FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**MAN/OOEY/LSC/2020/0058**
Property	**:**	**Various as listed in the Application**
Applicant	**:**	**Clifford Honey, James Honey, Catherine Yeo**
Representative	**:**	
Respondent	**:**	**Blackpool Council**
Representative	**:**	
Type of application	**:**	**Section 27a of the Landlord & Tenant Act 1985**
Tribunal member(s)	**:**	**Judge J White** **Valuer Mr H Thomas FRICS FCABE MEWI** **Paper(P)**
Venue	**:**	**Northern Residential Property First-Tier Tribunal, 1 floor, Piccadilly Exchange, 2 Piccadilly Plaza, Manchester, M1 4AH**
Date of Determination	**:**	**11 May 2021**
Date of Decision	**:**	**19 May 2021**

DECISION

The amounts claimed for Insurance, including commission and management fees for the years 2012 to 2020 are payable.

The Application

1. The Applicants seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges payable by the Applicant for years 2012 to 2020. They dispute the difference between insurance premiums assessed by the insurance company and the averaging premium invoiced by the Respondent Council on eight properties amounting to £1,163.63 is not payable.

2. The application was made on 2 July 2020 and on 20 December 2020 the Tribunal issued directions. In compliance with those directions the parties submitted documents set out below.

3. The Directions stated that the Tribunal did not consider an inspection would be needed and it would be appropriate for the matter to be determined by way of a paper determination. Neither party had objected. The Tribunal convened on 11 May 2021 without the parties to determine the application. It decided that there was enough evidence to determine the application without the need for an inspection or oral hearing. It was in the interests of justice to do so and in accordance with the Overriding Objective.

The Issues

4. The Application and Response raises the following issues:

    a. Whether the block insurance policy operated a fair reflection of the risk profile on the Applicants' eight properties.

    b. Whether the insurance brokers commission of 27% was payable.

    c. Whether 20% charged by the Respondent to administer the insurance is payable as a management charge.

5. The law in this area is complex. We annex the relevant statutory provisions to this decision.

The Leases

6. Two of the eight properties are governed by version 1 of the lease issued up until 1985, namely numbers 37 and 49 Edmonton Place. The other properties are governed by version 2 issued 1986 onwards.

7. Regarding the obligation to insure, version 1 states (our emphasis):

   Page 3 - (b) During the whole of the term hereby created (and by way of further rent) a rent equal to the sum or sums which shall from time to time be necessary by way of premiums for keeping the Premises insured from and against damage by fire and such other risks as the Council may from time to time consider appropriate to the full replacement value thereof such further rent to be paid on the usual quarter day immediately following the payment of the premium by the Council to the insurers

   Page 6 - 4. The Council hereby covenants with the Lessee.....(b) that the Council will insure and keep insured (unless vitiated in whole or in part by any act or default of the Lessee) the Property (including the Premises) against loss or damage by fire and such other risks as the Council may from time to time consider appropriate to the full replacement value thereof

   Page 22 – The Eighth Schedule before referred to covenants on the Part of the Council.... 4. The Council shall employ and engage such servants agents and contractors as it considers necessary or desirable for the performance of its obligations under this Lease and shall pay their wages commissions fees and charges

8. Version 2 of the lease states:

   Page 4 – SECONDLY during the whole of the term hereby created (and by way of further rent) a rent equal to the sum or sums which shall from time to time be necessary by way of premiums for keeping the Premises insured from and against damage by fire and such other risks as the Council may from time to time consider appropriate to the full replacement value thereof such further rent to be paid on the usual quarter day immediately following the payment of the premium by the Council to the insurers and THIRDLY during the term hereby granted all monies due to the Council pursuant to the provisions of Clause 3 hereof

   Page 5 – 3. THE Lessee hereby further covenants with the Council as follows:- (i) Subject to the provisions of Sections 18 to 30 of the Landlord and Tenant Act to pay a proportionate amount to the Council being reasonable expenses and outgoings incurred or to be incurred by the Council....(c) in respect of the rebuilding or reinstatement of the Property or in insuring against such rebuilding or reinstatement (d) in respect of the management costs involved in sub-paragraphs (a) (b) and (c) above and also in collection of the rent and the computation and collection of other monies due from the Lessee hereunder

Page 6 – 4. The Council hereby covenants with the Lessee as follows:- ..(b) That the Council will insure and keep insured (unless vitiated in whole or in part by any act or default of the lessee) the Property (including the Premises) against loss or damage by fire and other such risks as the Council may from time to time consider appropriate to the full replacement value thereof

The Applicants case

9. The applicants submitted in a brief statement of case that the "so-called averaging methodology" used for the Council's block insurance policy was in fact low risk properties "cross subsiding high risk properties". The 27% commission by the broker was "eye watering" and the 20% charged by the Council for management costs were too high.

10. They submitted a spreadsheet of the disputed premiums for the years 2012 to 2020 with a disputed total amount of £1,163.63. For each property they dispute the difference between the standard rate and averaged premium invoiced. The amounts in dispute per year are very similar for each year. As an example:-

	2020		**2012-2020**
NIG	**Averaged Premium**	**Disputed Amount**	**TOTAL Amount Disputed**
£ 146.84	£ 175.94	£29.10	£215.61
£ 154.11	£186.73	£32.62	£124.16
£ 160.48	£ 196.23	£35.75	£169.23
£ 118.68	£134.22	£15.54	£117.76
£ 116.58	£134.22	£17.64	£133.69
£ 148.73	£ 186.73	£38	£279.56
£ 117.63	£ 134.11	£16.48	£123.62
			£1,163.63

11. They did not submit any alternative quotes.

The Respondents case

12. The Respondents case is detailed below. It is contained in a statement of case, and Witness Statement of Claire Betteridge who is the Respondents senior risk and resilience adviser. It is supported by evidence as discussed below.

13. In summary it states that "the way in which insurance premiums have been charged is fair and reasonable, as it saves the time, costs and ensures security for the general body of leaseholders" [para 11 page 3]

Our Determination

The Findings

14. The Council owns 500 social housing properties. Since 2007 the social housing stock has been managed by Blackpool Coastal Housing (BCH"), an arm's length management organisation.

15. In common with other Local Authorities, the Council insures its property stock under a block insurance policy. The block policy for leasehold properties is separate to tenanted property policy. The leasehold policy includes the Applicants Properties and all others purchased under the "right to Buy" scheme.

16. The Council uses the services of a broker. They are entitled to do so under the Leases. On 1 April 2013 NIG took over insuring the leasehold properties from Royal Sun Alliance (RSA). Both companies applied an averaging methodology to establish the rates payable by each individual property.

17. The sum insured is based on the cost of rebuilding individual properties and common parts.

18. Prior to the engagement of NIG the Council undertook a consultation process from 13 February 2012 to 26 November 2012. This included a postal feedback questionnaire, a forum meeting, newsletters, notification by post regarding rebuild values and calculation of premiums. NIG did not initially provide an averaging policy but used a complex rating structure, taking into account multiple factors. The Council found that this individual accounting method threw up anomalies in the premiums and they worked with NIG to apply an averaging methodology, that had been used successfully with RSA. They believe averaging is the fairest way to ensure the properties with the same rebuild sum, pay the same premium. They share the same risks and rewards regardless of their personal experience and provides them with security. They are all protected from being penalised by poor claims histories. It has protected them from substantial increases. It enables the Council to save time and therefore costs associated with administration.

19. In October 2019, the Council obtained insurance quotations, via its broker, from the eight companies approached, six did not provide a quote. NIG quoted £59,292.79 and AXA £92,200.

20. The amounts invoiced for each year (being slightly different to the original spreadsheet premium due to mid-term additions and deletions are as follows:

Policy Year	**Invoiced Premium**
2013-14	£55,666.39
2014-15	£56,270.41
2015-16	£56,082.01
2016-17	£57,585.88
2017-18	£49,776.72
2018-19	£52,362.89
2019-20	£54,188.50
2020-21	£59,292.79

The Legal Context

21. The Respondent refers the Tribunal to two decisions. In Cos Services Limited v Nicholson & Willians [2017] UKAT 382 (LC). The Upper Tribunal reconciled earlier cases. His Honour Judge Stuart Bridge said that landlord's decision must be rational and any costs must be reasonably incurred. They referred us to paragraph 48 and 49:

"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 the lease 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.

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….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."

22. The Council relies by analogy on the case of Baharier v Southwark LBC [2019] UKUT 73 (LC), concerning the cost of a replacement heating system, in which the following was stated:

30 As a matter of contract, it is for the Landlord to decide how to supply the central heating/hot water service. That principle is firmly established in the case of covenants to repair (Lewison LJ included it as one of the controversial propositions in paragraph 14 of his judgment in Hounslow v Waaler citing Plough Investments Ltd v Manchester CC [1989] 1 EGLR 244 in support). It applies equally to covenant to provide a service. …

23. They refer us to the First Tier Tribunal matter *of* Royal Borough of Kensington and Chelsea v Multiple Leaseholders *LON/00AW/LSC/2018* at paragraph 8:

"It is a basic principle of leasehold law and practice, that it is a matter for a landlord to decide the manner in which obligations under a lease are to be discharged."

24. They correctly set out what they need to establish:

a. the burden is on the Council to satisfy the Tribunal on the balance of probabilities that the costs in question are rational and have been reasonably incurred.

b. The question, whether a charge is reasonable, is a matter of fact and degree and will depend on the relevant context in which the charges are made.

c. In order to be characterised as reasonable, the Council need not establish that it has obtained the lowest price on the market.

d. The Council is entitled to insure its property portfolio under a block policy, provided this does not result in a substantially higher premium being passed on to the Leaseholders.

e. If the block policy does result in a substantially higher premium being passed on to the Leaseholders, this will not automatically render the charge unreasonable, but the Council will need to satisfy the Tribunal that there are significant compensating advantages to the Leaseholders.

25. In summary the Tribunal has to consider:

a. The terms of the lease and the liabilities to be insured,
b. The landlord's explanation of the process of selecting the policy; and
c. The outcome and whether any comparable cheaper policy is genuinely comparable by reference to its terms.

First Issue: The block policy and insurance methodology

26. The Tribunal determines that the sums invoiced for insurance using the averaging methodology is payable for the years 2012-2020.

Reasons

The Lease

27. The Council have provided cogent evidence, as set out above, that the cover in place was obtained in the usual course of business and from a reputable insurer in accordance with Havenridge Ltd v Boston Dyers Ltd (1994) 49 E.G. 111 CA. The terms of both of the leases, as set out above, do not provide a further limiting factor on the Council and so provides the Council with discretion on how to charge the leaseholders within the confines of s19 of the Act. The Applicant has not put at issue the liabilities to be insured.

The Decision making process

28. The Council's reasoning set out above, though correctly establishes the legal test, is quite scant in its specific reasoning of the cost benefit ratio applicable in their own reasoning. Though they carried out a consultation process, and provides detailed evidence concerning the process, this was in 2012 and they do not appear to have revisited their decision or obtain new rebuilding valuations. There has to come a time when this decision is reviewed. Nevertheless, the Tribunal accepts their broad reasoning that block policies are common among local authorities for a valid reason particularly when taking into account the low cost to individual leaseholders. The methodology saves administration costs and protects individual leaseholders against individual swings in the market. They did not encounter any significant opposition when carrying out the consultation and the cost of the policy has not increased substantially over the subsequent years.

The Outcome

29. COS Services Ltd V Nicholson established that it was necessary for the landlord to satisfy the tribunal or court that the methodology "*has not resulted in a substantially higher premium that has been passed on to the tenants of a particular building without any significant advantages*" to the tenants.

30. The Applicant provides a schedule of the annual amount by which they submit that the Leaseholders have been overcharged ranges from £13.55 to £38.00 per property. The total amount alleged to have been overcharged during the period 2013-2020 ranges between £117.76 and £279.65 per property. The Respondent has provided recent evidence that the block policy is the lowest on the market. The Applicant has not attempted to provide any alternative comparative quotes and have instead used NIG initial premium before the averaging. The Respondent has provided evidence in the form of spreadsheets that other properties are clearly being invoiced less than the initial NIG premium, as a result of the very nature of

averaging. The differences in premium is marginable and the outcome is clearly reasonable.

31. The sums claimed to have been overcharged are not by any measure substantial and may well be lower when taking into account the administration costs of individually negotiated policies. The leaseholders have been protected from individual risks, drastic price increases, and the costs of administration dealing with individual policies.

Second Issue: Commission

32. The Commission paid is reasonable and recoverable in full from the leaseholders, in accordance with the proportion in their leases.

Reasons

33. Sagar Insurance has acted as the Councils broker since at least 2012. As part of its procurement process in October 2019 the council invited three brokers to quote. Again, the Council has not provided any real reasoning on why they appointed Sagar as broker, apart from the general reasoning above. They have not addressed the issue of commission, though it is clear that the 27% commission is payable to Sagar, as opposed to being retained by the Council and so they have little control over the payment if they can establish that the process is rational, and the outcome is reasonable. Three brokers were invited to quote in 2019, the tribunal have not been provided with details of the quotes, but based upon them Sagar were re-appointed, it is therefore assumed that this was the most competitive quote, though it would have been helpful if details had been provided.

The Lease

34. The lease does not prevent the instruction of an insurance broker. Version 1 specifically enables instruction of agents and paying of commission fees in clause 4 of the 8th Schedule. Version 2 refers to payment of reasonable expenses and outgoings incurred by the Council.

The Process

24. Nevertheless, the Council has provided adequate reasoning for the commission of 27%.

    a. The Council use a broker to source its building insurance as it does not have the resources to do so in house.

    b. They benefit from the brokers expertise in terms of knowledge, experience, and ability to secure the most competitive rates.

c. Insurance brokers charge a commission. 27% is said by the Applicant to be eye wateringly high. The Tribunal agrees that the high rate is a concern. However, this rate must be put in context. This is a multi property portfolio, often changing mid term and requiring considerable attention. The broker was reviewed as part of the procurement process in 2019. They appeared to be the only broker who responded, and clearly the policy is not one that most insurers want to quote for (six out of eight companies did not provide a quote).

d. RICS Guidance does not prevent the payment of a commission as long as the amount is transparent.

Outcome

25. The outcome in terms of the premium as a whole is reasonable. If the Council were to become a broker inhouse this would itself incur a commission that would have to cover the cost of obtaining inhouse expertise.

26. The outcome in terms of the cost to individual leaseholders is minimal amounting to less than £40.00 and often considerably less per year.

Issue 3: 20% management costs

27. The 20% management fee for administration of the claims is payable by the leaseholders.

Reasons

The Lease

28. This is provided for in the lease above though in slightly different terms. The first version to Clause 4 of Schedule 8 refers "*shall employ and engage such servants agents and contractors as it considers necessary or desirable for the performance of its obligations" and the second version to ") in respect of the management costs".*

Process

29. Again, there is little, if anything in the way of explanation by the Council, apart from stating it is for administration of the Insurance. The Council are entitled to claim the cost of administrating the insurance, including costs and charges in connection with claims. They may be numerous in a large block policy.

Outcome

30. The rate of 20% is not out of line or unreasonable (see for example Williams v Southwark LBC (2001) 33 HLR 224). Considering the sums involved the actual amount payable by each leaseholder is small and in line with other charges.

Judge J White
19 May 2021

RIGHTS OF APPEAL

1. 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.

2. 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.

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 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.

Appendix of Relevant Legislation

Landlord and Tenant Act 1985 (as amended)
Section 18

(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.

Section 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, and

(b) where they are incurred on the provisions 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.

Section 27A

(1) An application may be made to the appropriate 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.