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FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case References	:	LON/00BD/LSC/2013/0497
Property	:	Flats 1, 4 & 6 Garrick's Villa, Hampton Court Road, Hampton, Middlesex, TW12 2EJ
Applicants	:	(1) Ms Abigail Rainer (2) Mr M Mayhew and Mrs Carol Mayhew (3) Ms Susan Moore ("the Tenants")
Representative	:	In person
Appearances for Applicants:		(1) Ms Abigail Rainer (2) Mrs Carol Mayhew (3) Ms Susan Moore
Respondent	:	Garrick Estate Limited ("the Landlord")
Representative	:	In person
Appearances for Respondent:		(1) Mr David Goddard, director of Garrick Estate Limited (2) Mr Paul Hoffman, director of

		Garrick Estate Limited
		(3) Mr Howard Veglio, director of Garrick Estate Limited until November 2012
		(4) Mr Tony Newton, tenant of flat 9 Garrick Villa
Type of Application	:	For the determination of the reasonableness of and the liability to pay service charge
Tribunal Members	:	(1) Mr A Vance, LLB (Chair) (2) Mr M C Taylor FRICS (3) Mr P Clabburn
Date and venue of Hearing	:	28.10.13 10 Alfred Place, London WC1E 7LR
Date of Decision	:	27.03.14

DECISION

Decision of the Tribunal

1. The tribunal makes the determinations as set out under the various headings in this Decision

2. The tribunal makes an order under section 20C of the Landlord and Tenant Act 1985 so that none of the landlord's costs of the tribunal proceedings may be passed to the Applicants through any service charge.

Introduction

3. The Tenants apply under section 27A Landlord and Tenant Act 1985 ("the 1985 Act") for a determination of their liability to pay service charge to the Respondent in respect of Flats 1, 4 & 6 Garrick's Villa, Hampton Court Road, Hampton, Middlesex, TW12 2EJ ("the Properties") for the service charge years 2008 to 2013 inclusive. Ms Rainer is the tenant of flat 1; Mrs Mayhew is the joint tenant of flat 4; and Ms Moore is the tenant of flat 6.

4. Garrick's Villa is a grade 1 listed mansion built in around 1750 and set within gardens designed by Capability Brown. The villa was converted into nine flats in the early 1960's. The grounds of the estate have been developed to add seven flats and 23 houses. A total of 39 dwellings now comprise the Garrick Estate ("the Estate").

5. The freehold interest in the Estate lies with the Respondent, Garrick Estates Limited ("GEL"). GEL is run by volunteer directors who are elected by the shareholders of the company. Thirty seven of the 39 owners of dwellings on the Estate are shareholders in GEL. The Respondent engages managing agents, currently HL Estate Management, to deal with the day to day management of the Estate.

6. On 25.10.08 Garrick's Villa was seriously damaged by a catastrophic fire that occurred during the course of decorating works. That fire destroyed a very large part of the Villa, a consequence of which has been that the Applicants have been unable to occupy their flats and have had to resort to alternative temporary accommodation. The cost of that temporary accommodation was initially paid for by GEL's insurers, National Insurance and Guarantee Corporation Ltd ("NIG"), following a claim made by the Respondent on the insurance policy in place at the time of the fire. NIG also met the costs of the Applicants' service charge liability (except for the costs of insurance) and also funded initial repairs and reconstruction works required to the Villa.

7. However, NIG stopped assisting with these costs in November 2010. This was because the Respondent and NIG reached agreement whereby NIG would make a lump sum payment to GEL of £1,835,000 in final settlement of the insurance claim ("the NIG settlement"). This sum was accepted by GEL and placed in a 'Fire Fund' account to be used to fund the remaining reconstruction work on the Villa.

8. Also added to the Fire Fund account was the sum of £600,000, recovered in spring 2011, following settlement of proceedings commenced by GEL against the contractor carrying out works on the Villa at the time of the fire.

9. The NIG insurance policy provided for three years alternative accommodation cover which expired on 25.10.11. Since that date the Applicants have had to bear the cost of the alternative accommodation themselves and have also been asked to pay towards the service charge.

10. Soon after the fire it was identified that Garrick Villa had been substantially under-insured (estimated to be about a 32% shortfall). High Court proceedings were subsequently issued by GEL against its former insurance brokers, Grayside Limited ("Grayside") and managing agents, Curchod & Co, seeking damages arising from that underinsurance. The tribunal has been informed by Mr Goddard that these proceedings were compromised on 19.11.13 and that the terms of the settlement are subject to a confidentiality provision (although the terms have been disclosed to the shareholders of GEL, including the Applicants). In his email to the tribunal dated 28.11.14 Mr Goddard expresses the view that this settlement should allow the restoration of the Villa to be completed but whether there will be any money left over after that will depend on the final costs of the restoration and settlement of the costs of the High Court claim.

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

The Leases

12. The Respondent's position (which was not challenged by the Applicants) was that there are different types of lease in operation on the Estate. Therefore whilst flat owners contribute towards the cost of buildings insurance and repairs through the service charge, the lessees of houses are obliged to secure their own insurance and are responsible for repairs to their own houses. The cost of gardening is shared amongst all 39 lessees.

13. Both parties agreed that the relevant provisions of the Applicants' leases were in identical terms **[176]**. These can be summarised as follows:

(i) The Tenant covenants to pay by way of service charge a proportion of the expenditure incurred or to be incurred by the Landlord in respect of the matters specified in the Third Schedule (such proportion to be determined having full regard, where it is reasonable and proper to do so, to the rateable value of the flat compared to the aggregate of the rateable values of all the flats in the Villa.

(ii) Clause 3 contains the Landlord's insurance covenant and reads as follows:

"to insure and keep insured Garrick Villa with some insurance office of repute to the full reinstatement value thereof and a sum to cover architects or other professional fees in connection therewith and an amount equal to three years ground rental value thereof against loss or damage by fire and explosion tempest and aircraft and such risks as

commonly included in a comprehensive property-owners insurance policy and against such risks as the Lessors may from time to time require to be covered including property-owners liability to third parties and in the event of damage to or destruction of Garrick Villa or any part or parts thereof by any of the risks covered by such insurance to apply all monies received in respect of such insurance in or towards rebuilding reinstating or otherwise making good such damage or destruction".

(iii) Clause 4 comprises the Landlord's covenant for quiet enjoyment which is as follows:

"the Lessors hereby covenant with the Lessee that the Lessee paying the rent and service charge hereby reserved and performing and observing the covenants on the part of the Lessee herein contained shall peaceably hold and enjoy the flat for the term hereby granted without any interruption by the Lessors or any other person lawfully claiming under or in trust for the Lessors".

(iv) The matters specified in the Third Schedule include the cost of effecting and maintaining insurance of the Villa; repairing, cleaning and lighting the internal common parts; maintaining and repairing the non-demised parts of the Villa; maintaining, repairing, renewing and keeping in good condition the roadways, drives, footpaths, gardens, grounds, boundary walls, fences and gates; and maintaining the lawns including re-laying of lawn and replacing of shrubs and trees whenever necessary.

14. For the avoidance of doubt, where below the tribunal determines that a sum is payable by the Applicants, it means that the tribunal is satisfied that it is payable under the terms of the Applicants' leases as summarised above.

Case Management Conference/Mediation

15. A Case Management Conference ("CMC") took place on 08.08.13 at which the Applicants attended but not the Respondent. The tribunal identified the following matters as requiring determination:

(i) Whether, in the years 2008, 2009 and 2010 the fees for an insurance assessor and legal and professional fees are service charge items and whether the Respondent was entitled to use reserve funds towards these costs. There was no issue over the quantum of the sums claimed.

(ii) Whether or not the Applicants are obliged to pay service charges for the years 2011 to 2013 inclusive as they have been unable to occupy their properties during this period. Again, the quantum of these costs was not being challenged except the amount of the insurance premium for each year.

(iii) Whether or not an order should be made under s.20c of the 1985 Act.

(iv) Whether or not an order should be made for reimbursement of tribunal fees paid by the Applicants.

16. Directions were issued by the tribunal on the same day as the CMC.

Inspection

17. Neither party requested that the tribunal inspect the properties and the tribunal did not consider this to be necessary or proportionate.

The Hearing, Decision and Reasons

18. During the course of the hearing the parties provided copies of the following additional documents:

(i) A statement of the Garrick reserve account as at 31.12.12;

(ii) A breakdown of the Villa service charge and ground rent claims recovered from NIG;

(iii) Garrick Estate Accounts for the year ending 31.12.08;

(iv) An email from Mr Goddard to Villa lessees dated 07.11.08;

(v) An email from Mr Newton to Mr Goddard dated 24.12.08;

(vi) Copy bill from Infields Solicitors dated 15.02.10; and

(vii) Service charge demand to Ms Rainer dated 09.07.12.

19. Neither party objected to the other being allowed to rely on any of the additional documents provided. The tribunal allowed each party sufficient time to consider them and considered it just and equitable for them to be relied upon as evidence despite their late provision.

20. The tribunal heard oral evidence from Mr Goddard and Mr Newton, both of whom had provided witness statements **[107]** and **[150]**. Informal oral evidence and submissions were made by the Applicants, principally Ms Rainer.

21. At the hearing it became apparent that the tribunal did not have before it sufficient documents to determine the Applicants' challenges regarding costs of the insurance premiums paid by the Respondent. Directions were therefore given for this to be dealt with by way of written submissions with each party to provide copy documents relied upon. The tribunal then reconvened to make its decision.

22. Numbers appearing in square brackets below refer to the hearing bundle unless stated otherwise. Numbers in bold and in round brackets refer to documents relating to the insurance challenge. By way of example, **(A/1)** would refer to the first page of the Applicants' statement of case relating to the insurance challenge. **(R/1)** would refer to the first page of the Respondent's statement of case and **(RR/1)** to the first page of the Respondent's statement in reply. **(A:G)** would refer to appendix G to the Applicants' statement of case and **(R:4)** to the fourth appendix to the Respondents' statement of case.

Insurance Assessors Fees

23. The sums in dispute related to the fees of Harris Balcombe LLP ("Harris Balcombe") who were appointed shortly after the fire to assist in the claim. GEL paid their fees

out of the Villa reserve. The sum of £6,900 was paid in 2008; £9,359.71 in 2009 and £2,350 in 2010. These sums total £18,609.71.

24. After the NIG settlement subsequent invoices received from Harris Balcombe were paid out of the Fire Fund account.

25. Before this Application was made, in June 2013, the sum of £18,609.71 was paid from the Fire Fund account and credited to the Villa reserves to reimburse the fees paid in 2008-2010.

The Applicants' Case

26. The Applicants' position was that the sums paid to Harris Balcombe in the service charge years 2008, 2009 and 2010 were not costs recoverable under the service charge provisions of their leases. In addition, they considered that the Respondent had inappropriately paid these sums out of the service charge reserves without the consent of the lessees.

27. They acknowledged that in the aftermath of the fire it was agreed to appoint loss adjustors and that at a meeting between the GEL Board and lessees on 13.11.08, Harris Balcombe were nominated as the preferred firm. However, they dispute that a document signed that day **[52]** amounted to a contractually binding agreement for the engagement of Harris Balcombe. They assert that they assumed that the document was only a nomination for the appointment of Harris Balcombe

28. This document is a Harris Balcombe pro forma signed by the Chairman and director of GEL and which instructs Harris Balcombe to prepare and submit the insurance claim relating to the fire. It states that it is agreed that they would be paid the sum of 2% plus VAT on the value of sums received. The document is signed by or on behalf of the lessees of the Villa. The reverse side to this document **[92]** is headed up "Terms and Business" and contains details of *"the terms under which we will act for you"*. It also contains notification of the right for domestic consumers to cancel the agreement *"within 14 days of receiving the full terms"*. The Applicants say they were not notified of the full terms.

29. Nor, say the Applicants, was there any agreement that their fees should be paid out of the Villa reserve fund and GEL had no authority to do so. Their position is that the Respondent should have clarified who was going to pay Harris Balcombe's fees before signing a contract and formally engaging them. A memorandum of understanding sent to the lessees on 23.12.08 **[93]** referring to how the fees were to be paid was not signed by all the lessees. Some refused to do so and this document, they say, should not be seen as authority as to how these fees were to be met.

The Respondent's Case

30. The Respondent's position was that at the meeting on 13.11.08 all nine lessees in the Villa agreed not only to the appointment of Harris Balcombe but also that their fees would be paid out of sums recovered by them or the Villa reserve, with any shortfall (if the reserve was exhausted) being met by the lessees.

31. Sums held in the reserve and intended to be used for redecoration and roof repairs (no longer needed because of the fire) were subsequently reallocated to meet Harris

Balcombe's fees and the sum of £18,609.71 was paid out of those funds for service charge years ending 2008, 2009 and 2010.

Decision and Reasons

32. The tribunal is required to determine whether or not Harris Balcombe's fees of £18,609.71 amounted to a service charge and whether or not those sums were payable by the Applicants in their apportioned contributions. The Applicants are not arguing that the costs were unreasonably incurred or that the service provided was not of a reasonable standard.

33. Section 18 of the 1985 Act defines a "service charge" as an amount payable by a tenant of a dwelling, as part of or in addition to the rent, which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and the whole or part of which varies or may vary according to the relevant costs.

34. The tribunal is satisfied both that these sums are payable by the Applicants and that they amount to a service charge.

35. Paragraph (1) to the Third Schedule in the Applicants' leases contains an obligation by the tenants to contribute, by way of service charge, towards *"the cost from time to time of effecting and maintaining insurance of Garrick Villa to the full reinstatement value thereof and a sum to cover architects or other professional fees in connection therewith and an amount equal to three years' ground rental value thereof against loss by damage by fire....."*.

36. In the tribunal's view the fees of Harris Balcombe amount to professional fees that are recoverable under that provision. They were professional fees incurred in pursuing an insurance claim which, in the tribunal's view, amounts to costs incurred in maintaining insurance.

37. However, if that is incorrect, then they are recoverable under the provisions of paragraph (10) to that Schedule as *"administrative or management costs of the Lessors including any fees payable to any professional advisers in respect of any of the matters hereinbefore mentioned in this Schedule"*.

38. Paragraphs (4) to (6) of the Schedule includes the costs of repairing and renewing the structure of the Villa as well as its common parts and services. As such, the fees of loss adjustors are, in the tribunal's view, recoverable under paragraph (10) as administrative or management costs incurred in the pursuit of monies to be applied towards rebuilding and reinstatement of the Villa.

39. The tribunal does not accept that the Respondent acted improperly in paying these fees through the Villa reserve. There is no formal provision in the lease for a reserve fund. What seems to have happened is that, over time, sums demanded from the lessees over and above actual expenditure incurred have been held on reserve as opposed to being reimbursed to lessees. The sums paid to Harris Balcombe were therefore paid out of a general service charge reserve as opposed to a specific reserve fund.

40. Whether the Respondent was entitled to treat surplus service charge income in this way under the terms of the Applicants' leases is questionable, but this practice was not challenged by the Applicants. In submissions to the tribunal, Ms Rainer agreed that it was a practical way to manage expenditure. The Applicants' challenge was that the reserve had been used inappropriately, not that it was inappropriate to maintain a reserve.

41. It is not disputed that all parties agreed that a loss adjustor was required and that Harris Balcombe were to be appointed. In the tribunal's view the document signed by the lessees on 13.11.08, when viewed as a whole, including the terms on the reverse page, is a contractual document for the engagement of Harris Balcombe. It is signed by a chairman and director of GEL but it is also signed by or on behalf of the Villa lessees. The presence of these signatures indicates that the intention was for the loss adjustors to pursue the claim on behalf of all the lessees.

42. This agreement does not specify who was to pay Harris Balcombe's fees. In the tribunal's view the emails and minutes exhibited to Mr Goddard's witness statement **[113-149]** indicate that the intention of the parties to the agreement, including the Applicants, at the time that the agreement was entered into, was that the fees would be deducted from the claim monies recovered by Harris Balcombe. As this would mean that there would be less available for the reinstatement of the Villa, any resultant shortfall would have to be met by the lessees.

43. This is the position as set out in Mr Goddard's witness statement. According to him, on 11.11.08, two days prior to the signing of the agreement on 13.11.08, he and Ms Rainer (who was at that time on the Board of GEL) attended a board meeting at which he recommended the appointment of Harris Balcombe and at which he explained that their fees would be paid out of monies they recovered but that if there was a shortfall in the funds available to rebuild the Villa the lessees would have to make good the shortfall. It was also his evidence that the minutes of that meeting **[121]** were then distributed to the Villa lessees.

44. Ms Rainer, who when asked by the Tribunal why she did not raise any objection to the fee arrangement discussed at the meeting on 11.11.08, replied that she did not want to say anything that would undermine Mr Goddard at a Directors meeting.

45. The tribunal found Mr Goddard's oral evidence concerning the meetings on 11.11.08 and 13.11.08 to be persuasive and substantiated by the documents exhibited to his witness statement. It does not accept that the lessees present saw entry into the agreement with Harris Balcombe as no more than a 'letter of intent' as suggested by Ms Rainer. When asked, Ms Rainer accepted that the question of the loss adjustor's fees was discussed at the meeting on 13.11.08 but not the question of any shortfall. The tribunal accepts Mr Goddard's evidence that the question of the lessees having to bear these costs was discussed as evidenced by the notes in the minutes of the meeting **[126]** and as qualified in the minutes of the meeting on 17.11.08 **[132]**.

46. What then subsequently becomes apparent is that the insurance monies recovered could not be used to pay Harris Balcombe's fees as NIG would only allow such sums used for matters covered under the policy. It was then that Mr Goddard proposed, in an email to the lessees dated 23.12.08 **[142]**, that the Villa reserves be used for that

purpose. This email and Mr Goddard's request that the lessees sign a Memorandum of Understanding **[144]** regarding these costs led some lessees to object to the use of the reserve fund to pay the loss adjustors fees **[145]**. However, not all objected. In an email dated 24.12.08, Ms Mayhew referred to Harris Balcombe being an invaluable member of the team and that she had no strong feelings about reserve funds being used towards their costs **[146]**.

47. In the tribunal's view the use of the reserve to pay the loss adjustor's fees was reasonable given NIG's position. All parties wanted Harris Balcombe on board and if their fees were not paid out of the reserve then who, in the light of NIG's position, could have paid them? Ms Rainer suggested that GEL could have asked all shareholders across the whole of the Estate to pay towards these costs or that GEL could have taken out a loan.

48. However, there is no evident legal basis on which other lessees on the Estate should be asked to contribute towards these costs which relate solely to the claim made in respect of the Villa. As for taking out a loan, Mr Goddard's evidence was that the Respondent's only income is ground rent from the properties on the Estate and that there was no prospect of a financial lender lending it these sums. He indicated that as many of the lessees have extended their leases the freehold reversion in the Estate was probably of little value.

49. Again, the tribunal found Mr Goddard's evidence to be persuasive, namely that there were likely to be real practical difficulties in securing a loan. In any event, even if a loan was feasible, or another method of raising the money required was possible, the question before the tribunal is whether or not these sums could be charged to the service charge account and it has answered that question in the affirmative.

50. **The tribunal therefore determines** that the sums of £6,900, paid in the 2008 service charge year; £9,359.71 paid in the 2009 service charge year and £2,350 paid in the 2010 service charge year are sums that are payable by the Applicants in their apportioned share and that these costs were reasonably incurred.

Legal Fees

51. The Applicants challenged the costs of legal advice provided by Infields solicitors in the sum of £2,818.90 in the service charge year ending 2008 **[55]**.

The Applicants' Case

52. The Applicants contended that these were costs that should be borne by the lessor and should have been passed on through the service charge. This was because they related to matters resulting from the fire and were not to do with the running of the Estate.

53. No challenge was made as to the amount of these charges or whether the service provided was of a reasonable standard.

The Respondent's Case

54. The Respondent's position is that these sums were properly recoverable through the service charge.

Decision and Reasons

55. The narrative to Infields' bill indicates that their charges related to *"matters arising as a result of the fire and subsequent damage caused to Garricks Villa. Including liaising with various members of the Board....particularly with regard to what arrangements could be made to assist the Villa owners.... Speaking with individual Villa owners..... assisting you and the Villa owners in relation to the way forward. Correspondence with the managing agents and with your insurance brokers*

56. The tribunal considers these sums to be recoverable under the provisions of paragraph (10) of the Third Schedule to the Applicants' leases as an administrative or management fee paid to a professional advisor in respect of advice relating to the rebuilding and reinstatement of the Villa. The indication in the narrative is that the advice provided was for the benefit of both the Board and the Villa owners and that this was inextricably linked to the aftermath of the fire and the need for urgent professional and legal advice.

57. **The tribunal therefore determines** that the sum of £2,818.90 paid in the service charge year ending 2008 is payable by the Applicants in their apportioned share and that the costs were reasonably incurred.

Fees of PB Associates

58. These fees in the sum of £2,794.50 **[57]** appear in the service charge accounts for the year ending 2009 and relate to fees connected with accounting matters arising from the fire.

The Applicants' Case

59. As with the legal fees referred to above, the Applicants considered these costs were incurred as a result of the fire and should be borne by the Respondent. It was their case that they should not have been charged to the lessees via the service charge.

60. Again, no challenge was made as to the amount of these charges or whether they were reasonably incurred.

The Respondent's Case

61. The Respondent's position is that these sums were properly recoverable through the service charge.

Decision and Reasons

62. The invoice from PB Associates refers to *"advice and consultations in connection with issues arising out of the fire at Garrick Villa and various other matters..."*. The indication from the description of the work carried out **[58]** is that this included discussions regarding use of the Garrick reserve; how professional fees should be allocated and how matters connected with the fire should be reflected in the 2008 accounts.

63. As with the legal fees challenged by the Applicants, the tribunal considers these sums were properly recoverable through the service charge under the provisions of paragraph (10) of the Third Schedule to the Applicants' leases as administrative or management costs relating to the rebuilding and reinstatement of the Villa. The tribunal considers that it was appropriate and reasonable for the Respondent to seek such professional advice in the aftermath of the fire.

Insurance and the Applicants' liability to pay Service Charges for the Service Charge year ending 2011 onwards

64. The amounts in dispute in respect of the insurance premium, as shown in the service charge accounts and budget, are as set out in the table below. They do not match the premiums referred to below as the insurance year runs from 1st October to the 30th September in each year whereas the service charge year ends on the 31st of December each year.

Service Charge Year Ending	Amount	Insurers
2009	£8,229	NIG
2010	£13,467	NIG
2011	£13,080	NIG
2012	£17,551	NIG
2013 (budget)	£17,551	AXA

The Applicants' Case

65. The Applicants' relevant challenges can be summarised as follows:

(i) They have no liability to pay towards any service charges (including the costs of insurance) for the period that they have been, and will be, unable to occupy their properties. Further, it would be unreasonable to demand service charges from them in any event. This, they say, is because the Respondent has breached its covenant of quiet enjoyment towards them as set out in the lease.

(ii) The Respondent's admitted breach of covenant in failing to ensure that the Villa was insured to its full reinstatement value was, they say, directly causative of the unreasonable increase in insurance premiums. The thrust of the Applicants' argument is that this failure means that it would be unreasonable to pass on any increase in premiums resulting from the fire to the lessees via the service charge. They assert that the premiums are higher than those before the fire because of the greater risks associated with on-going construction work; the largely unoccupied status of the Villa since the fire and the fact that a substantial insurance claim had been made.

(iii) The failure of the Respondent to act on advice given by its insurance brokers, Grayside, after the fire to carry out a full survey of the Estate meant that it was unable to negotiate a premium based on a core and shell condition of the Villa. Instead, the Respondent's survey did not take place until August 2010, almost two years after the fire.

(iv) Unreasonable delays have occurred in the Respondent securing reinstatement of the Villa. The Applicants argue that delays in instituting and settling the legal claims brought against the contactor, former insurance brokers and former managing agents have all delayed reinstatement of the building. If the Villa had been reinstated within three years, they say that the annual insurance premiums since October 2011 would have reverted to pre-fire corrected levels or less **[A/8]**.

The Respondent's Case

66. The Respondent denies breach of the covenant of quiet enjoyment on the basis that the Respondent did not cause the fire and committed no positive act that would amount to such a breach.

67. It admits that it was in breach of the lease covenant to insure the Villa to its full reinstatement value **[49]**. However, this failure, it says, was caused by Grayside and its managing agents who they have sued to recover resulting losses. This breach, it says, does not entitle the Applicants to withhold service charge payments.

68. As for the increase in insurance premiums this was not due solely to the greater risks arising from the condition of the Villa after the fire as highlighted by the Applicants. A number of other factors are relevant including that premiums were lower before the fire because the Villa was underinsured; that it was not possible to secure an alternative insurance provider after the fire; and that premiums increased due to changes in the value at risk of the Villa following re-valuations of the whole Estate by NIG's surveyor in December 2008 and by Mellersh & Harding, an independent building consultancy instructed by the Respondent, in August 2010.

69. It denies that unreasonable delays have occurred in securing reinstatement of the Villa and in instituting and settling legal claims. It points out that until the NIG settlement there were no funds available to fund the High Court litigation it has successfully pursued.

70. It asserts that the reason for not carrying out a full survey of the Estate until August 2010 was because it had received very strong advice from Harris Balcombe after the fire not to do so because it would compromise their negotiating position with NIG. It was only after the Respondent's solicitors, Edwin Coe LLP, advised them to do so before entering into a settlement with NIG that this took place. After the 2010 valuation the Respondent was able to apportion the costs of the annual insurance premium across the constituent parts of the Estate. Prior to that the premium was calculated for the Estate as a whole which made it difficult to ensure that each part was adequately insured.

Decision and Reasons

71. The tribunal does not accept that there has been a breach of the covenant of quiet enjoyment by the Respondent. The covenant in the lease is against *"interruption by the Lessors or any other person lawfully claiming under or in trust for the Lessors"*. As such, the Respondent cannot be liable under the covenant for the acts of strangers. There is no suggestion that the Respondent caused the fire that led to the Applicants' being deprived of the use of their properties. By all accounts this was an act of a third party hence the claim against the contractor. Nor can the Respondent's breach of obligation in relation to insurance be an act or omission amounting to a breach of the covenant of quiet enjoyment as that breach was not the cause of the fire.

72. The tribunal considers that the Applicants remain liable to pay towards the service charge under the covenants contained in their leases notwithstanding the Respondent's breach of covenant in failing to ensure that the Villa was insured to its full reinstatement value. This is the case even though the Applicants, very regrettably, are unable to occupy their properties. The Applicants' obligation to pay service charge is not conditional upon the Respondent's compliance with its covenant to insure. The Applicants are, of course entitled to challenge whether or not such service charge costs have been reasonably incurred but they cannot avoid their liability to pay service charge at all. It is also in the Applicants' interests that these services are provided. By way of example, the Villa still needs to be insured; gardening is still required and accounts still need to be prepared.

73. **The tribunal therefore determines** that the Applicants are liable to pay service charges for the service charge ending years 2011 to 2013 inclusive.

74. The tribunal recognises that the cost of the insurance premium increased substantially after the fire (from £6,103.47 in the year ending 2008 to £8,229 in the year ending 2009; to £13,467 in 2010 with a further substantial increase in 2012). The Respondent accepts that some of that increase is due to the greater risks associated with the on-going construction work and the largely unoccupied status of the Villa. It is also likely, in the tribunal's view that the premium is higher than it would otherwise be because a very large claim has been made as a consequence of the fire.

75. However, despite these very large increases, and on the available evidence, the tribunal does not consider that it can conclude that the costs of these premiums have been unreasonably incurred. The tribunal has to consider two matters: whether the Respondent's actions in paying these premiums were reasonable and whether the amounts charged to the Respondent were within a range of what can be considered to be reasonable.

76. In doing so it is helpful to summarise relevant parts of the chronology set out in the Respondent's insurance submissions. The facts referred to below have not been substantively challenged in the Applicants' insurance submissions.

(i) On 16.09.08 Grayside wrote to the Respondent with renewal papers for the year ending September 2009 (**R:3**) quoting a renewal premium of £6,443.88

for an insured reinstatement value of the Estate of £4,696,177. That quotation was accepted.

(ii) After the fire, the following month, it was realised that the Villa was underinsured. NIG's loss adjustor, Watts and Partners, carried out a valuation of the Estate in December 2008 and assessed the value at risk to be £7,900,000 (although this sum was not, apparently communicated to the Respondent at the time).

(iii) After the fire the Respondent was advised by a chartered surveyor to insure the Villa to its full value at risk.

(iv) As a result of concerns held by both lessees and the Respondent that there may be potential under-insurance on other parts of the Estate the Respondent increased insurance cover to a declared value of £6,100,000 in February 2009 and then to £7,900,000 on 13.03.09. This resulted in additional premiums becoming payable of £1,043 and £1,250 plus £172 for terrorism cover.

(v) When the insurance policy next came to be renewed, in October 2009, NIG quoted a renewal premium of £28,000 which was negotiated down to £23,359.82. Despite this very large increase, the advice from Grayside, in an email dated 14.09.09, was to remain with NIG but that the risk should be marketed at the first opportunity following reconstruction as the premium should decrease once the work was finished **(R:5)**.

(vi) The Respondent was advised by Grayside in 2009 to carry out an independent valuation of the Estate for insurance purposes. However, it did not do so at that time because of professional advice received from Harris Balcombe. In a letter dated 10.07.09, Harris Balcombe stated that for the purposes of the insurance claim *"it would be prejudicial at this stage to invite any further companies to provide valuations bearing in mind we have our own Derek Browns estimated reinstatement cost together with a figure which we have at the moment from Watts and Partners"* and that *"I strongly suggest that you do not change insurers and continue with your current insurance brokers..."* **(R:4)**.

(vii) A decision to change brokers was, however, made in September 2010 because by that date it had become clear that Respondent would be suing Grayside. New brokers, CLEAR, were appointed and they managed to persuade NIG that for the October 2010 renewal it should base its assessment of the value at risk of the Villa on a core and shell valuation of £2,940,000 calculated by Mellersh & Harding. This reduced the total premium by £6,380 with the total premium for the Estate being £18,812.03 and the apportioned premium for the Villa being £12,526 and **(R:12)**.

(viii) Following the NIG settlement in November 2010 the Respondent was able to commence Phase 1 of the reconstruction of the Villa and, as work progressed, the insured value was increased resulting in additional premiums becoming payable. The Respondent states that this was done each time works valued at around £125,000 had taken place.

(ix) Insurance was again renewed with NIG for the period ending September 2012 when the premium apportioned to the Villa increased to £14,956.32 based on a declared value for the whole estate of £5,371,817 (the declared value of the Villa being £3,539.896) **(R:15)**. Further increases in the declared value occurred as works progressed.

(x) In 2012, the Respondent sought a new insurance company as three years had elapsed since the fire and it was felt that it may be possible to secure an alternative quote and there was concern that NIG had been increasing its premiums excessively. A quote was obtained from AXA for the period commencing October 2012. The total premium was £23,353.97 with a declared value for the whole estate being £7,785,452 (the declared value of the Villa being £5,544,000) and the apportioned premium for the Villa being £16,630.30 **(R:22)**.

(xi) The insurance certificate for the year beginning 01.10.13 shows an increased declared value for the estate of £7,983,910 for a total premium of £24,648 and the premium for the Villa being £17,551 **(R:25)**.

77. In the tribunal's view, the Respondent acted reasonably in paying all of the above premiums. It also considers the amounts to be reasonable having regard to the exceptional circumstances in which the Respondent (and of course the Applicants) found itself in the aftermath of the fire.

78. Given the discovery of the undervaluation of the Villa and the uncertainties concerning what should be the proper value at risk of the Estate the Respondent cannot be criticised, in the tribunal's view, for increasing the declared value for insurance purposes in February 2009 and on 13.03.09. The resulting additional premiums of £1,043 and £1,250 plus £172 for terrorism cover are, given their amount, in the tribunal's expert view reasonable for the additional cover provided.

79. The October 2009 NIG premium represented a dramatic increase from the previous years' premium. The Applicants' position is that this was based on an overvaluation of the value of the Estate by Watts and Partners for NIG. They say that if the Respondent had acted on the advice given by Grayside in 2009 to carry out a full survey of the Estate it should have been possible to negotiate a premium based on a core and shell condition of the Villa (as NIG agreed to do for the October 2010 renewal following the Mellersh & Harding valuation).

80. However, the Respondent had received advice from Harris Balcombe not to do so because this could compromise their negotiating position with NIG. The tribunal does not consider it unreasonable for the Respondent to have followed that advice. The tribunal accepts that carrying out a survey at that time had the potential to jeopardise such negotiations which were, obviously, intended to secure as high an insurance pay out as possible. If the valuation resulted in a very high undervalue then, obviously, the amount that NIG would be willing to pay would be lower than if the undervalue was in a smaller sum. Mr Goddard's evidence (uncontested by the Applicants) was that the lump sum secured in the NIG Settlement was on favourable terms to the Respondent. He informed the tribunal that Harris Balcombe indicated that NIG had agreed to pay an enhanced sum in order to dispose of the claim. This

suggests that that the terms of settlement may not have been as favourable if Harris Balcombe's advice had been disregarded.

81. The tribunal also bears in mind that the October 2009 premium for the Estate (based on the Watts & Partners valuation) totalled £23,359.82. The October 2010 premium (based on the core and shell valuation) was £18,812.03. That is a difference of £4,547.79. Whilst a significant difference, and the tribunal bears in mind the effect of indexation, the difference is not so grossly disproportionate as to justify a determination that the October 2009 premium was a cost that was unreasonably incurred. It is within the range of what can be considered reasonable.

82. On balance, the tribunal concludes that the Respondent acted reasonably in following the advice provided and in paying the October 2009 NIG premium.. The tribunal also considers the costs to have been reasonably incurred.

83. The same applies to the insurance premiums for the October 2010, 2011 and 2012 renewals and the 2013 budget. The tribunal is satisfied that these sums are payable by the Applicants in their apportioned shares and that the sums have been reasonably incurred. However, the apportionment for the 2010 renewal needs to be adjusted. This point is addressed below.

84. The tribunal wishes to stress that it has reached the conclusion that these costs have been reasonably incurred on the evidence available to it. It has done so in the absence of any alternative insurance quotes for insurance of the Villa from the Applicants.

85. The tribunal has considered the table at Appendix I of the Applicants' insurance submissions but considers this to have any limited evidential value. What the Applicants appear to have done in that table is to uplift the 2008 insurance premium by a 35% undervaluation figure and adjusted that figure for index linking. However, that does not take into account fluctuations in the insurance market. Nor can the tribunal be certain that the undervaluation was the sole reason for the 2008 premium being as low as it was.

86. As to the assertion that unreasonable delays have occurred in the Respondent securing reinstatement of the Villa and in instituting and settling the legal claims brought by the Respondent, the tribunal's view is that this is unsubstantiated on the evidence before it. It is difficult to see how the Respondent could pursue legal proceedings until the NIG settlement given Mr Goddard's evidence to the tribunal that NIG rejected claims for legal costs as not being covered under the policy. In any event, there is no evidence to support the Applicants' assertion (apparently derived from an unnamed insurance underwriting professional) that if the Villa had been reinstated within three years the annual insurance premiums would have reverted to pre-fire corrected levels or less.

87. **The tribunal therefore determines** that the costs of the insurance premiums for the service charges ending 2011 and 2012 are payable by the Applicants' in their apportioned shares and that these costs have been reasonably incurred. The tribunal also determines that the amount demanded from the Applicants in respect of the

2013 budget are reasonable (no challenge to the quantum of those estimated costs being brought, save in respect of insurance).

Apportionment

(i) *The October 2010 insurance renewal*

The Applicants' Case

88. The Applicants challenged the apportionment of this premium. Their case is that in the Respondent's apportionment **(R:13)** the declared value for the Villa was 62.3% of the total declared value of the Estate. However when it came to splitting the premium the Villa bears 66.6% of the total premium. That, they say, is out of line with the October 2011 renewal where both ratios are at 66.6% and also the October 2013 renewal where both ratios are at 71.2%.

The Respondent's Case

89. The Respondent's explanation for this variance is that the apportionment of the premium for this year, across the Estate, was calculated according to a poundage value (the ratio of the premium to each £1,000 of declared value). In the following year the apportionment was based on a fixed poundage value of 4.02 across the Estate except for the common parts. From the 2012 renewal onwards the Respondent has followed the advice of its new insurance brokers, St Giles Insurance & Financial Services Limited and split the premium according to the declared values.

Decision and Reasons

90. In the tribunal's determination the approach recommended by St Giles should have been used for the 2010 renewal. The tribunal is not satisfied that apportionment based on a poundage value is reasonable. It is appears unreasonable for the lessees of the Villa to have to pay 66.6% of the total premium when the declared value for the Villa was only 62.3% of the total declared value of the Estate.

91. **The tribunal therefore determines** that for the October 2010 renewal the amount that it is reasonable for the Applicants to pay is 62.3% of the premium (in their apportioned shares). The Respondent should recalculate the Applicants' service charge liability accordingly.

(ii) Apportionment based on floor area

The Applicants' Case

92. On 26.09.11 the Applicants received a letter from the Respondent proposing that the service charge (including insurance premiums) be apportioned according to the floor size of the flats in the Villa as opposed to the method in use at the time which was based on the rateable value of each flat compared to the aggregate value of all the flats in the Villa. The new method was implemented with effect from the 2012 service charge demand.

93. The Applicants' case is that they consider an allocation based on rateable value is reasonable and preferable.

The Respondent's Case

94. The Respondent's position is that apportionment based on a rateable value calculation is permitted under the terms of the Applicants' leases but is not mandatory.

Decision and Reasons

95. The tribunal agrees with the Respondent. The lease requires the Landlord to "*have full regard where it is reasonable and proper to do so, to the rateable value of the flat compared to the aggregate of the rateable values of all the flats in the Villa*". The Respondent is not obliged to apportion according to rateable value and, given that the last domestic property rateable value assessment happened many years ago, it appears to the tribunal an apportionment based on floor size was a reasonable decision for the Respondent to take.

Application under Section 20C and reimbursement of fees

96. The Applicants sought an order under section 20C of the Landlord & Tenant Act 1985 Act that none of the costs of the Respondent incurred in connection with these proceedings should be regarded as relevant costs in determining the amount of service charge payable by the Applicants.

97. Mr Goddard indicated that the Respondent had no objection to the making of such an order. In light of that concession and for the avoidance of doubt, 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 Respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal to the Applicants through the service charge.

98. Having heard the submissions from the parties and taking into account the determinations above (and the degree to which the Applicants have been unsuccessful in their Application) the tribunal does not order the Respondent to refund any fees paid by the Applicants.

Amran Vance (Judge of the First Tier Tribunal)

Date: 27.03.14

Annex - Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 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, 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 – 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 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 – Liability to pay service charges: jurisdiction

(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 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.