FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)
sitting at 10 Alfred Place, London WC1E7LR

Case Reference	**:**	**LON/OOBD/LSC/2019/0187**
Property	**:**	**Flats A and B, 5 Royal Parade, Kew, Richmond, Surrey, TW9 3QD**
Applicant	**:**	**Barbara Grant and Kenneth Shortt("the Applicant")**
Representative	**:**	**Barbara Grant**
Respondent	**:**	**JF Stone Investments Limited**
Representative	**:**	**Julian Stone**
Type of Application	**:**	**Determination of service charge payable and S 20C - landlord's costs.**
Tribunal Members	**:**	**Judge Jim Shepherd** **Michael Taylor FRICS**
Date of Hearing	**:**	**17th October 2019**
Date : 5th November 2019		

DECISION

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1. The Tribunal determines that the cost of insurance charged to the Applicant for the years 2017-2018 and 2018-2019 was not reasonable. A reasonable charge would be £600 per annum for both years.

2. The Tribunal allows the Appellant's application under Landlord and Tenant Act 1985,s.20C.

The Application

3. This is the third in a series of applications relating to the payability of insurance costs. All three applications have been brought by Barbara Grant (in the present case including Kenneth Shortt) the leasehold owners of Flat A and B, 5 Royal Parade, Kew ("The premises") respectively. The two previous cases were LON/00BD/LSC/2014 and LON/00BD/LSC/2017/0144. The former was settled. The latter was determined by a differently constituted tribunal where the members were Judge Tagliavini and Mr K Cartwright JP FRICS. They decided that the insurance premium for 2016-2017 was reasonable. The case was decided on the papers and therefore the evidence was not tested. The Tribunal in that case preferred the evidence of Mr Stone and his broker to that of Ms Grant and found that her insurance premium quotes could not be regarded as truly comparable. They also decided that the premium charge for 2015-2016 was the best available for that year in respect of the subject property. The Tribunal did however grant Ms Grant's application pursuant to s20C.

4. Whilst the present Tribunal notes the determination in LON/00BD/LSC/2017/0144 it is not bound by it not least because the present Tribunal is dealing with different periods - 2017-2018 and 2018/2019. The Applicants had sought through their application to reopen the previous determinations but Judge John Hewitt quite rightly limited the issues to be determined to the reasonableness of the cost of insurance in the years 2017/2018 and 2018/2019; the application pursuant to 20C of the Landlord and Tenant Act 1985 and the question of reimbursement of fees.

5. Ms Grant has effectively made the application on behalf of herself and Mr Shortt. The latter has taken no active role in the case except for writing to the Tribunal. He didn't attend the hearing of the application on 17th October 2019. The Tribunal found it difficult to ascertain whether Mr Shortt was properly joined to the proceedings and whether he gave his consent in this regard. In any event his failure to attend without explanation meant that the Tribunal gave little weight to his correspondence. Hereafter when the Tribunal refers to *the Applicant* it will be making reference to Ms Grant alone.

6. Ms Grant's application is dated 21st May 2019. She supported the application with three statements of case (Page 3.2a. onwards in the bundle). Mr Stone also produced a statement of case (7.25 b). At all points he has relied on the advice and guidance of his broker Mr Oliver of Gauntlet Shere.

Background

7. The Applicant occupies Flat B pursuant to a lease dated 2nd September 1983 (page 9.9 onwards). She doesn't reside there but has sublet. Pursuant to Clause 3 (c) (ii) the Applicant covenants to pay one third of the premium for maintaining the insurance of the premises and *all insurable fixtures thereon against loss or damage by fire storm tempest etc and such other risks as the Lessor thinks fit in some insurance office of repute…*

8. The premium payable in 2017-2018 was £2429.10 a third share of which is £809.70.

9. The premium payable in 2018-2019 was £2675, a third share of which is £891.67.

The submissions

The Applicant's case

10. The Applicant who is dyslexic produced a very useful bundle and with the assistance of a note taker put forward her case in a compellingly clear manner both in writing and in person.

11. The Applicant initially put forward a challenge to the effect that the premises were underinsured. In the event the parties have jointly appointed a Chartered Surveyor, Mr Toogood who has assessed the rebuilding valuation at £725000. In light of this evidence the issue of undervaluation was not pursued by the Applicant.

12. The Applicant's real challenge was about the level of the premiums paid. She submitted that these had increased by 158% since 2011. She prepared a useful table showing the increase year on year (6.2.a). Her broker told her that a 1-3% annual increase would be expected. She produced no supporting evidence from her broker in this regard. It is clear from the table that the most substantial increases in premium took place in 2013-2014 and 2014-2015. These years were not being assessed by the Tribunal. According to the Table which was not substantively challenged by the Respondent the increase in premium for the two years under analysis were 7.8 % in 2017-2018 and 10.10 % in 2018-2019.

13. The Applicant was also concerned about the effect of the Respondent's commercial interests on the premium. Pausing here it is worth giving some background. The Respondent is the managing director of the American Dry Cleaning Company who operate a chain of 42 dry cleaning shops in London. The flats are located above one of these shops where one person is employed. In many cases (as in the present case) the shops are essentially conduit points which simply collect the clothes and deliver them to a central depot where they are cleaned and then returned. The premises are insured under a block policy involving all of the shops and premises. In her submissions the Applicant highlighted the number of references to commercial provisions in the Allianz policy at page 8.1 onwards.

14. The Applicant put forward comparables from SJL Insurance Services (£1291.83) (5.1.a); direct line (£1421.35) (5.2.a) and Business Compare (£1157.05) She obtained these quotes without having told the companies about claims experienced during and before the relevant years. It is her case that she did not have enough information to do this and that this was the fault of the Respondent. In actual fact during the hearing there was an analysis of the correspondence leading up to the application . This showed that there is a letter from Gauntlet Sphere dated 20th August 2019 detailing the claims position in relation to the premises. The Applicant who saw this letter neither challenged the detail provided nor gave details to the insurance companies that had been asked to provide comparables. She said that she was not entitled to do this because she was not the freeholder however both she and Mr Shortt had been made a party to the insurance contract. The upshot of this is that the

Tribunal is left with a grey area - namely the effect of the claims on the premiums quoted by the "comparables".

The Respondent's case

15. As with the Applicant the Tribunal is grateful for the contribution of Mr Stone. During the hearing he sought to give an honest account. He accepted that he relied a lot on his broker and could not always give the level of detail required. He was clearly frustrated by the fact that this was the third set of proceedings on essentially the same insurance issue. He initially placed great stock on the previous Tribunal's decision that the premium of £2252.40 was reasonable but accepted that we were not bound by that decision.

16. In its written submission the Respondent said that any coverage for stock, business contents, loss of profit, employers or public liability as a retail outlet had not been charged back to the tenants. The Respondent also submitted in his written representations that at common law there was no obligation to obtain the cheapest possible quote.

17. At the hearing Mr Stone emphasised that he did not consider the Applicant's comparables to be like for like because despite being given the information via the letter on 20th August 2019 the Applicant had not passed the detail in relation to the claims to the Insurance Companies. In particular there was a potential claim on the Property Owner's Liability insurance in relation to alleged damage to a neighbouring property (29/3/17) which had resulted from a report by Mr Shortt. The notification had subsequently been withdrawn which was likely to reduce the premiums for 2019-2010 There had also been an escape of water as a result of a burst pipe which had been settled at £51011.52 (27/5/18). There was some discussion during the hearing as to validity of this claim however the Tribunal had no real contrary evidence to suggest that the claim was genuine. The Tribunal was subsequently sent photographs which were not very clear apparently showing damage within the dry cleaning shop.

18. Mr Stone denied that commercial aspects of the business had increased the premiums for the Applicant. He said that the company had separate business

interruption insurance through Duel. It would seem however that this is also part of the Allianz policy. Furthermore the policy schedule appears to cover such things as strikers locked out and workers taking part in labour disturbances as well as employer's liability insurance. Mr Oliver was unable to properly answer why these figure were in the policy if the commercial aspects are not included.

Post hearing correspondence

19. Both parties wrote to the Tribunal after the hearing giving further information in relation to the previous claims. In addition Mr Stone shared an email he had received from Mr Oliver dated 18th October 2019. He said that public liability insurance was not included in the charge added to the leaseholders; that the invoice to the leaseholders was purely in relation to buildings insurance, rental income, alternative accommodation after a claim, property owner's liability and employer's liability. The latter was included as an extension at nil cost and applied to 'domestic staff' such as cleaners of any communal areas or gardeners etc. He said that the property owners liability is an extension to public liability but only applicable if a defect or negligence relating to the building 5 Royal Parade caused loss or damage to a third party. Finally Mr Oliver broke down the premium.

20. He summarised by stating that *The rates above are high but with the claims experience we presented to the market in 2018 we could not get any insurers to get even close to this rate. I suspect this is why the claimants have struggled to provide a like for like quote as most insurers would decline to quote on this risk*.

21. The Applicant was allowed to reply to this letter and did so in a statement of case dated 30th October 2019. She challenged Mr Oliver's statement that he had not charged for commercial elements saying that the Employer's Liability was included on the insurance invoice and restating that the Allianz policy included insurance for the commercial aspect of the building. She said that there had been no justification for the year on year increase in the premium. She said that she had tried to contact Allianz but was unable to get any information and they said it was for the broker to pass on the information required. She also highlighted the size of the water ingress claim and said that it was unusual that a loss adjuster had not been instructed.

The Law

22. Section 19 of the Landlord and Tenant Act 1985 states the following:

> 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—
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> (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.
>
> (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.

23. The test under s.19 (1) is one of reasonableness and not one of rationality : *Waaler v Hounslow LBC* [2017] EWCA Civ 45;[2017] 1 W.L.R. 2817.

24. The landlord is not obliged to shop around for insurance as long as it is obtained in the market at arms length then the premiums are reasonably incurred: *Sinclair Gardens Investments (Kensington) Ltd v Avon Estates (London) Ltd* [2016] UKUT 317 (LC) where it was stated:

> *The appellant's complaint is that it might be possible to obtain a cheaper rate, but it is not for the landlord to establish (as has been expressly found in Berrycroft) that the insurance premium was the cheapest that could be found*

in order for the costs to have been reasonably incurred. The words "properly testing the market" used by Mr Francis in Forceclux in 2001 does not in any way detract from the decisions of the Court of Appeal in Berrycroft and Havenridge that the landlord must prove either that the rate is representative of the market rate, or that the contract was negotiated at arm's length and in the market place [at [30]]

25. The RICS Management Code. Section 12 deals with insurance. The Tribunal notes the following: (i) Part 12.4 provides that there is a need for regular reviews of the level of insurance and reinstatement value. The managing agent must ensure there is adequate insurance and that leaseholders are not paying for excessive or unnecessary coverage. (ii) Regard must also be had to the insurance company's record of handling claims in addition to the level of premium.(iii) Part 12.6 provides that any insurance fees (including commission received) should be declared to the client and leaseholders on an annual basis and should reflect the work carried out.

Analysis

26. The Tribunal were left with two significant grey areas in the evidence. First it was not possible to establish how the claims had affected the level of premium charged and in turn how they would have affected the comparables relied upon by the Applicant. It was a central limb of the Respondent's case that the comparables relied upon by the Applicant were not on a "like for like" basis because the claims had not been dealt with. Yet the Applicant says she was unable to obtain further information from Allianz. The Tribunal accepts this is true but this means that the first grey areas remains.

27. The Tribunal is also surprised about the size of the water ingress claim. In particular it is surprising that the leaseholders appeared to have no knowledge about it. The claim appeared to have largely involved the costs of remedial works in the dry cleaners and was therefore directly associated with the commercial part of the insuring the building. This renders any attempt by the Respondent to suggest that

the leaseholder's insurance is unaffected by the commercial aspects of the building to be questionable.

28. This leads onto the second grey area in the evidence. Namely the affect of the commercial aspects of the building on the premium paid. Mr Stone and Mr Oliver were anxious to seek to separate the commercial function from its effect on the residential insurance. To a certain degree one would expect that the fact that the flats were above the dry cleaners would have some effect on the insurance of the building. Whilst the lease terms require the leaseholders to pay a one third share of the cost of insuring the building (Clause 3 (c) (ii)) that is not the end of the matter because the Applicant is challenging the reasonableness of the charges pursuant to s.19(1) LTA 1985.

29. The Applicant is correct in stating that the invoice from the Respondent for 2017-2018 contains insurance provision for employer's liability (6.1.i). She is also correct in stating that the Allianz terms contain a number of references to commercial aspects (page 8 onwards). The Tribunal had some difficulty equating this with the explanations given by the Respondents. The Tribunal were also concerned that Mr Stone did not provide a clear enough explanation of the block policy and how the residential units figured within that policy.

30. Faced with these grey areas in the evidence the Tribunal felt the necessity to apply its own knowledge to the level of premium being charged. It considered that the premiums charged in 2017-2018 and 2018-2019 were not reasonable in all the circumstances. There is clearly an affect on the premium of the flats being above commercial premises. Nevertheless the Tribunal considers that a reasonable premium would be £1800 per annum for the building which equates to £600 per year for each leaseholder.

31. The Tribunal also considers that the case was reasonably brought by Ms Grant and that her application pursuant to LTA 1985,s.20C should be allowed.

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).

Judge Shepherd

5th November 2019