FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/21UD/LSC/2021/0043
Property	**:**	1 Mews Road, St Leonards on Sea, East Sussex TN38 0EA
Applicants	**:**	Ms Alexandra Clifford and others
Representative	**:**	Ms Alexandra Clifford
Respondent	**:**	G&O Estates Ltd
Representative	**:**	Mr Arjun Nath (Urbanpoint Property Management Ltd, Managing Agents)
Type of Application	**:**	Landlord and Tenant Act 1985 s.27A (service charges)
Tribunal Members	**:**	Judge MA Loveday Mr D Barnden MRICS
Date and venue of hearing	**:**	6 October 2021 (video proceedings)
Date of Decision	**:**	27 October 2021

DETERMINATION

Introduction

1. This is an application for a determination of liability to pay service charges under s.27A Landlord and Tenant Act 1985.

2. The Respondent is the freehold owner of 1 Mews Road, St Leonards on Sea, East Sussex TN38 0EA. The building is described as a 3-storey Victorian building which was converted into six flats in 2007. The Applicants are the registered leasehold owners of Flats A-F within the block.

3. The application seeks a determination in respect of service charges for the 2016 to 2021 service charge years, as well as a determination of liability to pay interim service charges for 2021/22. The sole challenge is to the element of service charges relating to insurance of the premises. The relevant insurance costs /budgeted costs of insurance are agreed as follows:

2016-17	£3,057.77
2017-18	£2,948.82
2018-19	£3,357.88
2019-20	£3,490.80
2020-21	£4,574.34
2021-22 (budgeted*)	£4,600.00
* *See below*	

4. Directions were given on 17 June 2021. Although the matter was originally scheduled to be dealt with under the tribunal's paper track, the matter was eventually listed for a remote hearing on 6 October 2021. At the hearing, the Applicants were represented by Ms Alexandra Clifford of Flat B, and the Respondent was represented by Mr Arjun Nath of the managing agents Urbanpoint Property Management Ltd. The Tribunal is grateful to both Ms Clifford and Mr Nath for their clear, succinct and helpful submissions.

The Lease

5. A copy of a sample lease for Flat B was included in the bundle. The lease dated 4 June 2008 is for a term of 125 years from 29 September 2007. The Lease includes standard form provisions which enable the lessor to recover through the service charge contributions to various heads of relevant cost in Sch.6. By para 6 of Sch.6, these include:

> "6. Insuring and keeping insured the Building and other structures including for the avoidance of doubt the spiral staircase at all times against all the usual comprehensive risks applicable to a reasonably normal insurance policy covering this type of property in the full reinstatement value and such other risks as the lessor shall reasonably decide in the full reinstatement value and if required by the lessee to produce evidence that this covenant is being performed …
> …
>
> 6.2 the Lessor shall determine a reputable Company or office with which the insurance is to be placed at the sum insured …"

6. By para 6 of Sch.7, the service charge year ran to 31 March in each year. The sample lease adopts an apportionment of 15% to arrive at the service charge payable by the lessee of Flat B, although the apportionments for the other flats were not provided to the Tribunal.

The Law

7. Under s.27A Landlord and Tenant Act 1985, an application may be made to the Tribunal for a determination whether a service charge is payable, and if it is, the amount which is payable. Section 18(1) defines "service charge" as a variable "amount payable by a tenant of a dwelling as part of or in addition to the rent … which is payable, directly or indirectly, for … insurance". The familiar reasonableness limitation is at s.19:

> "(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.
> (b) where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard;
> and the amount payable shall be limited accordingly.
> (2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise."

In effect, s.19(1) applies to service charges at year end, whilst s.19(2) applies to 'interim' or 'on account' service charges.

8. The leading modern case in relation to insurance costs is Cos Services Ltd v Nicholson [2017] UKUT 382 (LC); [2018] L. & T.R. 5. In Cos Services, the Upper Tribunal (Lands Chamber) applied a two-stage test as to whether relevant costs are reasonably incurred under s.19(1) of the 1985, The test, which was derived from the Court of Appeal decision in LB Hounslow v Waaler [2017] EWCA Civ 45, was described by HHJ Bridge as follows:

> "[47] … If, in determining whether a cost has been 'reasonably incurred', a tribunal is restricted to an examination of whether the landlord has acted rationally, s.19 will have little or no impact for the reasons identified by the Court of Appeal in Waaler. I agree with the Court of Appeal that this cannot have been the intention of Parliament when it enacted s.19 as it would add nothing to the protection of the tenant that existed previously. It must follow that the tribunal is required to go beyond the issue of the rationality of the landlord's decision-making and to consider in addition whether the sum being charged is, in all the circumstances, a reasonable charge. It is, as the Lands Tribunal identified in Forcelux, necessarily a two-stage test.
>
> 48. Context is, as always, everything, and every decision will be based upon its own facts. It will not be necessary for the landlord to show that the insurance premium sought to be recovered from the tenant is the lowest that can be obtained in the market. However, the tribunal must be

satisfied that the charge in question was reasonably incurred. In doing so, it must consider the terms of para 6 of Sch.6 to the flat leases. and the potential liabilities that are to be insured against. It will require the landlord to explain the process by which the particular policy and premium have been selected, with reference to the steps taken to assess the current market. Tenants may, as happened in this case, place before the tribunal such quotations as they have been able to obtain, but in doing so they must ensure that the policies are genuinely comparable (that they "compare like with like"), in the sense that the risks being covered properly reflect the risks being undertaken pursuant to the covenants contained in the lease."

9. The issues in Cos Services were strikingly similar to those in the present application, indeed the appeal may well have involved the same landlord's 'block' or 'portfolio' insurance policy to the one which features in this application. It is therefore material to look at the way the Upper Tribunal applied the above two-stage test to the insurance premiums in Cos Services:

> "49. It is open to any landlord with a number of properties to negotiate a block policy covering the entirety, or a significant part, of their portfolio. That occurred in Forcelux itself, and the landlord satisfied the tribunal in that case that the charges had been reasonably incurred. It is however necessary for the landlord to satisfy the tribunal that invocation of a block policy has not resulted in a substantially higher premium that has been passed on to the tenants of a particular building without any significant compensating advantages to them.
> ...
> 68. It is clear to the tribunal that the insurance premiums being charged by the landlord to the tenants were excessive, in the sense that considerably lower premiums for similar protection could have been obtained elsewhere. Moreover, insofar as there may have been certain advantages with the NIG policy, they were so insubstantial that they could not justify the amount being charged."

Facts

10. There is no dispute about any of the basic facts.

11. During each of the years in question, the Managing Agent prepared budgets for the forthcoming service charge year which included estimated figures for insurance premiums. Copies of the budgets were provided to the Tribunal and the relevant parts can be summarised as:

Budget date	*S/C year*	*Insurance budget*
12.12.16	2016-17	£2,990.00
31.07.17	2017-18	£3,100.00
28.02.18	2018-19	£3,100.00
12.03.19	2019-20	£3,450.00
13.03.20	2020-21	£3,600.00
24.03.21	2021-22	£4,600.00

12. Mr Nath explained that insurance was placed by the landlord, rather than the managing agent, as part of a portfolio or block insurance policy across its various property interests. In each year, insurance brokers tested the insurance market for competitive cover and pricing for the group property portfolio at renewal every year. For example, in 2021/22, the brokers approached the following insurers providing a full broking presentation and claims experience for all properties in the portfolio:
    a. Aegis Insurance
    b. Allianz Insurance
    c. Aviva Insurance
    d. AXA Insurance
    e. Covea Insurance
    f. Zurich Insurance
    g. RSA
    h. Rentguard
    i. Hiscox
    j. Vasek
    k. QBE
    l. Incepta for London Market Insurers, and
    m. Carroll's for Lloyds underwriters

13. The Respondent produced copies of the policy schedules. Insurance was placed through the brokers with NIG with policy excesses of up to £1,000. The part of the policies in each year which related to the premises can be summarised as follows:

Date	*Period*	*Building Sum Insured*	*Premium*
20.03.16	10.04.16 to 09.04.17	£1,179,640	£3,057.77
18.03.17	10.04.17 to 09.04.18	£1,201,226	£2,948.82
29.03.18	10.04.18 to 09.04.19	£1,244,350	£3,357.89
29.03.19	10.04.19 to 09.04.20	£1,294,124	£3,490.80
06.04.20	10.04.20 to 09.04.21	£1,339,418	£4,574.34
	10.04.21 to 09.04.22		£4,696.09

14. Mr Nath explained the block or portfolio policy had certain advantages over what he described as a "standard" policy for a block of flats. He listed them as follows:
    a. Insurers undertake not to cancel or restrict in any way the cover under the policy irrespective of the nature of any sub-letting, and the insurance will not be invalidated by any increase in risk due to acts of the leaseholders or any tenants.
    b. The insurance will not be invalidated or restricted or cancelled in the event of any part of the property becoming unoccupied for any period of time, whether or not the insurers are aware of any such non occupancy or being used for business or trade purposes.
    c. Insurers undertake not to cancel the insurance or lapse the policy due to late payment of premium and undertake to maintain insurance for the benefit of the freeholders. The exception would be in the event of fraud, criminal act, wilful or malicious act or neglect on the part of the

Freeholders when insurers would reserve their right to cancel the insurance, after a full consideration of the facts.

d. The insurance provided for cover in respect of loss of rent, including loss of ground rent and service charges receivable by the Freeholders and/or their agents and alternative accommodation for the owner occupier leaseholders for an amount of not more than 20% of the buildings declared value.
e. The insurance includes cover for loss of or damage to the property as a result of acts of terrorism, subject to the terms and conditions of the policy wording.
f. The insurance provides extensions of cover to provide the interest of the Freeholders as well as the leaseholders, including automatic reinstatement of sum insured following a loss, contract works cover, capital additions, privity of contract, inadvertent omission to insure, failure of third parties to insure, and property owner's legal liability for a limit of £10,000,000.
g. Invalidation and non-vitiation clauses to ensure that the Freeholders are fully insured irrespective of any breach of the Insurance Act 2015 and that remedies under the Act will not be invoked against the freeholders.
h. No exclusions or restrictions of cover or increased excesses in respect of unoccupied property, sub-letting, or accidental damage caused by occupiers (whether leaseholders or subtenants).
i. No restriction of cover due to non-standard construction of the premise or the presence of flat roofs (no matter what surface area).
j. No conditions precedent to liability relating to security or fire safety requirements in respect of the property, such as door and window locks, or alarms.

15. It can be seen from the above that the 2020-21 insurance premiums (both budgeted and actual) rose sharply compared to previous years. Although there was some suggestion the cost of insurance had been queried in the past, the first enquiry about insurance in the hearing bundle was dated 18 August 2020, when Mr John Standaloft (Flat F) emailed the agents seeking details of the current policy and the renewal cost. Mr Nath replied on the same day with a summary of the 2020-21 policy, which he suggested could be passed onto any other broker or insurer to obtain a "like for like estimate". The summary of insurance terms included substantially the list of advantages set out above, but it did not mention any claims history.

16. It is unclear whether Mr Standaloft followed up that email in the summer of 2020. But in event, on 2 April 2021 (a few days before the 2021/22 insurance year began), he again emailed the agents suggesting the landlord obtained three quotations before renewing the policy. On 7 April 2021, Mr Standaloft followed this up with a quotation from the brokers GBS Insurance Services for providing cover with AXA for the period 10 April 2021 to 9 April 2022. The quoted premium was £1,365.72, adopting a Building Sum Insured of £1,488,243 and similar excesses to the NIG block policies. The AXA quotation was expressly "subject to [there being] no claims in the past 3 years". The agents referred the AXA quotation to the landlord, but in the meantime, the

2021-22 cover was renewed with NIG on 10 April 2021 at a premium of £4,696.09.

17. In fact, the premises had a significant insurance claims history (details of which were provided to the Tribunal in a spreadsheet). The Applicants' attention was drawn to this issue, as result of which they obtained a further estimate from Aviva Insurance dated 17 August 2021. That quotation indicated a premium of £2,899.90. The quotation was passed back to the managing agents. In response, the landlord asked its brokers to seek a matching quotation for cover. Four insurers declined to offer cover. NIG quoted £7,950.17 for a standalone policy for the premises. But Zurich Insurance quoted £3,005.46 plus a £20 fee. In short, by mid-2021, both parties had obtained quotations for cover on "standard" terms which reflected the claims history, and which differed by only £125.56 (4%).

The Applicants' case

18. It is no disrespect to the Applicants' arguments to say that their case was very simple indeed. Ms Clifford accepted the landlord had placed insurance in accordance with the terms of para 6 of Sch.6 to the Lease. She further accepted the Respondent did not need to pick the cheapest insurance. But the Applicants argued the relevant cost of insurance premiums were excessive. The April 2021 or August 2021 quotations obtained by the Applicants (£1,365.72 and £2,899.90) were far less than the premium for the NIG cover for 2021-22 (£4,696.09). The landlord's own Zurich quotation (£3,025.46) also showed the premiums were excessive. Moreover, the August 2021 Aviva quotation reflected a recent poor claims history, suggesting the premiums in earlier years ought to have been even lower than that.

19. The Applicants invited the Tribunal to reflect the alleged overcharging by making a pro-rata reduction to the insurance element of the service charges in each of the service charge years. In the application itself, this discount was derived from a comparison between the Aviva 2021-22 insurance quotation (£1,365.72) and the budgeted insurance figure for 2021-22 (£4,600). The Application therefore referred to a reduction to 29.7% of the budgeted insurance costs in each of the earlier service charge years:

	Budgeted insurance	*% allowance*	*Applicants' case*
2016-17	£2,990.00	29.7%	£887.72
2017-18	£3,100.00	29.7%	£920.38
2018-19	£3,100.00	29.7%	£920.38
2019-20	£3,450.00	29.7%	£1,024.29
2020-21	£3,600.00	29.7%	£1,068.82
2021-22	£4,600.00	29.7%	£1,366.20 (interim s/c)

However, at the hearing Ms Clifford accepted any such discount should (i) be derived from a comparison between the Zurich 2021-22 insurance quotation (£3,025.46) and the actual NIG 2021-22 premium (£4,696.09), and that (ii) it should be applied to the actual insurance costs in each of the 2016-21 service charge years. On this basis, the Tribunal calculates the Applicants' revised case

is that the relevant costs of insurance should be reduced to 64.4% of the actual NIG insurance premiums in the 2016-21 service charge years, and that the budgeted insurance costs for 2021-22 should be £3,025.46:

	Insurance premium	*% allowance*	*Applicants' revised case*
2016-17	£3,057.77	64.4%	£1,969.97
2017-18	£2,948.82	64.4%	£1,899.78
2018-19	£3,357.88	64.4%	£2,163.32
2019-20	£3,490.80	64.4%	£2,248.95
2020-21	£4,574.34	64.4%	£2,947.02
2021-22	£4,696.09	64.4%	£3,025.46 (interim s/c)

The Respondent's case

20. Mr Nath submitted that under the lease, the lessor was responsible for placing the insurance, and had a wide discretion. It chose to place the insurance by way of a block policy across its whole property portfolio. The block policy provided the various benefits set out above, which did not feature in the alternative AXA quotation. Similarly, the Aviva and Zurich quotations did not compare 'like for like'. The NIG policies were "more generous". In particular, the premiums did not reflect the claims history for an individual property. In this case, although a *pro rata* adjustment might seem fair, one could not simply apply an adjustment based on the 2021-22 insurance year to previous years. This was because (for example) the claims history differed in each year.

Discussion

21. For each of the service charge years, there is no dispute the AXA policies met the terms of para 6 of Sch.6 to the Lease.

22. As far as the first stage in Cos Services is concerned, the Tribunal has no doubt the lessor's decision to place insurance with NIG as part of a block or portfolio insurance policy was perfectly rational. Although only limited evidence was given about the decision-making process involved, it does appear the Respondent placed cover through reputable brokers, who tested the market for a block or portfolio policy. Indeed, Ms Clifford did not suggest the decision to place the insurance with NIG as part of a block policy was irrational.

23. However, the Tribunal is required to go beyond the question of rationality. Under s.19(1)(a) of the 1985 Act, it must consider whether the relevant costs of insurance were in all the circumstances "reasonably incurred". Under s.19(2), it must consider whether the element of interim service charges relating to insurance are in all the circumstances "reasonable". In the words of the Upper Tribunal in Cos Services, "it is … necessary for the landlord to satisfy the tribunal that invocation of a block policy has not resulted in a substantially higher premium that has been passed on to the tenants of a particular building without any significant compensating advantages to them."

24. Dealing first with the 2016-21 premiums, the tenants placed three insurance quotations before the Tribunal to support the contention that the costs were

not reasonably incurred under s.19(1). Two (AXA and Aviva) were obtained by the lessees, and one (Zurich) was obtained by the landlord. The real difficulty here is that none of these three quotations directly deal with the cost of insurance in 2016-21. They are quotations for a different year (against a background that insurance premiums can increase or decrease significantly in any given year), they are quotations for policies on different terms (as identified by Mr Nath) and one of them reflected a different claims history. Moreover, even though the Zurich and Aviva quotations addressed the issue of the claims history in 2021-22, they did not address the rather different claims history in earlier years. Regrettably, the Tribunal did not have the benefit of evidence from an insurance broker to explain the possible effect of any of these considerations on the likely level of premium, or to explain why the NIG premiums rose so significantly in 2020-21. Evidence that insurance could be obtained more cheaply in 2021-22 is not in itself evidence it could have been obtained more cheaply in previous years. In short, the Tribunal rejects the contention that the insurance costs for 2016-21 were not reasonably incurred under the second stage in Cos Services.

25. As to the 2021-22 interim charges, the test under s.19(2) of the 1985 Act is strictly speaking slightly different to that under s.19(1) Technically, the issue is whether the element of the 2021-22 interim service charges relating to the estimated insurance premiums was "reasonable".

26. The estimated costs of insurance for 2021-22 are set out in the budget prepared on 24 March 2021, and it assumed the 2021-22 insurance premium would be £4,600. The Applicant essentially relies on the same three pieces of evidence to show the 2021-22 insurance provision was not reasonable. Of these, it is common ground the AXA quotation fails to have regard to the claims history for the premises, so the Tribunal disregards it. But the Aviva quotation (£2,899.90) and the Zurich quotation (£3,025.46) are very close to each other, and both properly reflect the previous claims history. Since it is accepted both quotations would provide cover which complies with the terms of the Lease, they are highly relevant to the question whether the provision of £4,600 for insurance in the 2021-22 budget was a reasonable one.

27. The relevant assumption made by the landlord in the 2021-22 budget was that the premises would be insured under the NIG portfolio policy. The Tribunal is satisfied on the balance of probabilities that this assumption unreasonably resulted in a substantially higher interim 2021-21 service charge than would otherwise be the case. The risks covered by the NIG, Aviva and Zurich quotations (by common consent) all reflect the risks undertaken pursuant to the covenants contained in the lease. But the £4,600 figure in the budget derived from the NIG portfolio policy is very much higher than either the Aviva or Zurich quotations. The Respondent argues the difference is explained by the beneficial terms of the NIG policy. But the Tribunal considers there are (in the words of the Upper Tribunal in Cos Services at [49]) no "significant compensating advantages" to the lessees with these 'enhanced' terms. Many of the matters identified by Mr Nath at para 14 above benefit the lessor, rather than the lessees, and the remaining items cannot be described as "significant compensating advantages". It follows the Tribunal considers a reasonable provision for insurance in 2021-22 would be a premium for a 'standard' policy within the range of

the Aviva and Zurich insurance quotations. Taking the higher of the two, a reasonable insurance premium for 2021-22 would be no more than £3,025.46.

28. The Tribunal therefore concludes that under s.19(2) of the 1985 Act, the provision for insurance in the 2021-22 interim service charge is an amount which is greater than is reasonable. The lessees are liable to contribute towards insurance costs of £3,025.46 for the 2021-22 interim charges, according to the percentage apportionments for each of the flats.

29. Mr Nath indicated the Respondent would continue with the NIG portfolio policy pending the Tribunal's decision. The Tribunal cannot of course direct the landlord to place insurance with any particular provider or to place insurance on any particular terms. Indeed, it may be the case that in future years there is a convergence between the premium payable under the NIG portfolio insurance policy and the premium payable for an individual policy for the block on (what the parties have described as) 'standard' terms. But suffice it to say that in future the Respondent would be well advised to consider insuring this particular block of flats under an individual insurance policy on 'standard' terms.

Conclusions

30. The Tribunal finds the Applicants are liable to contribute to the relevant cost of insurance in the 2016-21 service charge years as set out in paragraph 13 above.

31. The Tribunal finds the interim 2021-22 service charges payable by the Applicants are greater than is reasonable. The Applicants' contributions towards the estimated insurance costs for 2021-22 are limited to £3,025.46. The Applicants are liable to pay their contributions towards this sum according to the percentage apportionments for each of the flats.

Judge Mark Loveday
27 October 2021

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.