FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00BG/LSC/2019/0277**
Property:	**:**	**Canary Riverside Estate, London E14**
Applicant	**:**	**Various leaseholders represented by the Residents Association of Canary Riverside**
Respondents	**:**	**(1) Canary Riverside Estate Management Limited ("CREM")** **(2) Octagon Overseas Limited**
Interested Parties	**:**	**(1) Mr Alan Coates** **(2) Mr Sol Unsdorfer**
Type of application	**:**	**Liability to pay service charges**
Tribunal	**:**	**(1) Judge Amran Vance** **(2) Mrs Evelyn Flint FRICS**
Date and venue of hearing	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Decision	**:**	**12 May 2020**

DECISION ON PRELIMINARY ISSUE

Decision

1. The Applicants have not, by their conduct or otherwise, admitted liability to pay service charge costs concerning insurance for the service charge years 2010/11 to 2015/16 inclusive.

NB: Pages in bold and in square brackets below refer to pages in the hearing bundle before the tribunal.

Background

2. The Canary Riverside Estate ("the Estate") is a mixed-use, purpose-built development comprising 325 flats, a hotel, health club and commercial units. Octagon Overseas Limited ("Octagon") is the freehold owner of the Estate. Canary Riverside Estate Management Limited ("CREM") is the leasehold owner of a large part of the Estate, pursuant to six long leases. The applicants are sub-lessees of residential flats in the Estate, all held under long leases. CREM is and has, at all material times, been the applicants' immediate landlord.

3. This application concerns a challenge to the costs incurred by the Respondents for insuring the Estate for the service charge years 2010/11 to 2019/20 inclusive. The Applicants seek a determination as to whether the insurance premiums were reasonably incurred.

4. The Applicants' leases provide for payment of insurance costs on account, with actual costs to be certified by an accountant, and for the accounts to be sent to lessees, with any balancing payment to be paid, or surplus credited to their account.

5. At a CMH on 26 September 2019, the tribunal directed that it would determine a preliminary issue, namely, "*whether the applicants have, by their conduct or otherwise, admitted liability to pay service charge costs concerning insurance for the service charge years 2010/11 to 2015/16 inclusive"*. For the reasons stated below, we determine that they have not.

6. On 5 August 2016, the tribunal made a management order ("the Management Order") in respect of the Estate under the provisions of s.24 Landlord and Tenant Act 1987 ("the 1987 Act"), appointing the First Interested Party, Mr Alan Coates, as Manager. Since the making of the Management Order there has been a steady succession of applications made to both this tribunal and to the Upper Tribunal (Lands Chamber). This tribunal has varied the Management Order on several occasions, most recently on 9 September 2019, and it has also determined applications made under s.20ZA Landlord and Tenant Act 1985 ("the 1985 Act") and, most recently, under Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

7. In respect of applications before the Upper Tribunal:

(a) on 1 November 2016, the Deputy President refused an application for permission to appeal the Management Order (see *Octagon Overseas v Various Leaseholders of Canary Riverside* [2016] UKUT 0470 (LC)).

(b) on 6 March 2017, in *Octagon Overseas Limited v Coates* [2017] UKUT 0190 (LC) the Deputy President allowed an appeal by Octagon, the owner of the freehold interest in the Estate, and by the head-lessee, CREM, against a decision of the FTT concerning responsibility for insurance of the Estate.

(c) on 1 February 2018, in *Alan Coates v Marathon Estates Limited* [2018] UKUT 0031 (LC) the Deputy President refused the Manager's application for a penal notice to be attached to an order of this tribunal; and

(d) on 4 September 2019, Upper Tribunal Judge Cooke refused to grant permission to appeal a decision of this tribunal to exclude paragraphs of a witness statement relied upon by the Respondents, together with documents exhibited to it, from evidence in proceedings relating to the replacement of Mr Coates by an alternative manager.

8. On 9 September 2019, this tribunal appointed the Second Interested Party, Mr Unsdorfer, as the Manager, in place of Mr Coates.

9. The hearing of the preliminary issue took place on 3 March 2020. Mr Upton, of counsel, represented the Applicants and Mr Bates, of counsel represented the Respondents. Also present were Ms Alison Willis, solicitor at Freeths LLP for the Respondents, Mr Peter Louca, in-house counsel at CREM, Ms Jezard, the representative of the Residents Association of Canary Riverside ("RACR"), Dr Steel, the lessee of Flat 151 Berkeley Tower, and Mr Bell, the lessee of Flat 26 Hanover House.

10. Section 27A of the 1985 Act permits an application to be made to this tribunal for a determination as to whether a service charge is payable, whether or not any payment has been made. Subsections (4) and (5) provide as follows:

(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) .....

(c) has been the subject of determination by a court, or

(d) .....

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

11. The Respondents' position, as set out in paragraphs 13 to 15 of their Statement of Case **[42-44]** is that, for the years in dispute, the Applicants paid the insurance contributions due, without reservation, qualification, or other challenge or protest, and that they have therefore, by their conduct, admitted and/or agreed that the sums in question were payable by them.

12. Mr Bates relied on the decision of the Upper Tribunal in *Cain v Mayor and Burgesses of The London Borough of Islington* [2015] UKUT 542 (LC). At paragraphs 14 to 19 of that decision, HHJ Nigel Gerald concluded that:

    (a) "an agreement or admission may be express, or implied or inferred from the facts and circumstances. In either situation the agreement or admission must be clear, the finding being based upon the objectively ascertained intention of the tenant which may be express or implied or inferred from the conduct of the tenant – usually an act or a series of acts or inaction in the face of specific circumstances or even mere inaction over a long period of time or a combination of the two"[14];

    (b) "Whilst it would generally be inappropriate to make such an implication or inference from a single payment because it could not be said that the conduct of the tenant was sufficiently clear, where there have been repeated payments over a period of time of sums demanded, there may come a time when such an implication or inference is irresistible"[15]

    (c) "it would be open to the F-tT to make such a finding even where there had been no payment at all but there were other facts and circumstances clearly indicating that the tenant had agreed or admitted the amounts claimed. What is required is some conduct which gives rise to the clear implication or inference that that which is demanded is agreed or admitted by the tenant [16]."

    (d) the effect of sub-section (5) is to preclude any such finding "by reason only of [the tenant] having made any payment". The making of a single payment on its own, without more, will never be sufficient to warrant a finding of an agreement or admission. There must always be other circumstances from which such agreement or admission can be implied or inferred. Such circumstances may be a series of unqualified payments over a period of time which, depending upon the circumstances, could be quite short, it always being a question of fact and degree in every case [17].

    (e) "the longer the period over which payments have been made the more readily the court or tribunal will be to hold that the tenant has agreed or admitted that which has been demanded and paid. It is the absence of protest or qualification which provides the additional evidence from which agreement or admission can be implied or inferred [18].

13. At paragraph 19, HHJ Gerald considered the case of *Shersby v Greenhurst Park Residents Company Limited* [2009] (UKUT 241 (LC), the facts of which Mr Bates submitted, are close to what occurred in this case. In *Shersby*, an agreement or admission was found to be established from a combination of a series of payments over a period of time, made without any complaint or reservation, coupled with: (a) a substantial delay before challenge; and (b)

other proceedings, about two years previously, in which the applicant tenant challenged certain costs, but not the insurance premiums he then subsequently sought to challenge.

14. HHJ Gerald considered *Shersby* to be a particularly strong case, because in addition to a series of payments being made without challenge over a long period of time, there were proceedings in which, the Upper Tribunal held, the tenant should have but failed to raise the challenges he subsequently sought to raise.

15. In this case, Mr Paul Curtis, CREM's financial controller, states, in paragraphs 16-18 of his witness statement dated 22 November 2019 **[50]**, that all of the Applicants were up to date with their service charge payments when management of the Estate was handed over to Mr Coates on 1 October 2016, and that he has no record of any payments by the Applicants being made under protest or on any condition or qualification. He also asserts, that the Applicants would have been aware of the insurance sums incurred at, or around the time of payment of the service charge, as they would have received a service charge budget as well as a summary of expenditure before making such payment.

16. The application before us was not made until 26 July 2019, and in Mr Bates submission, the Applicants' payments for the years in dispute, made without complaint, or reservation, bring this case squarely within the ambit of the test in *Cain*, and warrant the finding of an admission or agreement. This argument is, he said, is strengthened when one considers the wider litigation context involving the parties. He referred to the notice of intention, seeking an appointment of a Manager, served under section 22 of the 1987 Act, by lessees represented by RACR, and submits that whilst that notice referred to unreasonable legal and professional fees, failure to carry out works to a reasonable standard (regarding chiller units), missing reserve fund monies, and unreasonable and overcharged service charges, no reference at all is made to unreasonable insurance charge costs. Nor, he said, is there any reference in the tribunal's subsequent decision dated 5 August 2016, to appoint Mr Coates as Manager of the Estate, to unreasonable insurance costs being raised as an issue.

17. He also drew our attention to the 6 March 2017 decision of the Deputy President in *Octagon Overseas Limited v Coates*. At paragraph 19, the Deputy President referred to the section 22 notice and said that *"The grounds relied on in this case made no criticism concerning the insurance of the Estate, other than a complaint about the frequency of revaluations which was not carried forward into the evidence"*. At paragraph 21, he said that the evidence did not suggest there was a serious problem with CREM's performance of its obligations in relation to insurance, and at paragraph 23 he said:

> *"That brings me to the third aspect of the FTT's decision which I consider to amount to an error of law. Although there was no real complaint about the insurance which CREM had arranged in previous years, there clearly was a serious*

problem, with which the FTT was rightly concerned, concerning co-operation between CREM and Mr Coates and CREM's general relationship with the residential leaseholders. The FTT was entitled to be sceptical about CREM's willingness to co-operate in relation to insurance matters. It was entitled to take the view that Mr. Coates should not be dependent on CREM's co-operation for his own public liability insurance or for the handling of claims."

18. In Mr Bates submission, the Applicants had the opportunity to raise a challenge to the reasonableness of insurance costs, before the tribunal who made the original Management Order, and before the Upper Tribunal, but did not do so. That failure, coupled with Applicants' payments without complaint, or reservation, he submits, meets the test in Cain, and is similar to the facts in *Shersby*.

Reasons for Decision

19. We do not concur with Mr Bates' analysis. It is important to note that in this application the Applicants seek to challenge the *actual* insurance costs incurred, not the *estimated* costs. We agree with Mr Upton's submission that it was impossible for the Applicants to agree or admit the amount of insurance costs payable by way of service charge, until the *actual* costs were known, and that for the years in dispute, the tenants were not so aware until they received the certified accounts for the years in question.

20. The accounts for the year ending 31 March 2011 were sent to lessees on 20 February 2014 (some 34 months after the year-end) **[410]**. The Applicants' position **[236]**, which was not disputed by the Respondents, was that the 2011/12 accounts were sent to lessees on 19 November 2015 (43 months after the year-end), the 2012/13 accounts on 19 January 2016 (33 months after the year-end), and the 2013/14 accounts on 7 April 2016 (24 months after the year-end). The 2014/15 accounts appear to have been provided to lessees in April 2016 **[583]**, and the 2015/16 accounts between that April and the end of September 2016 **[591]**.

21. Mr Bates accepts that the audited accounts were late, but stresses that prior to service of the accounts the tenants would have received not only a service charge budget, but a letter constituting a notice under section 20B of the 1985 Act, setting out the actual service charge costs for the year. An example, he said, was the letter dated 25 September 2012, sent by Marathon Estates ("MEL"), the managers of the Estate at that time, to Dr Steel, enclosing a summary of expenditure for the service charge year ending 31 March 2012 **[60]**. However, that letter expressly states that the accompanying summary was not a demand for payment, but a forecast of unaudited expenditure incurred, that was subject to change during the preparation of the final accounts. The same wording appears in letters from MEL to Dr Steele in respect of expenditure for the service charge year ending 31 March 2013 **[64],** 31 March 2014 **[63],** and 31 March 2015 **[72]**.

22. It may well be that figures for items of expenditure stated in those summaries were carried over, without adjustment, into the certified accounts but, in our view, the amount of actual costs incurred does not crystallise until finalisation of the end of year accounts, with the lessees' contributions becoming payable following the service of a demand, in accordance with the provisions of their leases.

23. For the years in issue, the earliest date on which it could be implied or inferred that the Applicants had agreed or admitted the insurance costs were payable is therefore the end of February 2014. This application was made on 26 July 2019, five years and five months later. We accept that the evidence does not suggest that the Applicants raised a protest to the amount of the insurance costs prior to making this application, and there is no evidence to suggest that the payments made were subject to any qualification. However, despite this, in our judgment, the Applicants' delay in pursuing this challenge does not, in all the facts and circumstances, lead us to conclude that it can be inferred or implied that they agreed or admitted that the sums in question were payable by them.

24. In *Cain*, HHJ Gerald's conclusion that payment by Mr Cain of demanded service charges over a six year period, without reservation, qualification, or other protest, was sufficient to constitute an agreement, or admission, was, he said, *"reinforced by the sheer length of time which has elapsed before challenge was first made – between eight years in respect of the 2006/07 service charge and 12 years for the 2001/02 service charge."* [25].

25. In this case, the delay in the Applicants pursuing their challenge is between roughly three years, and five years, five months. We do not consider such delay to be akin to that in *Cain*, and in our judgment, it does not support the inference of an admission or, agreement, by the Applicants.

26. Nor do we consider that the facts and circumstances in this case warrant such a finding. The detailed chronology **[244]** attached to Ms Jezard's witness statement **[262]**, supported by accompanying documents, demonstrates, as submitted by Mr Upton, that for a significant period both before, and after, service of the 2010/11 accounts, lessees repeatedly set out their substantial and wide-ranging grievances about the First Respondent's management of the Estate.

27. Minutes of a meeting held on 2 May 2012, between individuals from CREM, MEL and several lessees, including Ms Jezard **[285]**, indicates that lessees requested provision of the relevant insurance policy documents, details of the insurance cover provided and sums insured, as well as the protocol for insurance renewal and competitive tendering. These requests were repeated on regular occasions in subsequent months, as evidenced by minutes of meetings on 12 September 2012 **[295]** and 7 March 2013 **[314]**.

28. Provision of the certified accounts for the years 2009/10 through to 2012/13 was pursued in a letter from four lessees, including Ms Jezard, to CREM, dated 3 September 2013 **[366]** in which it was asserted that the service charge budgets for the three previous service charge years had been overestimated.

29. In April 2014, after service of the 2010/11 accounts in February 2014, lessees sought to inspect the underlying documentation underlying the accounts **[418-423]** pursuant to the provisions of s.22 of the 1985 Act. This was followed by the service of the section 22 notice on 14 May 2014, and the issue of the appointment of a Manager application on 16 June 2015. That application, as Mr Upton points out in his skeleton argument, continued, in the form of appeals, and applications to vary, all the way up to 9 September 2019.

30. Mr Bates submits that requesting information is not akin to a reservation, and that such an assertion was rejected in *Cain*. In that case, Mr Cain sought to explain his delay in pursuing his challenge, by explaining that he did not previously have the material required to mount a challenge, having made over 70 requests for service charge information. HHJ Gerald concluded that a request for information does not equate to a challenge, especially in circumstances where payment had been made without qualification.

31. However, whilst we agree that the requests pursued by the Applicants in this case, do not constitute a challenge to the amount of costs of insurance payable by them by way of service charge, the repeated efforts to secure information from CREM should not be disregarded. They are relevant to the factual context in which we must ascertain, objectively, whether it can be implied or inferred from the conduct of the lessees, that the sums in question have been admitted or agreed.

32. In our assessment the evidence, when viewed objectively, indicates that lessees were clearly unhappy about CREM's management of the Estate, the lack of provision of certified accounts, and other documentation requested, including in respect of insurance. The minutes of the meetings between lessees, CREM, and MEL between May 2011 to September 2013 evidence lessees repeated attempts to secure the provision of documents regarding insurance renewal, including renewal procedures, securing best value, ensuring financial transparency and the allocation of costs between commercial and residential units. After service of the 2011/12 accounts, lessees sought, and chased, the provision of documentation underlying those accounts.

33. This dissatisfaction with CREM's management of the Estate culminated in the service of the section 22 notice, and the application to appoint a Manager. Viewed objectively, the facts indicate that the lessees were not inactive in pursuing their challenge to CREM's management, including what they saw as the levying of unreasonable service charges. The evidence indicates that rather than challenging the specific costs of insurance by way of a service charge dispute, they elected instead to prioritise the pursuit of an application for the appointment of a Manager.

34. Mr Bates suggests that the Applicants could have raised their dissatisfaction with the amount of insurance costs in their s.22 notice but did not do so. Ms Jezard, in paragraph 30 of her witness statement **[269]**, explains that when lessees were considering the contents of the section 22 notice they *"decided to focus on those costs which we had sufficient information to challenge and*

which we thought would be very easy to prove were unreasonable". In our judgment, that election, does not, in itself, support a finding that there was an admission, or agreement, as to payability of service charge costs not mentioned in the section 22 notice, or which were not raised before the tribunal that was considering whether to make a Management Order. We add, by way of comment, that, in our view, there is merit in Ms Jezard's comment, in her witness statement, that if lessees were to challenge every service charge cost they disputed in a section 22 notice, that it would make section 24 applications longer and more expensive to resolve.

35. Mr Bates also referred us to paragraphs 25 to 29 of Mr Curtis' witness statement **[52]** in which he states that on 12 and 13 January 2015, and in April 2015, RACR inspected supporting documents underlying the 2010/11 accounts, having previously been offered an inspection on 12 September 2014. He states that following the January inspection, RACR asserted that an insurance invoice was missing, following which CREM's solicitors provided a copy on 27 February 2015. He goes on to say that those solicitors wrote to RACR on 31 March 2016 **[184]**, offering an inspection of documents relevant to the 2011/12, 2012/13, and 2013/2014 accounts, an invitation repeated on 5 April 2016 **[190]**. In Mr Bates' submission the lessees had been provided with sufficient documentation to pursue a service charge challenge for those years before this tribunal but did not do so. Instead, they continued to pay the service charge costs demanded, and did not dispute the insurance costs until this application.

36. It is, however, noteworthy that in its decision dated 15 September 2016, the tribunal who made the Management Order recorded at [71] that CREM had failed to comply fully with the terms of the s.22 notice, and that, in its view, lessees *"had not been given sufficient information regarding the invoices and receipts relating to the expenditure on the estate that would enable them to make informed decisions regarding their service charge expenditure"*.

37. Even if Mr Bates' submission is correct, and that by early 2015, lessees had sufficient information to challenge the 2010/11 insurance costs, and sufficient information to challenge the costs for the three subsequent years by March/April 2016, we do not, for the reasons stated above, consider that, in the facts and circumstances of this case, their delay in pursuing this application until July 2019, supports his submission that it can be inferred or implied that they agreed or admitted that the sums in issue are payable.

38. We agree with Mr Upton's submission, in paragraph 22 of his skeleton argument, that when viewed objectively, the evidence indicates that the purpose of the lessees requesting to inspect documents relating to the costs of insurance was so that they could satisfy themselves that these costs were reasonable and/or to ascertain whether there was any basis for disputing the costs. We also agree that the lessees repeated requests for information and documents is inconsistent with an agreement or admission that the amounts of those costs were payable.

39. As to Mr Bates' reference to the 6 March 2017 decision of the Deputy President in *Octagon Overseas Limited v Coates*, all that decision indicates is

that the costs of insurance of the Estate were not pursued in the section 22 notice as a ground justifying the appointment of a Manager, and that the evidence before the Upper Tribunal, in that application, did not indicate a serious problem with CREM's performance of its insurance obligations. In *Shersby*, it was the issue of a separate application by Mr Shersby, to the LVT, raising a challenge to certain services charges, but not the insurance premiums that he later sought to challenge, that was found to support the conclusion that he had agreed or admitted the payability of the premiums.

40. In this case, the application before the tribunal who made the Management Order, which was then appealed to the Upper Tribunal, was not a service charge dispute, it was an application for the appointment of a Manager. We do not consider the fact that the lessees in this case, chose to rely on certain grounds to support the appointment of a Manager, rather than other potential grounds, is comparable to a situation where a lessee such as Mr Shersby sought to challenge service charge costs in an application to the tribunal, that could, and should, have been raised in an earlier application disputing the payability of service charge costs.

Amran Vance

12 May 2020

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

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

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

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

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

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).