FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY) &

IN THE COUNTY COURT at
Watford, sitting at 10 Alfred Place,
London WC1E 7LR

Tribunal reference	**:**	**LON/00AQ/LSC/2020/0255**
Court claim number	**:**	**136MC350**
Property	**:**	**2 Trevor Close, Harrow HA3 6AE**
Applicant/Claimant	**:**	**Nilesh Solanki**
Representative	**:**	**Mr Erskander of Counsel**
Respondent/Defendant	**:**	**Dependable Investments Limited**
Representative	**:**	**Trevor Leigh**
Tribunal members	**:**	**Judge N Hawkes** **Mr M Cairns MCIEH**
In the county court	**:**	**Judge N Hawkes**
Date of decision	**:**	**12 July 2021**

DECISION

This decision takes effect and is 'handed down' from the date it is sent to the parties by the Tribunal office:

Summary of the decisions made by the Tribunal

(i) In respect of the service charge years 2011 to 2019, for the reasons set out below, the Tribunal determines that the gross insurance premium (inclusive of commission) is excessive and therefore the insurance is be unsatisfactory insofar as the commission exceeds 30% the total sum paid or 49% of the net insurance premium.

(ii) The Tribunal does not make a determination that the Applicant is in breach of the terms of his lease.
(iii) The Tribunal does not make an order requiring the Respondent to reimburse the Tribunal fees paid by the Applicant.

Summary of the decisions made by the Court

(iv) The Applicant's claim for damages is dismissed.

(v) There is no order for costs.

The proceedings

1. Proceedings were originally issued by the Applicant against the Respondent on 21 April 2020 in the County Court under Claim Number 136MC350. The Respondent filed a Defence and Counterclaim which is undated.

2. The proceedings were transferred to this Tribunal by order of Deputy District Judge Reissner dated 7 September 2020. Directions were issued by the Tribunal on 30 December 2020 and the matter eventually came to a final hearing on 1 July 2021.

The hearing

3. The Applicant lessee, Mr Solanki, was represented (without charge) by Mr Erskander of Counsel on the morning of the hearing. Mr Eskander was unable to continue to represent the Applicant on the afternoon of the hearing due to unexpected personal commitments. However, over the lunch adjournment, he filed and served a copy of *Williams v Southwark LBC* [2000] 3 WLUK 705 (2001) 33 H.L.R. 2 and some written submissions on the Applicant's behalf. The Respondent freeholder was represented throughout the hearing by Mr Leigh.

The background

4. The property, 2 Trevor Close, Harrow HA3 6AE, is a flat situated building containing ten flats, all of which are let on long leases.

5. Neither party requested an inspection of the property; nor did the Tribunal consider that one was necessary, or that one would have been proportionate to the issues in dispute.

The issues

6. After the proceedings were transferred to the Tribunal, the Tribunal decided to administer the whole claim so that the Tribunal Judge at the

final hearing performed the role of both Tribunal Judge and Judge of the County Court (District Judge). No party objected to this.

7. The dispute between the parties concerns the commission element of sums paid by the Applicant to insure the property in the years 2011 to 2019 and whether the Applicant is in breach of the terms of a covenant to insure.

8. At the hearing, the Applicant confirmed that he seeks a determination that commission in the sum of £822.55 should not have been paid, damages in the sum of £500 representing "compensation for stress and time", and the reimbursement of Tribunal fees.

9. In the Counterclaim, the Respondent seeks a determination that the Applicant is in breach of covenant. On the Respondent's case, there is an ongoing failure to insure the property in accordance with its full reinstatement value. The Respondent also seeks an order for costs.

10. The issues concerning the insurance commission, whether the Applicant is in breach of covenant, and whether Tribunal fees should be reimbursed are matters within the jurisdiction of the Tribunal. Any damages claim and claim for County Court costs are matters for the County Court.

Decisions of the Tribunal

11. By paragraph 16 of the Sixth Schedule to the Applicant's lease, the lessee covenants with the lessor as follows:

"The Lessee shall insure and keep insured the Demised Premises at all times throughout the said term in the joint names of the Lessor and the Lessee from loss or damage by fire storm or tempest and such other usual and insurable risks normally incorporated in a Householder's Comprehensive Policy in the Eagle Star Insurance Company Limited or in some other Insurance Office to be from time to time nominated by the Lessor and through such agency as may be nominated by the Lessor in a sum equal to the full value thereof including Architects' and Surveyors' fees and shall pay all premiums necessary for the above purposes within seven days after the same shall respectively become payable and shall produce to the Lessor on demand the Policy or Policies of such insurance and the receipt for every such payment."

12. The Applicant initially sought to rely upon section 19(1) of the Landlord and Tenant Act 1985 ("the 1985 Act"). The Respondent contended that section 19 cannot be relied upon because the costs payable by the Applicant in connection with insuring the property are not a service charge.

13. Section 19(1) of the 1985 Act provides:

19.— Limitation of service charges: reasonableness.

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

14. Section 18 of the 1985 Act provides (emphasis supplied):

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.

15. In the present case, the landlord does not incur the cost of insuring the lessee's property. The Tribunal expressed the preliminary view that, because the lessee is required to insure the property himself and

contracts directly with the insurance brokers, the costs in connection with insurance are not "relevant costs" and so are not subject to the limitation provided for at section 19 of the 1985 Act. However, the Tribunal was also of the preliminary view that Paragraph 8 of Schedule 1 to the 1985 Act ("Paragraph 8") is applicable in the present case.

16. Paragraph 8 provides (emphasis supplied):

"8.—

(1) ***This paragraph applies where a tenancy of a dwelling requires the tenant to insure the dwelling with an insurer nominated or approved by the landlord.***

(2) The tenant or landlord may apply to the county court or the appropriate tribunal for a determination whether—

(a) the insurance which is available from the nominated or approved insurer for insuring the tenant's dwelling ***is unsatisfactory in any respect****, or*

(b) ***the premiums payable in respect of any such insurance are excessive****.*

(3) No such application may be made in respect of a matter which—

(a) has been agreed or admitted by the tenant,

(b) under an arbitration agreement to which the tenant is a party is to be referred to arbitration, or

(c) has been the subject of determination by a court or arbitral tribunal.

(4) On an application under this paragraph the court or tribunal may make—

(a) an order requiring the landlord to nominate or approve such other insurer as is specified in the order, or

(b) an order requiring him to nominate or approve another insurer who satisfies such requirements in relation to the insurance of the dwelling as are specified in the order.

(6) An agreement by the tenant of a dwelling (other than an arbitration agreement) is void in so far as it purports to provide for a

determination in a particular manner, or on particular evidence, of any question which may be the subject of an application under this paragraph."

17. The Tribunal considered that case law under section 19 of the 1985 Act concerning reasonableness may be relevant under Paragraph 8 when determining whether the insurance is unsatisfactory in any respect or whether the premiums payable in respect of such insurance are excessive.

18. The Tribunal invited submissions from the parties. Both parties were of the opinion that the Tribunal's preliminary analysis was correct and the Applicant confirmed that he only takes issue with the commission element of the insurance costs.

19. The Applicant has prepared a table setting out the net insurance premiums and the sums which are received by way of commission by the insurance broker, Stride Limited ("Stride"), and by the Respondent's managing agents. Mr Leigh agreed the figures put forward by the Applicant in respect of the commission but he and the Applicant presented these figures in a different manner.

20. Mr Leigh states that commission should be considered as a percentage of the total sum paid by the Applicant, inclusive of commission. The commission is 40% of the total sum paid (17.5% of which is paid to the Respondent's managing agents and 22.5% of which is paid to the insurance brokers).

21. The Applicant states that commission should be considered as a percentage of the insurance premium net of commission. It is 66.6% of the net insurance premium (56.25% of which is paid to the insurance brokers and 43.75% of which is paid to the Respondent's managing agents). The Applicant would be content to pay commission at the rate of 20% of the net insurance premium.

22. Mr Erskander placed reliance upon *Williams v Southwark LBC* [2000] 3 WLUK 705 (2001) 33 H.L.R. 2. On the basis of this authority, the Tribunal is of the view that the gross premium (inclusive of commission) will be excessive and therefore the insurance will be unsatisfactory if the Respondent cannot, on the specific facts of this case, establish on the balance of probabilities that services were provided for which the commission represents reasonable remuneration. In the Tribunal's opinion, the relevant question is whether the sums paid by way of commission can be justified on the facts of this case rather than how they are presented.

23. Mr Leigh did not seek to dispute this analysis but contended that the commission is reasonable remuneration for services which have been

provided to the lessees. He stated that the insurance brokers have to issue the policies and send out renewals. We take notice of the fact that Stride will carry out the usual functions of insurance brokers in researching the market and obtaining insurance cover.

24. As regards the managing agents, Mr Leigh stated that the managing agents are often asked by lessees what they think about potential insurance claims; that they chase any lessees who are in arrears to ensure payment, sometimes contacting the lessee's mortgagor; that they incur costs in periodically valuing the property; and that there is no service charge. Mr Leigh stated that there are ten lessees to potentially chase and he indicated that a significant amount of correspondence had been sent to the Applicant alone. He stressed that it is of key concern to a landlord to ensure that the whole building is insured. He stated that the Applicant's lease is unusual and contrasted the present case with a situation in which one insurance policy obtained by the landlord covers the whole building.

25. Mr Leigh's assertions were not supported by any witness evidence. In any event, we do not accept that under the terms of the lease the managing agents are required to deal with queries from lessees concerning potential insurance claims; that they are required ensure the payment of insurance premiums; or that they are entitled to charge for doing so. We also do not agree that there are no provisions concerning the payment of service charge and we referred Mr Leigh to paragraph 9 of Part I of the Sixth Schedule and to the Seventh Schedule of the lease (although we note that these provisions do not concern insurance).

26. By paragraph 1 of the lease, the lessee is required to pay:

"unto the Lessor on demand by way of additional rent a sum equal to all such sums as the Lessor may from time to time pay for insuring and keeping insured the demised maisonette in case the Lessee shall make default in insuring and keeping insured the demised premises pursuant to the covenant on that behalf hereinafter contained."

27. In our view, the managing agents can be expected to correspond with the lessee to request the production of the lessee's insurance policy and "the receipt for every such payment" in accordance with paragraph 16 of the Sixth Schedule to the lease and to check that paragraph 16 (including as regards the value of the property) has been complied with.

28. We accept that ascertaining whether the lessee can demonstrate that appropriate insurance is in place will involve a certain amount of work. However, in the case of default, the Respondent can itself insure the property and can recover from the lessee all sums paid for insuring and keeping the property insured. There is nothing in the lease to justify the managing agents playing a greater role such as providing advice in

respect of potential claims, contacting a mortgagor, or sending out extensive correspondence.

29. Having carefully considered the nature of the services to be provided by the insurance brokers and by the managing agents, we find that the commission should not exceed 30% the total sum paid or 49% of the net insurance premium (with 2/3 of the commission payable to the insurance brokers and 1/3 payable to the managing agents). We are not satisfied that the Respondent has established on the balance of probabilities that a higher rate of commission is justified.

30. Although the issue of limitation was raised on the papers and the Tribunal invited argument with reference to relevant case law, Mr Leigh did not seek to persuade the Tribunal that a determination under Paragraph 8 is statute barred.

31. In respect of the service charge years 2011 to 2019, the Tribunal determines that the gross insurance premium (inclusive of commission) is excessive and therefore the insurance is be unsatisfactory insofar as the commission exceeds 30% the total sum paid or 49% of the net insurance premium. We are not satisfied that, under Paragraph 8, we have power to vary the contact which the Applicant has entered into with Stride so as to require sums to be repaid to the Applicant. We note that the Applicant does not, at this stage, seek an order under Paragraph 8, subparagraph (4).

32. As regards, the Respondent's Counterclaim, the determination sought by the Respondent is that the Applicant is in breach of covenant. Mr Leigh contends that there is an ongoing failure on the part of the Applicant to insure the property in accordance with its full reinstatement value. The Respondent did not refer the Tribunal or the Applicant to any statutory provision but we note that, by section 168 of the Commonhold and Leasehold Reform Act 2002, we have jurisdiction to make such a determination.

33. The only valuation evidence before the Tribunal was an assessment dated 23 June 2020 (and amended on 24 June 2020) provided by the Respondent, prepared by Murray Bodek and checked by William Molland MCIOB AssocRICS. In the absence of any evidence to the contrary, we accept that this valuation evidence is likely on the accurate. It was common ground that the Applicant had not been insuring the property in accordance with this valuation. However, during the course of the hearing, the Applicant gave oral evidence that he had paid the premium in accordance with the Respondent's valuation evidence. He also provided documentary evidence showing that a bank transaction was pending.

34. Mr Leigh submitted that if the transaction was pending, the premium had not been paid. In response, the Applicant gave evidence that he

had paid by debit card, that his account balance had been reduced by the amount of the premium, and that the insurance was in place. We accept on the balance of probabilities on the basis of the Applicant's evidence that the property is now insured in accordance with paragraph 16 of the lease. We therefore do not make a determination that the Applicant is in breach of covenant.

35. The Applicant only avoided a determination that he is in breach of covenant by making payment on the day of the hearing and, in all the circumstances, we do not accept that the Tribunal fees which he has paid should be reimbursed by the Respondent.

Decisions of the Court

36. The Applicant did not provide any legal authority for the proposition that the Court has the power to award him "compensation for stress and time" on the facts of this case and the Court is not satisfied that there is any basis for making such an award. The Accordingly, the Applicant's claim for damages is dismissed.

37. Neither party has obtained the relief sought in the pleadings and neither party has served any costs schedule. In all the circumstances, the Court makes no order for costs.

Name: Judge **Date:** 12 July 2021

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

1. A written application for permission must be made to the First-tier Tribunal at the Regional tribunal office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

3. 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.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers

5. Any application to stay the effect of the decision must be made at the same time as the application for permission to appeal.

Appealing against the County Court decision

1. A written application for permission must be made to the court at the Regional tribunal office which has been dealing with the case.

2. The date that the judgment is sent to the parties is the hand-down date.

3. From the date when the judgment is sent to the parties (the hand-down date), the consideration of any application for permission to appeal is hereby adjourned for 28 days.

4. The application for permission to appeal must arrive at the Regional tribunal office within 28 days after the date this decision is sent to the parties.

5. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking. All applications for permission to appeal will be considered on the papers.

6. If an application is made for permission to appeal and that application is refused, and a party wants to pursue an appeal, then the time to do so will be extended and that party must file an Appellant's Notice at the appropriate County Court (not Tribunal) office within 14 days after the date the refusal of permission decision is sent to the parties.

7. Any application to stay the effect of the order must be made at the same time as the application for permission to appeal.

Appealing against the decisions of the tribunal and the County Court

In this case, both the above routes should be followed.