause 4(14) of the lease would not be a claim for a "service charge" and that s.20C could not be engaged. The Tribunal therefore makes no order under s.20C of the Act, but on the basis that the Respondent cannot claim a contribution for its costs incurred in connection with proceedings before the tribunal by way of service charges.

34. It may well be that the Respondent does at some stage in future attempt to recover its legal costs in connection with proceedings before this Tribunal under clause 4(14) of the lease. If it does so, the Tribunal will have to consider whether (i) the Respondent can properly do so under clause 4(14) and (ii) whether any such variable administration charge was reasonable under Schedule 11 para 2 of the 2002 Act. However, that is a matter for any future Tribunal in the event that the landlord demands its legal costs from the Applicant.

35. If the Tribunal is wrong about jurisdiction, it would not make any order under s.20C. Briefly, the reasons are that the Respondent has substantially succeeded on the main issue in the matter, namely the apportionment issue. It was reasonable for the Respondent to incur legal costs, given the complex issued arising from the insurance rent and premiums. Moreover, once the error with the sum insured for the building was discovered, the Respondent made a prompt offer to give the Applicant credit for the additional premiums paid, which accorded with the Tribunal's determination. The error with the sums insured appears to have been the fault of the insurer, and there is no evidence that the Respondent was culpable in this respect. It would not therefore be just and equitable to make an order under s.20C.

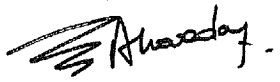
CONCLUSIONS

36. For the reasons given above, the Tribunal determines under s.27A of the Landlord and Tenant Act 1985 that the Applicant's liability for insurance rent in each of the years in question are as follows:

2006/07	£255.99
2007/08	£264.09
2008/09	£294.10
2009/10	£165.94
2010/11	£171.67
2011/12	£190.69

2012/13 £191.33

37. No order is made under s.20C of the Act.



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MA Loveday BA(Hons) MCIArb

Chairman

3 August 2012