FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	**CAM/22UH/LIS/2020/0018**
Property	**:**	**16a and 16b St John's Road, Epping, Essex CM16 5DN**
Applicant	**:**	**Assethold Limited**
Managing Agent	**:**	**Eagerestate**
Representative	**:**	**Scott Cohen, Solicitors**
Respondents	**:**	**1. William Jonathan Hoye & Kirsty Lauren Hoye (Flat 16b)** **2. Nicola Fox (Flat 16c)**
Representative	**:**	**Pro-Leagle**
Type of Application	**:**	**Application for Permission to Appeal**
Tribunal	**:**	**Judge JR Morris** **Ms E Flint DMS FRICS**
Date of Hearing	**:**	**24th June 2021**
Date of Decision	**:**	**3rd September 2021**
Date of Application	**:**	**1st October 2021**
Date of Decision	**:**	**1st November 2021**

DECISION

Decision of the Tribunal

1. The Tribunal has decided not to review its Decision and refuses permission to appeal to the Upper Tribunal because it is of the opinion that there is no realistic prospect of a successful appeal against its Decision.

2. In accordance with section 11 of the Tribunals, Courts and Enforcement Act 2007 and Rule 21 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010, the applicant / respondent may make further

application for permission to appeal to the Upper Tribunal (Lands Chamber). Such application must be made in writing and received by the Upper Tribunal (Lands Chamber) no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission to appeal. Where possible, you should send your application for permission to appeal **by email** to Lands@justice.gov.uk, as this will enable the Upper Tribunal (Lands Chamber) to deal with it more efficiently.

3. Alternatively, the Upper Tribunal (Lands Chamber) may be contacted at: 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL (tel: 020 7612 9710).

Reason for the Decision

4. The reason for the decision is that the Tribunal had considered and taken into account all of the points now raised by the Applicant, when reaching its original decision.

5. The original Tribunal's decision was based on the evidence before it and the Applicant has raised no new legal arguments or additional evidence in support of the application for permission to appeal.

6. For the benefit of the parties and of the Upper Tribunal (Lands Chamber) (assuming that further application for permission to appeal is made), the Tribunal has set out its comments on the specific points raised by the applicant in the application for permission to appeal, in the appendix attached.

Judge J R Morris

APPENDIX TO THE DECISION
REFUSING PERMISSION TO APPEAL

For the benefit of the parties and of the Upper Tribunal (Lands Chamber), the Tribunal records below its comments on the grounds of appeal. References in square brackets are to those paragraphs in the main body of the original Tribunal decision.

Application

1. This Application is by the Respondent of the original proceedings against a decision of the Tribunal dated 3rd September 2021 following a hearing on 24th June 2021.

2. The appeal is limited to determinations in respect of the contractual payability and reasonableness of the service charges demanded in respect of insurance, the fire and safety reports obtained and the management fees of the Respondent's managing agent Eagarstates Ltd.

3. The original application was for a determination of the reasonableness and payability of Service Charges incurred for the period 1st January to 31st December 2018, 2019 and for the costs to be incurred for the year ending 31st December 2020 ("the years in issue"). (Section 27A Landlord and Tenant Act 1985) on 7th August 2020. The Respondent of the original proceedings is hereinafter referred to as the Applicant and the Applicant of the original proceedings are hereinafter referred to as the Respondent.

4. The Tribunal's decision was that it found that the Applicant had omitted to inform the insurers of a material fact which is likely to cause the insurance to be repudiated or reduced. The Tribunal therefore determined the insurance premiums to be unreasonable and not payable.

5. The Tribunal determined that the reasonable Service Charge payable for each of the years in issue by each of the Respondents were for the years ending 31st December:
   2018 £270.00
   2019 £407.58
   2020 £793.40

Preliminary Issue

6. The Respondents submitted that the Application received on 1st October was outside the 28-day time limit.

Decision on Preliminary Issue

7. The Tribunal's decision was sent to the parties on 3rd September and 28 days after that date is 1st October. Therefore, the Tribunal found that the Application was on the 28th day after the decision was sent.

The Grounds for Appeal

8. The Applicant stated the following grounds for appeal.

Ground 1 - Insurance

9. The Applicant identified three elements to the Tribunal's decision in respect of insurance as follows:
   a) The demands for insurance were not made in accordance with the terms of the lease.
   b) The insurance was not reasonable because it was possible that the policies were invalidated by a possible failure by the Respondent to disclose to the Insurer the existence of the easement and
   c) The costs were unreasonable in amount.

a) Contractual Validity

10. The Tribunal was wrong to construe the lease as requiring notification of the date by which the gross premium was payable to the insurers or that more information as to how the Insurance rent was calculated was a precondition of payment. The Applicant referred to paragraph 2.2 of Schedule 6 of the Lease which states: [The Landlord is]
"To serve on the Tenant a notice giving full particulars of the gross cost of the insurance premium payable in respect of the Building (after any discount or commission but including IPT). Such notice shall state:
2.2.1 the date by which the gross premium is payable to the insurers: and
2.2.2 the Insurance Rent payable by the tenant, how it is calculated and the date on which it is payable."

11. The Tribunal erred in law in concluding that as the notice to the Leaseholder (in the form of the service charge demand) stated the gross cost of insurance but did not state the date when the premium was payable to the insurers or broker or how it was calculated then it was invalid.

12. The Tribunal applied an overly technical approach deprecated in *LB Southwark v Dirk Andrea Woelke* [2013] UKUT 0349 (LC) and that the Respondent complied with the essential requirement of the lease in notifying the Applicants of the gross cost of insurance and the date by which it was to be paid- the leaseholders contribution was identified as half the gross cost of insurance.

b) Validity of the Policy

13. The Tribunal held at paragraph 149 of the decision that it finds that the Respondent had omitted to inform the insurers of a material fact, namely the existence of the easement, of which the Applicant made the Respondent aware which is likely to cause the insurance to be repudiated or reduced.

14. There was no factual basis for the finding that the Respondent had omitted to inform the insurers of a material fact; the evidence from the managing agent was that he believed the broker had been aware of the easement.

a. Any effect on risk of the easement was trivial such as to not require declaration under the terms of any of the policies, the risk of a major insurance claim (for example the destruction of the building or damage to the root) is not appreciably affected by a right of passage through the common parts.
b. The Tribunal did not find (and would have been wrong to find) that the insurer would be legally entitled to refuse to pay out; such a finding is a necessary precondition for any finding that the policy of insurance is effectively worthless.

c) Reasonableness of Insurance

15. The Tribunal was wrong to find that the demands in respect of insurance were unreasonable and accordingly irrecoverable.

16. There are two elements to reasonableness, firstly that the decision to incur a charge is a rational one. In this case there is no suggestion that the decision to insure was irrational, the Respondent was contractually obliged to insure. The second is outcome, the recoverable cost being limited to the value of the service actually provided.

17. The Tribunal was wrong to find (insofar as it did) that the cost of insurance was unreasonable as it was not of a reasonable standard.

Ground 2 - Fire and Safety Reports

18. The Tribunal held that it was unreasonable for Fire Safety Reports to be obtained every year and accordingly held that the cost of the July 2019 report was unreasonable, this conclusion was wrong.

19. The Fire Safety Report dated March 2019 identified that a further inspection should be undertaken in the next year. The Respondent was accordingly acting reasonably in commissioning such a report (and could be severely criticised for not doing so).

Ground 3 - Management Fees

20. The Tribunal reduced the amount recoverable by way of management fees. The basis for this reduction was in part the conclusion that the insurance of the building was unsatisfactory which is wrong for the reasons given under Ground 2 above.

21. The Tribunal was further wrong to consider that the general management of the building was poor relative to the amount charged, there was no evidential basis for this finding, for example no repairs unattended to or want of decoration or poor administration. The central complaint is of poor communication which does not justify a reduction in the amount demanded. No comparator evidence was provided for what a reasonable charge might have been.

Decision & Reasons

a) Contractual Validity

22. The Tribunal applied the provisions of the Lease. It found that the amounts were not payable until demanded in accordance with the Lease [72] & [73].

b) Validity of the Policy

23. The Applicants had expressed concern to the Respondent's Managing Agent that the easement was a material fact and that failure to inform the insurer of the easement might invalidate the insurance. To allay the Applicant's justifiable fears and to satisfy the Tribunal, the Managing Agent only had to obtain from the Broker and the Insurer confirmation in writing that they were aware of the easement and that it had been taken into account when the insurance was placed. Whether the risk of the easement was trivial is a matter for the Broker and the Insurer.

24. Only the Respondent or it's Managing Agent can obtain the confirmation sought. The failure to do so led the Tribunal to determine that the insurer was not aware of the easement and that on the balance of probabilities it would invalidate the insurance [144] to [149].

c) Reasonableness of Insurance

25. The Tribunal determined that based upon the evidence adduced the outcome of the Respondent's process of insuring the Building led to a premium that was significantly higher than could be obtained at arm's length in the market place [150] to [164].

Ground 2 - Fire and Safety Reports

26. The Tribunal determined at paragraphs 170 – 172 as follows:

> "170. The Tribunal was of the opinion that each case should be taken on its particular circumstances. This is a relatively new block of just two flats on two storeys. With regard to the Health Safety and Fire Risk Report dated 26th March 2019 provided the only matter of concern related to the recipients of the report ensuring that the doors to the flats met the minimum half hour standard of fire resistance. The responsibility for this rests with the Landlord and Leaseholders. Regular inspections should be undertaken by the competent person under the Regulatory Reform (Fire Safety) Order 2005 to ensure that unauthorised items are not stored in common parts including plant rooms. There is little point in having full assessments which merely pick up these points. The responsibility rests with the competent person with action taking place on an ongoing basis.
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> 171. In the absence of any change in the Building over the next three to four years the Tribunal saw no reason for there to be an assessment every

year. The Tribunal therefore determined that the Health Safety and Fire Risk Report dated 26th March 2019 at a cost of £240.00 was reasonable.

172. The Tribunal found that the Health Safety and Fire Risk Report dated 29th July 2020 was unnecessary and so determined the charge of £300.00 to be unreasonable."

"174. ...The Tribunal determined that the Fire Health and Safety Service to be necessary and reasonable for each of the years at a cost of £246.00 for 2018 and 2019 and £250.00 for 2020."

27. The Tribunal made its decision taking into account the RICS (Royal Institution of Chartered Surveyors) Service Charge Residential Management Code (3rd edition) which states at Paragraph 8.3: -

"You should ensure that periodic risk assessments are carried out by competent persons at every scheme with common parts. The frequency of a formal review should form part of the risk assessment process but should be carried out whenever there are significant changes at the scheme."

28. The Code goes on to state that "First-tier Tribunals have been critical of some managers incurring costs on a regular basis by frequently procuring new risk assessments. Regular reviews do not necessarily entail producing a completely new risk assessment document. The extent of any review should be proportional to the risks identified and the complexity of the installations at each scheme." The Tribunal agrees with this view.

Ground 3 - Management Fees

29. The Tribunal determined at paragraphs 180 – 183 as follows:

"180. The Tribunal noted that the Applicants had been managing the cleaning of the common parts since they purchased the leasehold interest of their flats in 2015.

181. The Tribunal found that communication by e mail alone was restrictive and responding to the Applicants' concerns and providing information was poor. For example, there are only two flats and yet the Health and Safety and Fire Risk Assessment was not provided although it raised a point regarding the fire resistance of the front doors which should have been addressed. In addition, it is cold comfort that an insurance premium is not payable if the property is not properly insured. As stated above, the evidence shows that on the balance of probabilities the insurer is unaware of the material fact that there is a shared access. There was a failure to notify the Applicants of visits to the property by the Valuers and Assessors as required under the Lease. The Applicants were also not informed of inspections by the Managing Agent which might have been a good opportunity to discuss any issues and consult with the Tenant Applicants.

182. In addition, the production of invoices for cleaning the carpets, adjusting the front door and clearing the guttering showed that the Tenants had taken a significant part in ensuring that the Building was maintained.

183. Taking into account the failings in management, the size of the Building, the number of Flats, the involvement of the Tenants in maintaining the Building, and the failure to comply with the RICS Code, the Tribunal considered a Management fee charged for all the Years in Issue to be unreasonable. As the Applicants had themselves effectively managed the building the amount allowed for the managing agents fees are reduced to £120 + VAT (£60.00 per unit) for each year."