FIRST-TIER TRIBUNAL
PROPERTY CHAMBER

(RESIDENTIAL PROPERTY)

Case Reference	**:**	CHI/19UD/LSC/2020/0077
Property	**:**	62-80, Erica Drive, Corfe Mullen, Wimborne, Dorset BH21 3TQ
Applicants	**:**	Mr Leslie Charles Fathers
Representative	**:**	
Respondent	**:**	G&O Rents Limited
Representative	**:**	Urbanpoint Property Management Limited
Type of Application	**:**	Service charges
Tribunal Member(s)	**:**	Judge D. Agnew Mr M Ayers FRICS
Date of Decision	**:**	3rd December 2020

DETERMINATION

Background

1. By an application dated 10 August 2020 the Applicant applied to the Tribunal for a determination under section 27A of the Landlord and Tenant Act 1985 ("the Act") as to the payability and reasonableness of service charges levied by the Respondent as landlord of the Applicant's property at 74 Erica Drive, Corfe Mullen, Wimborne, Dorset BH21 3TQ. The Applicant's property is a flat within a block of 10 at 62-80 Erica Drive aforesaid ("the Property"). The service charge years in question are 2014/15 to 2020/21. The Respondent is the landlord. The landlord's managing agents are Urbanpoint Property Management Limited (hereinafter referred to as "Urbanpoint")

2. The application form identified that the main item of service charge in contention was the amount of premiums charged for buildings insurance. In addition, the amount of management charges was said to be in issue. However, as only a brief reason for challenging the management charges was set out in the application form without any detail and as no mention of this was included in the Applicant's statement of case the Tribunal has made no determination in respect of management fees. Finally, on behalf of himself and all other lessees in the block, the Applicant seeks an order under section 20C of the Act which gives the Tribunal the power to order that the landlord's costs of these proceedings should not be included in any future service charge demand.

3. Directions were issued on 3 September 2020 which included a direction that unless either party objected within 28 days the matter would be determined by way of a paper determination without an oral hearing under Rule 31 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013. Neither party did object to a paper determination.

4. Directions also provided for the parties to serve statements of case which was duly done and the case was set down for determination on 2 December 2020.

The relevant law

5. By section 19By Section 27A of the 1985 Act it is provided that:-
"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) ……(not relevant to this case)
And the amount payable shall be limited accordingly."

6. By section 27(A) of the Act:
(1) An application may be made to a Leasehold Valuation Tribunal for a determination whether a service charge is payable and, if it is, as to –
(a) the person by whom it is payable,

(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.

(3) An application may also be made to a Leasehold Valuation Tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvement, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to –
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

The Applicant's case

7. The Applicant says that the premiums he has been required to pay for buildings insurance and included in his service charges since 2014/15 have been far too high. He asked an insurance broker to obtain quotations for insurance cover on a like for like basis. The result was that the Applicant's brokers obtained a quotation from Ageas that was considerably cheaper than the premium being charged by the landlord's insurers. For 2020/21 the landlord's insurers' premium is £5518.96 whereas the Ageas quotation is £1685.84. The Applicant has applied a commensurate adjustment to the premiums charged for all years going back to 2014/15 and argues that these are the reasonable figures for buildings insurance premiums for which he should be liable.

8. A comparison of the resulting figures is as follows:-

The Respondent's charges are:	The Applicant's figures are:
2014/15: £4496.44	£1373.49
2015/16: £4735.20	£1446.42
2016/17: £5066.46	£1547.61
2017/18: £5354.01	£1635.45
2018/19: £5625.26	£1718.30
2019/20: £5896.50	£1801.16
2020/21: £5518.96	£1679.87 (exc broker's fee of £100)

9. The Applicant refers to a case decided by HH Judge Stuart Bridge in the Upper Tribunal. The case is *Cos Services Limited v Nicholson and Willans [2017] UKUT 0382 (LC)* hereinafter referred to as the *Cos*

case. He says that this case and his own are very similar. They both involve consideration of the reasonableness of buildings' insurance premiums charged to a lessee under a long lease. They both involve the same managing agents, Urbanpoint, and they both involve the same insurance brokers, Genavco Insurance Limited and latterly Citigate Insurance Services Limited (hereinafter referred to as "Citigate"). In both cases the insurance premiums demanded by the landlord via its agents is three to four times that of quotations obtained by the lessees. In both cases the landlord's insurance obligation under the leases was arranged through a block policy of a very large portfolio of properties managed by Urbanpoint. In both cases the landlord's managing agents claimed that the quotations obtained by the lessees was not on a like for like basis. The Applicant points out that in the *Cos* case, the premiums payable by the lessees for a number of years prior to the application to the Tribunal were reduced substantially.

The Respondent's case

10. The Respondent's evidence was given by Mr Peter Luke, Urbanpoint's Property manager in the Respondent's statement of case and Mr Christopher O'Dell, a Director of the Respondent landlord in a witness statement.

11. Mr Luke says that Urbanpoint have been the managing agents for the Property since 1996. He explains that the buildings insurance cover is effected by means of a block policy. He points out that it includes terrorism cover, and allows sub-letting of flats at any time. He says that the insurers give an undertaking not to cancel or restrict the policy in any way irrespective of the nature of any sub-letting or any increase in risk due to acts of lessees or any tenants. He also says that the policy is not invalidated or restricted in the event of any part of the property becoming unoccupied for any period whether or not the insurers are aware of any such unoccupancy or for the property being used for business or trade purposes. In addition, the insurers undertake not to cancel the policy "in any circumstances, including the late payment of premium". The cover also includes the provision of alternative accommodation for lessees for an amount not less than 20% of the building sum insured. There is an extension of cover should there be an inadvertent omission to insure and "automatic reinstatement of sums insured following a loss, contract works and capital additions" although he does not explain what this means.

12. Mr Luke says that he believes it is reasonable for the Respondent to cover all the elements referred to in the preceding paragraph. The Respondent, he says, has no control over sub-letting or occupation of flats and in the absence of such provisions there would be a real risk that the policy could be breached leaving the building uninsured. He

exhibits a letter from Citigate confirming the cover provided under the Respondent's policy.

13. Mr Luke deals with the question of the commission received by the landlord This is 18% and is built into the premium. In return, he says, the Respondent "undertakes various tasks" as set out in the witness statement of Mr O'Dell.

14. Mr Luke says that the brokers, Citigate, advise that premiums are based on risk factors and claims experience both for individual properties and for the overall portfolio of properties insured under the block policy. He says that the brokers carry out "a selective market exercise most years and recommend renewal with the existing insurers unless another insurer is interested in providing a confirmed quotation. He understands that at the last renewal Citigate undertook enquiries of a range of insurers "but there was no interest in quoting for this large residential portfolio until the brokers can show an improvement in claims performance". This is confirmed in a letter from Citigate dated 20 October 2020.

15. Mr Luke exhibits an email from Citigate in which they comment on and compare the cover offered by Ageas compared with the NIG cover. He maintains that the Ageas cover is not like for like with that of NIG. This suggests that Ageas have not considered the claims history of the block (a claim was made in 2015 for water ingress but this was not pursued), it does not cover terrorism risks or the extra cover referred to in paragraph 11 above.

16. Finally, Mr Luke says that if the landlord had to insure every property in its extensive portfolio individually, there would be a considerably greater administrative burden the cost of which would ultimately have to be borne by the lessees by way of an increased management charge.

17. Mr O'Dell in his witness statement seeks to set out the steps Citigate takes "to ensure we receive a competitive policy", to explain why the Respondent chooses a policy such as that offered by NIG, and to deal with the question of commission. Notwithstanding this stated intention his statement does not refer to the first of these three aims.

18. With regard to the extent of the cover Mr O'Dell says that it is prudent to include terrorism cover. Further, the Respondent has little control over how the Property and the individual flats are used. There is no power to prevent sub-letting, to require the units to be occupied or for the Respondent or their agent to be notified if units are unoccupied. The unoccupancy provision in the Ageas policy come into effect if 25% of the flats become unoccupied. This then places burdensome duties on the Respondent for example to carry out an internal and external inspection every seven days, any defects to be rectified promptly,

combustible materials removed, all letter boxes sealed up or fitted with an internal metal cage and all exit doors to be fitted with a mortice deadlock of a certain standard. Accessible windows are to be locked or sealed shut.

19. Mr O'Dell says that the Respondent would have no means of knowing whether or not a 25% unoccupied threshold had been reached and the requirements would put an intolerable burden on the Respondent. It is particularly useful to have cover for the premises being used for a trade or business purpose in view of the increasing trend for home working and AirBnB type use.

20. As for commission Mr O'Dell says that until June 2020 it was 19% which reduced to 18% at that date. This is paid to compensate the Respondent for certain tasks it undertakes. Mr O'Dell lists those tasks. They are
    (a) regular meetings with brokers to discuss policy terms
    (b) discussion of claims
    (c) monitoring subletting as, even though he says the policy holds good regardless of status of occupier, if the landlord becomes aware of anything it needs to be disclosed to the insurer
    (d) regular discussion with Urbanpoint about the Property and to decide if this needs to be disclosed to insurers.

21. In summary, Mr O'Dell considers that the insurance provision for the Property is reasonable and appropriate.

The Applicant's response

22. The Applicant accepts that there may be some advantages in the NIG policy compared with the Ageas policy but they are so insubstantial that they cannot justify the amount being charged.

23. With regard to unoccupancy cover, the Ageas policy does not affect cover for the first three months of unoccupancy and thereafter, only if 25% of the flats are unoccupied. Mr Fathers says that this applies only to the first year and that thereafter this could be altered to mirror the NIG policy but he has no confirmation of this and he does not say how such an amendment would affect premium. He does note, however, that the NIG policy requires the insurer to be notified of unoccupancy and that NIG reserve the right to amend their cover when they are made aware of unoccupancy. Currently, Mr Fathers says that none of the flats in the Property are unoccupied.

24. The Applicant does not understand why the Respondent should say that the Ageas policy does not include terrorism cover, as clearly it does.

25. Mr Fathers accepts that it is reasonable for the Respondent to receive a commission but considers 18% to be excessive. He would consider a 10% commission, as reported in the *Cos* case to be reasonable.

26. Finally, the Applicant addresses a reference to a subsidence claim for £14,000 made in respect of a neighbouring property at 56 Erica Drive in 2018. It is said by the Respondent's brokers that this would for a number of years, affect the ability for an individual insurance policy for the Property being taken out. The Applicant's brokers have advised that this claim, which was in respect of a conservatory in a property 100 yards away from the Property with garages in between is unlikely to affect the ability of the Property to obtain cover. Ageas will have carried out a search as to whether the property is in an area liable to subsidence (which it is not) before giving their quotation.

The lease

27. There is no dispute in this case that under paragraph 1 of the Fifth Schedule to the lease dated 10 June 1982 made between Nurseries Development Company Limited (1) and Mr B Emberley and Miss C.L. Challoner(2) of which the Applicant is currently the lessee, that the landlord is required to "effect and maintain a policy or policies of insurance against loss or damage to the building and the garage or the block of garages hereinbefore mentioned by fire storm tempest and damage by impact and such other risks as the company shall think fit……"

28. Nor is there any dispute that under paragraph 2 of the Third Schedule to the lease that the Applicant is required to pay 10% of the "building costs" which are defined in paragraph 1 of the Fourth Schedule to the lease as including the cost to the landlord of "effecting and maintaining any policy or policies of insurance as the company or the surveyor may decide and in particular any policy or policies required to be effected and maintained pursuant to the Company's obligations in that behalf under the Fifth schedule hereto."

The determination

29. The Tribunal is empowered and required by sections 19 and 27A of the Act respectively to determine whether the insurance costs which have been charged to the Applicant as service charges under his lease have been reasonably incurred. The meaning of the words "reasonably incurred" have been considered in a number of cases over the years. Those and analogous cases were reviewed by HH Judge Stuart Bridge in the *Cos* case referred to in paragraph 9 above and that case is binding authority on this Tribunal. Distilling the principles that emerge from the *Cos* decision they can be said to be as follows:

    1) The onus of proving on a balance of probabilities that the charges were reasonably incurred rests upon the landlord.

2) The landlord is not obliged to find the cheapest insurance in the market.
3) The landlord is likely to discharge the burden of proof upon him if he can show that the cost of the insurance cover is within a range of costs for similar cover available in the market.
4) The landlord is likely to discharge the burden of proof upon him if he can show that it was negotiated at arms- length in the market
5) The landlord is entitled to effect insurance by way of a block policy covering not only the subject property but also a number of other properties within the landlord's portfolio provided that this does not result "in a substantially higher premium that has been passed on to the tenants of a particular building without any significant compensating advantages to them" (paragraph 49 of the *Cos* case judgment).

30. Undoubtedly, there is a considerable difference between the premium charged by the Respondent in respect of the NIG policy and the quotation obtained by the Applicant from Ageas for 2020/21. It is a pity that the Applicant has produced only one comparative quotation. His case would have been much stronger had there been one or more other quotations at a similar level to that of the Ageas quotation. However, Ageas is a well-known and established company and their policy documentation, as included in the bundle, is comprehensive. The Tribunal therefore does consider that it is entitled to put considerable weight on its quotation particularly as, in the Tribunal's own knowledge and experience, the premium for insurance for a building such as the Property is likely to be in the region of that quoted by Ageas. It also notes that it is in line with the costs approved by the First-tier Tribunal and endorsed by the Upper Tribunal in the *Cos* case. However, the second of the principles set out in paragraph 28 above shows that simply because a cheaper cover can be obtained it does not necessarily mean that the landlord's costs have been unreasonably incurred.

31. The Tribunal is aware from its experience of dealing with many cases where there are challenges to the cost of insurance that they often fail because, although the lessee produces quotes from other insurers that are lower than the premiums under the landlord's policy, the landlord is able to show that their costs are within a range of premiums for similar cover after brokers have tested the market thereby satisfying the third and fourth principles in paragraph 28 above. In this case, the landlord says through Mr Luke in his statement of case that the brokers did not undertake any formal survey of the market but from their informal approaches they ascertained that other insurers were not interested in covering such a large and diverse portfolio as the Respondent's particularly in view of its claims record. This indicates two things: first, that there was no forensic investigation of the market and, secondly, what investigation there was revealed that the market

for other insurers to cover this particular portfolio was practically, if not wholly, non-existent due to the nature of the portfolio. Thus, by the Respondent choosing to insure by way of a block policy, the existing insurers, NIG, could almost name their price. It is not surprising, therefore, that the premium was as high as it was. The Respondent has been unable to show that the cost of its insurance cover is within a range in the market because, on the Respondent's own evidence, there is no real market for this particular block policy.

32. Again, in the Tribunal's experience, challenges to the cost of buildings' insurance often fail because the lessee finds it difficult to find comparative quotes on a like for like basis. This was the main thrust of the Respondent's answer to the considerably lower quotation obtained by the lessee. The first point made by the Respondent was that their policy includes cover for terrorism. However, as Mr Fathers points out, so does the Ageas policy, so there is no difference there.

33. Two other major differences between the NIG policy and the Ageas policy are said to be that the NIG policy will not be avoided or affected by any sub-letting of any of the flats or any periods of unoccupancy. The Respondent through Mr O'Dell claimed that this was important because these events are beyond the control of the Respondent who cannot risk the policy being avoided should they be unaware of such circumstances.

34. The Tribunal notes that the same arguments were employed in the *Cos* case. Indeed, there are striking similarities between that case and this. The managing agents are the same, the insurers NIG are the same, evidently the wording of the block policies are very similar if not the same, the brokers are effectively the same and the difference between the costs for insurance being charged and the lessees' comparative quotations are of the same order. As the learned judge in *Cos* pointed out although the headline provision in the NIG policy is that it is unaffected by sub-letting or unoccupancy of which the insured is unaware, as the Applicant points out, the insurance certificates issued by Citigate state that "Notice must be given to Citigate when any premises become unoccupied or when unoccupied premises or portion thereof is again occupied." The NIG policy documentation produced states that it is a condition of cover that notice of unoccupancy must be given to the insurer as soon as the landlord becomes aware. This was the same in the *Cos* case and Mr O'Dell says, in justifying the commission paid, that "the sub-letting situation also needs to be investigated because.....if we become aware of anything it needs to be disclosed to the insurer." There would be no need for this if cover were to be unaffected whatever the sub-letting situation. Further, the Ageas unoccupancy requirements only apply if 25% of the property is unoccupied for over 90 days. The Respondent landlord says it has no way of knowing if this situation were to occur. In this block at least two

out of 10 flats would have to be unoccupied for over three months for the condition to apply. The Respondent has managing agents. It is reasonable to expect managing agents to know if two out of ten flats in a block are unoccupied for over three months. The Tribunal considers, therefore, that the advantages of the NIG policy over that of the Ageas policy have been over-emphasised by the Respondent just as they were in the *Cos* case.

35. Mr Fathers had done his best to obtain a like for like quote. He had asked for and had been told initially that there had been no claims in the previous five years. Subsequently, he was told that there had been one claim initiated in 2015 but that this was not pursued. He was also made aware by the Respondents of a subsidence claim relating to a nearby property, 56 Erica Drive, in 2018 which, Citigate suggested would render any individual policy for the Property unobtainable in the market for a period of time. However, the Applicant's broker advised that this should not affect the situation and, indeed, Ageas confirmed that this did not affect their quote.

36. Taking the situation in the round, the Tribunal accepts that there are some advantages to the NIG policy compared with the Ageas cover but, in the words of HH Judge Stuart Bridge in the *Cos* case "they are so insubstantial that they could not justify the amount being charged".

37. Turning now to the advantages of a block policy, there may be advantages to such a policy as set out in Mr O'Dell's witness statement, particularly where a property has a poor claims record or is subject to particular risks such as flooding or subsidence. In this case, the Property's claims history is good and there are no particular risk features. It was held in the *Cos* case that where a landlord holds a block policy it is necessary for it to satisfy the Tribunal that this has not resulted in a substantially higher premium that has been passed on to the tenants of a particular building without any compensating advantages to them." This Tribunal finds that the difference between the amount charged to the lessees for buildings' insurance and the Ageas quote is so great that the block policy has indeed resulted in a substantially higher premium to the Applicant.

38. Having found that the insurance charge for 2020/21 has been unreasonably incurred, the question remains as to what a reasonable charge for that year should be and whether the charges for insurance for 2014/15 to 2019/20 should also be reduced.

39. As stated previously, the Tribunal only has one alternative quote from the Applicant and that is unfortunate, but it is in line with what the

Tribunal would expect for a block such as the property. Accordingly, the Tribunal finds that the Ageas figure of £1679.87 for the Property is a reasonable one for the lessees to pay for 2020/21. The Applicant's proportion is 10% (£167.99).

40. The Tribunal has no evidence from Ageas or any other insurer as to what their premiums would have been for previous years. Perhaps this is something they would not be prepared to provide. The Applicant has applied a proportionate reduction for previous years based on the 2020/21 differential. His figures will be slightly out due to the revision of the Ageas quotation after he applied his methodology. The question is whether the Tribunal is prepared to adopt the same methodology in respect of the earlier years. What is evident is that the NIG premiums have been much higher than the Ageas figure for the whole of the period since 2014/15. It is therefore right, that those charges too must have been unreasonably incurred. The Respondent has made no representations concerning the previous years or the Applicant's methodology. In all the circumstances it is reasonable for the Tribunal to adopt the Applicant's methodology. It does track the fluctuations in the Respondent's charges over the years. Accordingly, the Tribunal finds that the insurance charges as calculated by the Applicant and set out in the right-hand column in paragraph 8 above are the reasonable charges for which the Applicant is liable. If the Applicant has paid the higher sums demanded, as the Tribunal understands to be the case, he will therefore have overpaid. This Tribunal has no power to order a refund but notes that overpayment which ought to result in either a refund of the amount overpaid (for which, if necessary, the Applicant would have to pursue through the County Court) or a credit against future service charges.

41. The Tribunal has considered whether the commission paid to the Respondent should be taken into account in determining the amount the Applicant should pay and has decided that this is not necessary. The Respondent will have already received the commission for 2010/21 and previous years. If it values the advantages the NIG policy provides it, it can carry on with the block policy if it wishes, in which case, presumably it will continue to receive the commission. It simply means that it will not be collecting in from the Applicant the full amount of the contribution it sought from him towards the cost of the policy. If other lessees in a similar position to the Applicant in this case and in the Cos case start to challenge the amount they are being charged for this policy there may come a point where the shortfall in receipts starts to eradicate the advantage of the block policy to the Respondent. In the meantime, the Respondent may be banking on other lessees being unaware of their right to challenge the charges or are not prepared for whatever reason to challenge them. Evidently, it has taken some time since the Cos decision for the Applicant to challenge the costs. Whatever the situation may be, the Tribunal saw

no reason to include in the amount it has found that the Applicant should pay an additional figure to reflect the commission that has been paid to the Respondent and, presumably, will continue to be paid under the current arrangement.

Section 20C

42. The Tribunal has a discretion to make an order under section 20C of the Act if it considers it just and equitable to do so. If an order is made it means that the landlord cannot add its costs of these Tribunal proceedings to any future service charge demand. The Applicant makes the section 20C application on behalf of himself and all the other long lessees at the Property. In exercising its discretion one of the major factors, but not necessarily the only factor, is whether the Applicant has succeeded in the case. In this case, the Applicant has been wholly successful and it is clear that he would not have succeeded in reducing the insurance charges without having brought the proceedings. In those circumstances the Tribunal finds that it is just and equitable for an order under section 20C to be made and so orders.

Summary

43. The Tribunal finds that the charges made by the Respondent for the Applicant to pay in respect of buildings' insurance were not reasonably incurred. The amounts payable by the Applicant instead is 10% of the following figures:

2014/15: £1373.49
2015/16: £1446.42
2016/17: £1547.61
2017/18: £1635.45
2018/19: £1718.30
2019/20: £1801.16
2020/21: £1679.87

The Tribunal makes an order under section 20C of the Landlord and Tenant Act 1985.

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