FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case references	**:**	CAM/22UB/LSC/2019/0028
Property	**:**	The Upper Parts, The Willows Residential (Urban Pulse), The Willows Shopping Centre, High Street, Wickford, Essex SS120RD
Applicant	**:**	Maxine Investments Limited
Representative	**:**	Geoffrey Faiman
Respondent	**:**	Sheet Anchor Investment Limited
Representative	**:**	Miss Miriam Seitler, of counsel, instructed by Messrs Higgs & Sons, solicitors
Type of application	**:**	For the determination of the reasonableness of a service charge
Tribunal members	**:**	Mr Max Thorowgood, Mr Gerard Smith and Mr Nathaniel Miller
Venue	**:**	Basildon Magistrates Court
Date of Decision	**:**	7 November 2019

DECISION

The application

The Respondent complained, with some justice, that it was difficult to discern the precise nature of the Applicant's complaints from its Statement of Case. However, in her Skeleton Argument, counsel for the Respondent, Miss Seitler helpfully identified the issues which she said the Tribunal needed to decide. Those were:

1. Whether the demands originally served complied with the requirement of s. 21B in terms of providing the required statutory information.
2. Whether the Respondent was required to consult with the Applicant in relation to its service charge demands.
3. Whether the sums claim in respect of insurance premium for the years 2015/16, 2018/19 and 2019/20 are reasonable.
4. Whether the sums claimed in respect of cleaning and pest control for the years 2018/19 and 2019/20 are reasonable.

Mr Faiman agreed that those were the matters which he had intended to raise.

Having conducted some further preliminary investigation, Mr Faiman told us he accepted that the first and second of those issues did not arise on the facts of this case and that he did not wish to pursue his case in respect of them any further.

The Tribunal therefore proceeded to consider the third and fourth issues. Having investigated the fourth issue in rather more detail and the Respondent having explained in detail (by a combination of Miss Seitler's exposition and Mr Martin's evidence) how it had calculated the sum charged to the Applicant in respect of both cleaning and pest control, Mr Faiman informed us that he accepted that both charges were reasonable and that he no longer wished to pursue that issue either.

Accordingly, the only live matter remaining for decision by the Tribunal is the reasonableness of the insurance premiums which the Respondent seeks to recover in respect of the one quarter of 2015/16 and for the years 2018/19 and 2019/20.

The subject premises

The subject premises are the residential upper part of the Willows Shopping Centre in Wickford which comprise approximately 27.77% or the total floor area of the premises.

The insurance premiums

We remind ourselves that there is an evidential burden upon the Applicant as the challenger of the reasonableness of service charges to show: either, a) that the works/expenses incurred were not appropriate or properly incurred under the lease; or, b) that they were not reasonable in amount.

The position on the evidence is as follows:

- In 2010 a building insurance valuation was commissioned in respect of the whole of the building. At that time the rebuild valuation for the Applicant's premises was £2,741,105.38. The specialist knowledge of Mr Smith and Mr Miller allows it to conclude that whilst surveyors have typically applied a 'rule of thumb' 3% p.a. uplift to re-build costs that allowance in the past 2-3 years would generally be greater so as to make allowance for the general increase in building costs. Even so, applying a generous allowance, a conservative estimate of the re-build costs as at 2018/19 would be unlikely, in the absence of any special features which are not apparent on the evidence before us , to exceed £5,000,000.00.
- In 2015/16 the premium demanded was for the quarter to June 2015 was £340.91 or £1,363.64 p.a.
- The premium charged to the Applicant in respect of the year to 31st March 2016 was £2,914.42 . This provided £3,118,869 buildings cover and allowed for excesses of £1,000.00 in respect of subsidence of heave and £350.00 in respect of all other losses save for fire, aircraft, riot and earthquake.
- The premium charged to the Applicant in respect of the year to 31st March 2017 was £2,881.00. This provided £3,175,000.00 of buildings cover. The excesses were the same as the previous year.
- The premiums paid by the Applicant were calculated and charged pursuant to its block insurance policy.
- We were provided with no information in respect of the premium for the year to 31st March 2018
- For the year to 31st March 2019 the proportion of the premium charged to the Respondent in respect of its insurance of the Willows Shopping Centre under its block policy allocated to the Applicant was £4,720.38, an increase of £1,839.38 (or 39%) as against the premium charged to the Applicant for the year to 31st March 2017. We do not have a schedule for policy of insurance effected by the Respondent for the year to 31st March 2019 insurance but it seems reasonable to assume that it was on the same basis as the most recent year of account for which we do have information. No explanation for that very substantial increase in the premium paid has been offered by the Respondent.
- For the year to 31st March 2020 the proportion of the insurance premium paid by the Respondent charged to the Applicant was £3,942.46 in respect of £15,946,351.00 buildings cover and £10,000,000.00 in

respect of Owner's liability with excesses of £150.00 in respect of residential claims; £250.00 in respect of commercial claims and £2,500.00 in respect of subsidence etc.

- In an effort to demonstrate that the premium charged to the Respondent in both 2018/19 and 2019/20 was too high, the Applicant sought an alternative quote from its insurance broker as a part of its block policy. The quote which he received in respect of the whole of the premises (including the commercial parts was) £14,312.82 on 14th June 2019 its broker apparently confirmed that the proportion of that premium attributable to the Applicant's part of the building would be £3,163.38 (22.1% of the whole). It is notable that that 'quote', consists in no more than two very brief emails from the broker. Those very brief emails did make it clear, however, that the quote was subject to the assumption that there was no adverse claims history, whereas Mr Faiman admitted that there had been some recent claims. The basis for the apportionment of the premium between the various lessees by the Applicant's broker was not explained (either by the broker or by Mr Faiman) and is inconsistent with the Respondent' s 27.77% allocation.

Miss Seitler referred the Tribunal to *COS Services v Nicholson* [2017] UKUT 382. That case is authority for the proposition that whilst a landlord is not obliged to opt for the cheapest insurance policy available in the market and is entitled to enjoy the benefits of a block policy, it is incumbent upon it, if it wishes to do so, to show that a substantially higher premium is not passed on to lessees as a result. The Upper Tribunal explained the position as follows:

> 45. Having cited paragraphs [39] and [40] of the Tribunal decision in *Forcelux* (see above at [33]), the Court of Appeal commented at [33]:
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> > "It is true that the member considered the landlord's decision-making process. But the important point is that he did not stop there. He also tested the outcome by reference to what the cost of cover was on the market. In other words the landlord's decision-making process is not the only touchstone. The outcome was also "particularly important."
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> 46. The Court of Appeal emphasised that in the course of the decision in *Forcelux* the Tribunal, when considering the cost of other works, made no criticism of the landlord's policies or procedures, but held nevertheless that the sum charged was in excess of an appropriate market rate. Lewison LJ continued, at [37]:

> "In my judgment, therefore, whether costs have been reasonably incurred is not simply a question of process: it is also a question of outcome."

47. This is in my judgment a crucial point. If, in determining whether a cost has been "reasonably incurred", a tribunal is restricted to an examination of whether the landlord has acted rationally, section 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 section 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 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. 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."

Miss Seitler prayed in aid of her client's case that the premium for the existing year was reasonable the recommendation of its broker AON which recommended continuing with Zurich Insurance. Nevertheless, it seems to us to be clear that the 39% increase in the premiums paid between 2016/17 and 2018/19 requires some compelling explanation if it is to be deemed reasonable. This is especially so when that is considered that an 11.5% reduction in the premium payable was achieved in the most recent year of account.

We are acutely conscious of the complexity of effective comparison between different insurance premiums. Nevertheless, it does seem to us that useful comparators in the form of the insurance schedules for the years 2015/16, 2016/17 and 2019/20 are available although they are not precisely comparable because the levels of cover offered differ. Equally, however, no sufficient explanation of the need for £15 million of buildings cover, as opposed, say £5 million was offered.

For these reasons, it seems to us that it would not be appropriate to use the 'quote' provided by the Applicant's broker as a reliable guide to what is a reasonable premium for this building in the current market.

Nevertheless, it is also our judgment that in the absence of any proper explanation for the substantial increase in the insurance premium paid for the year 2018/19 was not reasonable and that it is not payable by the Applicant at that level.

So far as the premium paid in this year of account is concerned, it is significant in our view that 27.77% of the total premium quoted by the Applicant's broker is £3,974.44, very slightly more than the premium charged to the Applicant. On that basis it seems likely that the difference between the parties in relation to this year of account is attributable to a difference in respect of the measurement of the relative sizes of the units which has been subject to change over time. For that reason both parties agreed in the course of the hearing that it would be appropriate, after 10 years since the previous insurance valuation including detailed measurements compliant with the latest measurement standards, for a further insurance valuation to be carried out.

At present, however, as Miss Seitler pointed out in her supplemental written submissions, the calculation of the Applicant's share of the insurance premium, as it is set out in the spreadsheet at p. 227 behind Tab L in the bundle, is in the same proportion to the premium for the whole building as the Respondent's calculates the Applicant's unit's size bears to the premises as a whole. On this basis the premium has been correctly demanded in accordance with the terms of the lease and appears to us to be reasonable.

In default of any other evidence, we consider that the reasonable premium payable by the Applicant in respect of the year 2018/19 is the same as that payable in the most recent year of account.

Section 20C

The final matter left for us to consider is the Applicant's application for an order pursuant to s. 20C Housing Act 1985. The burden of the Applicant's submissions in this regard were to the effect that Mr Faiman had made numerous efforts to obtain the information and explanations which the Respondent had provided in these proceedings but had failed to do so previously. Mr Faiman took us to no correspondence which illustrated or supported his submissions in this regard but he did accept and apologise to Mr Martin for having put the phone down in the course of a conversation in which Mr Martin had been attempting to explain the Respondent's position to Mr Faiman.

Mr Faiman's tendency to ignore material which does not suit his view of matters is also to be seen in his very late abandonment of almost all the points of the Applicant's application despite the information and explanations having been set out very fully and clearly in the Respondent's Statement of Case.

It is obvious that the Tribunal exists as a mechanism for requiring compliance by landlords with the law regulating the levying of service charges (amongst a number of other purposes). That does not mean it is appropriate for tenants to resort immediately to the Tribunal as a means of securing explanations it seeks without first attempting to procure that information by means of polite, coherent enquiries. That is especially so when, despite the fact that the lessee is a property professional, the enquiries are expressed in such a diffuse manner as to create unnecessarily difficult for the landlord to establish the true nature of the complaints/enquiries being made.

For these reasons, we decline to make the order sought by the Applicant pursuant to s. 20C.

APPENDIX 1- 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 2

RELEVANT LEGISLATION

Landlord and Tenant Act 1985 (as amended)

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.

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

(3) An application may also be made to the appropriate tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, 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 would be payable,
   (b) the person to whom it would be payable,
   (c) the amount which would be payable,
   (d) the date at or by which it would be payable, and
   (e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -
   (a) has been agreed or admitted by the tenant,
   (b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the tenant is a party,
   (c) has been the subject of determination by a court, or
   (d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

(5) But the tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

20ZA. Consultation requirements: supplementary

(1) Where an application is made to the appropriate tribunal for a determination to dispense with all or any of the consultation requirements in relation to any qualifying works or qualifying long term agreement, the tribunal may make the determination if satisfied that it is reasonable to dispense with the requirements.

Service Charges (Consultation Requirements) (England) Regulations 2003.

Part 2 - consultation requirements for qualifying works for which public notice is not required

Notice of intention

1. (1) The landlord shall give notice in writing of his intention to carry out qualifying works—

(a) to each tenant; and

(b) where a recognised tenants' association represents some or all of the tenants, to the association.

(2) The notice shall—

(a) describe, in general terms, the works proposed to be carried out or specify the place and hours at which a description of the proposed works may be inspected;

(b) state the landlord's reasons for considering it necessary to carry out the proposed works;

(c) invite the making, in writing, of observations in relation to the proposed works; and

(d) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(3) The notice shall also invite each tenant and the association (if any) to propose, within the relevant period, the name of a person from whom the landlord should try to obtain an estimate for the carrying out of the proposed works.

Inspection of description of proposed works

2. (1) Where a notice under paragraph 1 specifies a place and hours for inspection—

(a) the place and hours so specified must be reasonable; and

(b) a description of the proposed works must be available for inspection, free of charge, at that place and during those hours.

(2) If facilities to enable copies to be taken are not made available at the times at which the description may be inspected, the landlord shall provide to any tenant, on request and free of charge, a copy of the description.

Duty to have regard to observations in relation to proposed works

3. Where, within the relevant period, observations are made, in relation to the proposed works by any tenant or recognised tenants' association, the landlord shall have regard to those observations.

Estimates and response to observations

4. (1) Where, within the relevant period, a nomination is made by a recognised tenants' association (whether or not a nomination is made by any tenant), the landlord shall try to obtain an estimate from the nominated person.

(2) Where, within the relevant period, a nomination is made by only one of the tenants (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate from the nominated person.

(3) Where, within the relevant period, a single nomination is made by more than one tenant (whether or not a nomination is made by a recognised tenants' association), the landlord shall try to obtain an estimate—

(a) from the person who received the most nominations; or

(b) if there is no such person, but two (or more) persons received the same number of nominations, being a number in excess of the nominations received by any other person, from one of those two (or more) persons; or

(c) in any other case, from any nominated person.

(4) Where, within the relevant period, more than one nomination is made by any tenant and more than one nomination is made by a recognised tenants' association, the landlord shall try to obtain an estimate—

(a) from at least one person nominated by a tenant; and

(b) from at least one person nominated by the association, other than a person from whom an estimate is sought as mentioned in paragraph (a).

(5) The landlord shall, in accordance with this sub-paragraph and sub-paragraphs (6) to (9)—

(a) obtain estimates for the carrying out of the proposed works;

(b) supply, free of charge, a statement ("the paragraph (b) statement") setting out—

(i) as regards at least two of the estimates, the amount specified in the estimate as the estimated cost of the proposed works; and

(ii) where the landlord has received observations to which (in accordance with paragraph 3) he is

required to have regard, a summary of the observations and his response to them; and

(c) make all of the estimates available for inspection.

(6) At least one of the estimates must be that of a person wholly unconnected with the landlord.

(7) For the purpose of paragraph (6), it shall be assumed that there is a connection between a person and the landlord—

(a) where the landlord is a company, if the person is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(b) where the landlord is a company, and the person is a partner in a partnership, if any partner in that partnership is, or is to be, a director or manager of the company or is a close relative of any such director or manager;

(c) where both the landlord and the person are companies, if any director or manager of one company is, or is to be, a director or manager of the other company;

(d) where the person is a company, if the landlord is a director or manager of the company or is a close relative of any such director or manager; or

(e) where the person is a company and the landlord is a partner in a partnership, if any partner in that partnership is a director or manager of the company or is a close relative of any such director or manager.

(8) Where the landlord has obtained an estimate from a nominated person, that estimate must be one of those to which the paragraph (b) statement relates.

(9) The paragraph (b) statement shall be supplied to, and the estimates made available for inspection by—

(a) each tenant; and

(b) the secretary of the recognised tenants' association (if any).

(10) The landlord shall, by notice in writing to each tenant and the association (if any)—

(a) specify the place and hours at which the estimates may be inspected;

(b) invite the making, in writing, of observations in relation to those estimates;

(c) specify—

(i) the address to which such observations may be sent;

(ii) that they must be delivered within the relevant period; and

(iii) the date on which the relevant period ends.

(11) Paragraph 2 shall apply to estimates made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.

Duty to have regard to observations in relation to estimates

5. Where, within the relevant period, observations are made in relation to the estimates by a recognised tenants' association or, as the case may be, any tenant, the landlord shall have regard to those observations.

Duty on entering into contract

6. (1) Subject to sub-paragraph (2), where the landlord enters into a contract for the carrying out of qualifying works, he shall, within 21 days of entering into the contract, by notice in writing to each tenant and the recognised tenants' association (if any)—

(a) state his reasons for awarding the contract or specify the place and hours at which a statement of those reasons may be inspected; and

(b) there he received observations to which (in accordance with paragraph 5) he was required to have regard, summarise the observations and set out his response to them.

(2) The requirements of sub-paragraph (1) do not apply where the person with whom the contract is made is a nominated person or submitted the lowest estimate.

(3) Paragraph 2 shall apply to a statement made available for inspection under this paragraph as it applies to a description of proposed works made available for inspection under that paragraph.