FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00BJ/LSC/2020/0210**
HMCTS code (paper, video, audio)	**:**	**V: CVPREMOTE**
Property	**:**	**Flat 4, 332 Old York Road, Wandsworth, London SW18 1SS**
Applicant	**:**	**Richard Embrey**
Representative	**:**	**In person**
Respondent	**:**	**(1) TR Property Investment Trust PLC (Freeholder)** **(2) Richard Embrey, Frederica Rose Hawthorn (substituted for Samuel Hawthorn), Mark Moran and Marjan Moshiri (Head-Lessees)**
Representative	**:**	**Mr George Gay (of BMO Global Asset Management) for TR Property Investment Trust PLC**
Type of application	**:**	**Determination of the liability to pay service charges under section 27A of the Landlord and Tenant Act 1985**
Tribunal members	**:**	**Judge Nicola Rushton QC** **Mr Luis Jarero BSc, FRICS** **Ms Jacqueline Hawkins**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of decision	**:**	**XX January 2021**

DECISION

Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to (or, in the case of those not attending, not objected to) by the parties. The form of remote hearing was V: CVPREMOTE (video hearing, using the CVP platform). A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The orders made are described at the start of these reasons.

The electronic documents which the tribunal was referred to were: (a) the Applicant's bundle, being an electronic folder of 10 documents (94 pages in total); (b) the First Respondent's electronic bundle (57 pages); (c) an emailed statement from Tom Hawthorn (with attached office copy entries), on behalf of his son Samuel Hawthorn and daughter Frederica Hawthorn; (d) a response from the Applicant to Mr Hawthorn's statement. In addition, during the hearing the parties in attendance and the tribunal downloaded the Aviva "Policy Wording" document from the link http://broker.aviva.co.uk/integrated/RPI/Combined/PolicyWording/BCOPO14489092019/ on page 2 of the Aviva Quotation Schedule in the Applicant's bundle. The tribunal has noted the contents of all of these documents.

Decisions of the tribunal

(1) Frederica Rose Hawthorn is substituted for Samuel Hawthorn as a Head-Lessee and Respondent.

(2) The tribunal determines that the following sums were/are payable to the Freeholder, in respect of service charges for building insurance, by the four Head-Lessees jointly, for the following years:

2014/2015	£1,070.32
2015/2016	£956.71
2016/2017	£1,008.82
2017/2018	£1,071.85
2018/2019	£1,013.66
2019/2020	£1,020.33
2020/2021	£1,058.31

(3) The tribunal does not make any order under section 20C of the Landlord and Tenant Act 1985, the First Respondent having stated at the hearing through Mr Gay that it will not be passing on any of its costs

of these tribunal proceedings to the Head-Lessees, whether through service charges or otherwise.

(4) The tribunal makes no order that any Respondent shall reimburse the Applicant in respect of the tribunal fees paid by him.

(5) The tribunal makes further determinations as set out under the various headings in this Decision.

The application

1. The Applicant seeks a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the 1985 Act") as to the amount of service charges for building insurance payable by the four Head-Lessees in respect of the service charge years 2014/2015 to 2020/21.

2. The application is dated 22 May 2020. The Applicant is one of the four Head-Lessees. Each Head-Lessee is also the sub-lessee of one of four flats, as detailed further below.

The hearing

3. The Applicant appeared in person at the hearing. The Freeholder, TR Property Investment Trust PLC ("TRP") was represented by Mr George Gay, an employee of BMO Global Asset Management ("BMO"), who have been engaged by TRP to manage its property assets. Mr Gay is also a chartered surveyor.

4. The hearing was also attended by Mr Tom Hawthorn, the father of Samuel and Frederica Hawthorn. He clarified that while Flat 3 had previously been registered in the names of Samuel and Frederica jointly, it was now solely owned by Frederica. He produced office copy entries for the leasehold flat, which record that she was registered as sole owner on 14 September 2020. The tribunal has not seen any office copy entries for the Head Leasehold title, but on the assumption that Samuel Hawthorn's interest in that has also been transferred (or will shortly be transferred) to Frederica Hawthorn, she is substituted as the relevant Respondent to these proceedings.

5. The other two Head-Lessees (Mr Moran and Ms Moshiri) did not attend the hearing and were not represented.

6. The hearing was also attended by Mr Nick Symes, an insurance broker engaged by BMO who was a witness for TRP, and by Blanche Lonley, a colleague of Mr Gay.

7. The tribunal heard live witness evidence from Mr Gay, Mr Symes and Mr Embrey. It also heard oral submissions on the issues from Mr Gay on behalf of TRP and from Mr Embrey.

8. Prior to the hearing, the tribunal was sent the electronic bundles described above. The tribunal and the parties also downloaded the Aviva policy wording, as described above, and considered this during an adjournment.

9. Directions in this matter were given by Judge Donegan on 22 September 2020, which were substantially complied with, except as noted below.

The background

10. The property which is the subject of this application, 328-334 Old York Road, Wandsworth, is a 3-storey masonry building constructed in about 1920 ("the Property"). The ground floor is a retail area, presently tenanted by Costa Coffee. The first and second floors are divided into four flats, each floor having a one-bedroom flat and a two-bedroom flat. The flats are accessed by stairs from a single street-level front door.

11. The Property is located at the point of a triangle where Old York Road meets Ferrier Street. Immediately next door is another property also owned by TRP and known as 1 Ferrier Street. This also has a retail area on the ground floor which is let to LVB Cleaning. While there was some dispute about this, it appears this property also includes a flat on the first floor, albeit probably only used for storage by the cleaning company.

12. The undisputed practice of TRP, as confirmed in the evidence, has been to treat the Property and 1 Ferrier Street as a single unit for building insurance purposes (until about 2013/2014 the retail parts formed a single shop). Any quotations obtained by TRP and premiums paid have been for both properties taken together.

13. There were no photographs of the Property in the bundle (despite an order of Judge Donegan for these) but the tribunal had the benefit of lease plans and it was also described by the parties. No party requested an inspection and the tribunal did not consider that one was necessary or proportionate to the issues in dispute, nor realistically possible given Covid-19 restrictions.

14. The first and second floors (and street level entrance) of the Property were demised under a 99 year Head-Lease dated 29 September 1985, at a nominal ground rent[1]. The freehold was subsequently acquired by TRP. Each of the four flats has been sublet on a on a long lease. The tribunal

[1] From a letter of 1 April 2020 from TRP's solicitors to Mr Embrey, it appears the title number is TGL181687.

has only seen a copy of Mr Embrey's sub-lease of Flat 4 (the one-bedroom flat on the second floor), which is also a 99-year lease from 29 September 1985. It appears likely that all 4 subleases were on essentially identical terms. Each of the four sub-lessees is also a Head-Lessee (or will be once Samuel Hawthorn's interest is transferred to Frederica Hawthorn, as necessary). The current Head-Lessees are all assignees who took on obligations under the Head-Lease when each acquired their interest in it.

15. The Head-Lease requires the landlord to provide services and the Head-Lessees to contribute towards their costs by way of a variable service charge, including in respect of building insurance. Paragraph 4 of the Head-Lease sets out covenants given by the Head-Lessees, including sub-paragraph 4(8), by which they covenant:

"*(8) To repay to the Lessor on demand two thirds of the sums which the Lessor shall from time to time pay by way of premiums for keeping the Building insured under the covenants on the part of the Lessor contained in paragraph 5 hereof.*"

Other provisions of the lease will be referred to below where appropriate.

16. The tribunal has seen invoices from TRP to the Head-Lessees for the years 2016-2017, 2017-2018, 2019-2020 and 2020-2021. From these it appears the insurance premium year runs from 23 June to 22 June.

17. The evidence of Mr Gay, which was not disputed by Mr Embrey, is that although the Head-Lease provides for the Head-Lessees to pay two-thirds of the costs of the building insurance for the Property, since 2013/2014 TRP has in fact invoiced the Head-Lessees for one third of the total insurance premium it has paid for both the Property and 1 Ferrier Street together. Mr Gay said that an informal agreement had been reached at that time with Costa Coffee and LVB Cleaning under which each of them would pay one third of the insurance premium. That has been the arrangement ever since. (Mr Gay also said that prior to 2013/2014, the commercial tenant occupying all the ground floor of the Property and 1 Ferrier Street had paid 100% of the building insurance.)

18. In relation to the division of the premium, TRP also relied on a Reinstatement Cost Assessment Report from Sarah Hazell MRICS of Jones Hargreaves, dated September 2020. This advised at paragraph 2.7 that the gross internal area of the Property was 828 m^2, of 1 Ferrier St was 330 m^2, and the combined area of both was 1,158 m^2. The Property therefore comprises 72% of the combined unit, by area, and 1 Ferrier St comprises 28%. At paragraph 4.2, the report advised on the separate reinstatement costs for the two properties. This also divided 72% to the Property and 28% to 1 Ferrier St.

19. TRP's position is that the Head-Lessees have therefore benefitted by being charged only one third of the total insurance premium for the Property and 1 Ferrier Street. If the premium had been split between the two properties by reference to either reinstatement cost or floor area, the Head-Lessees would have been obliged under the terms of the Head-Lease to pay two thirds of 72% of the premium, i.e. 48% of the premium for the two properties together.

20. TRP does not argue that the amount payable for insurance for the years in question is any more than the one third which was invoiced. However, Mr Gay said he could make no commitment that TRP would continue to charge the Head-Lessees only one third of the total premium in the future.

21. The tribunal is only concerned on this application with the liability for insurance costs as between TRP and the Head-Lessees (jointly). It is not concerned with the division of the costs as between the Head-Lessees. It is nevertheless noted that paragraph 2(2) of Mr Embrey's sublease requires him to pay the lessor (i.e. the four Head-Lessees, jointly) 25% of the expenses and outgoings incurred by the lessor, including in relation to insurance of the building. However, the undisputed evidence of Mr Embrey was that the Head-Lessees had informally agreed between themselves that the tenants of the two-bedroom flats would contribute 30% and those of the one-bedroom flats 20% of any expenses incurred.

22. It appears separate part-payments in respect of insurance costs were made by the Head-Lessees individually to TRP's managing agents (who until March 2020 were Savills), rather than as a single annual payment. Surprisingly, no records have been produced by TRP of the payments received by it from the Head-Lessees: Mr Gay said he had not yet been able to obtain the records from Savills. However, he said he did not believe there were any sums outstanding, at least prior to the 2020/2021 year. There were also no documentary records (such as copy bank statements) from Mr Embrey as to the payments he has made. These included a cheque for £1,020.32 which he paid to TRP's solicitors in about February 2020. He also said he had been unable to obtain details from the other three Head-Lessees of what they had paid. This lack of cooperation appears to stem mainly from a concern on the part of the other Head-Lessees that Mr Embrey's application might result in their insurance service charges being increased rather than reduced.

23. One consequence of all of this has been a great deal of confusion and lack of clarity as to what has actually been paid by the Head-Lessees, and for what. The tribunal has been wholly unable to resolve this on the evidence available. This decision therefore deals only with what is payable, and expresses no view as to what has been paid or by whom. It is however recorded that Mr Gay said during the hearing that TRP would be getting a full reconciliation of payments from Savills and that if there had been any overpayment, this would be repaid to the Head-Lessees.

The issues

24. The issue for determination by the tribunal is the payability and reasonableness of service charges in respect of building insurance costs, for each of the years from 2014-2015 to 2020-2021.

25. The relevant statutory provisions are contained in sections 18, 19 and 27A of the Landlord and Tenant Act 1985 ("the 1985 Act"). Extracts from the 1985 Act are set out in an appendix to this decision.

26. Having heard evidence and submissions from the parties and considered all of the documents provided, the tribunal has made determinations on the various issues as follows.

The tribunal's decision on payability

27. The following sums were/are payable to TRP in respect of building insurance, by the four Head-Lessees jointly, for the following years:

2014/2015	£1,070.32
2015/2016	£956.71
2016/2017	£1,008.82
2017/2018	£1,071.85
2018/2019	£1,013.66
2019/2020	£1,020.33
2020/2021	£1,058.31

Reasons for the tribunal's decision

28. Section 27A of the 1985 Act provides that the tribunal has the power to determine whether a service charge is payable; and if so, the amount payable, by whom and to whom. Section 18(1) provides that "service charge" means (a) an amount payable by a tenant for, among other things, insurance, which (b) may vary according to the relevant costs.

29. Section 19 provides (so far as material) that relevant costs shall be taken into account only to the extent that they are reasonably incurred.

30. It should be noted that the tribunal therefore has to determine *whether the costs have been reasonably incurred*; not whether the amount of the service charge is reasonable.

31. In TRP's written evidence, Mr Gay set out two tables of the sums for insurance charged to the Head-Lessees[2], together with hypothetical alternative charges at either 48% or 66% (approximately) of the total premiums. These were intended to demonstrate the extent to which the Head-Lessees were said have been treated advantageously, by being charged less than they would have been charged if TRP had enforced what it said were its strict legal rights. However, this does not address the correct question, which is whether the insurance costs themselves have been reasonably incurred.

32. What it does suggest is an awareness that charging the Head-Lessees 48% of the premiums incurred seemed excessive, possibly because the two-thirds fixed by the Head Lease appears unfairly high. However, as the tribunal explained during the hearing, it has no power to alter the proportions fixed by the lease: this is not a case where the lease has provided for the tenants to pay a "fair proportion" of the costs, which the tribunal could review[3].

33. In addition of course, since TRP has been receiving two thirds of the premium from the commercial tenants, it could not have justified demanding more than one third from the Head-Lessees. Insofar as TRP has received two thirds of the total premium for any year from Costa Coffee and LVB Cleaning, the tribunal considers that no more than one third of the premiums paid by it can be payable by the Head-Lessees, under s.27A(1) of the 1985 Act, in any event.

34. Mr Embrey's position was that these sums were still not fair because in absolute terms he said the amount charged to the Head-Lessees (and in particular to him) was still too high. He said that the benchmark should be that one could get a quote for building insurance for a one-bedroom flat in London for £100-£200 p.a.. However that approach is clearly wrong for several reasons: first, the tribunal has to consider the whole demise of all four flats, not a single one alone; second, one has to consider the particular property, so any alternative quotes obtained are genuinely comparable; third, there was no proper evidence before the tribunal of a quote of £100-£200, simply Mr Embrey's statement that he had obtained such quotes through websites.

35. The Upper Tribunal case of *Sadeh v. Mirhan and Azzniv* confirms that where a property is mixed-use commercial and residential, an appropriate insurance premium is one calculated by reference to the

[2] pages 3 and 5 of TRP's bundle

[3] Unlike e.g. *Sadeh v. Mirhan and Azzniv* [2015] UKUT 0428 (LC), considered further below.

building being as it is, i.e. mixed use, and not as if it were a 100% residential building[4].

36. Much the better and more relevant evidence put in by Mr Embrey was the building insurance quotations which he had obtained from Aviva and QBE, both dated 2 October 2020, through Allianz Business Services Ltd and for the purposes of this application. He said he had done this by sending Allianz/Aviva/QBE a copy of the policy schedule for the Zurich policy. The quotation from Aviva was £1,667.47 before tax, or £1,867.57 after Insurance Premium Tax. The quotation from QBE was £1,902.16 before tax and £2,130.42 after tax. The comparability of these quotations is considered in more detail below. The tribunal records that it has not in fact seen the Zurich policy, as no party put it in evidence, although TRP included at Appendix III to its evidence details of the "Basis of Cover" on which Reich carried out its market testing and instruction.

37. The *total* premiums actually paid by TRP for building insurance[5] were set out in the first line of Mr Gay's tables, and (with a breakdown into component parts) in Appendix II to TRP's written evidence. The same figures (or 1p different) are stated by Mr Embrey in his evidence. The tribunal therefore accepts these figures. No evidence was given by TRP as to the premium paid in 2014/2015. Mr Embrey stated in his evidence at p.4 that the total premium paid in that year was £3,210.95, and the tribunal accepts that evidence. Accordingly it finds the total premiums paid by TRP were:

2014/2015	£3,210.95
2015/2016	£2,870.12
2016/2017	£3,026.50
2017/2018	£3,215.59
2018/2019	£3,040.97
2019/2020	£3,061.03
2020/2021	£3,174.93

38. Mr Embrey also referred in his evidence to the decision of Judge Stuart Bridge in the Upper Tribunal in *Cos Services Ltd v Nicholson*[6], which is directly relevant to this application. That decision concerned the approach which the tribunal should take to determining whether

[4] [2015] UKUT 0428 (LC) at [41]

[5] i.e. for the Property and 1 Ferrier Street together

[6] [2017] UKUT 382 (LC)

insurance costs which had been charged to tenants through a service charge, had been reasonably incurred. The judge held this had to be considered in the light of the decision of the Court of Appeal in *Waaler v. Hounslow LBC*[7], as to the proper approach to applying the reasonableness test in s.19 to service charges more generally.

39. In particular, both cases confirm that this is a two-stage test: the tribunal must consider (a) whether the landlord's decision-making process was reasonable and (b) whether the amount actually incurred was reasonable in the light of market evidence, or outside the market norm. In deciding what is reasonable, the tribunal must also take into account relevant circumstances, including the fact it is the tenant who will ultimately be paying the charge. Finally, the question is whether the option selected by the landlord was a reasonable one, even if other reasonable decisions could also have been made. The tribunal cannot substitute its own preference if the landlord's decision was a reasonable one.

40. The Court of Appeal in *Waaler* confirmed that the test is not simply whether the landlord has followed a rational process. If it had not acted rationally, then the charge would not be recoverable at all under the lease at common law, even without s.19. That section must have been intended to add something more to the common law position. That something was that the outcome also needed to be reasonable, in the light of market evidence. It was not enough that the landlord followed a reasonable process, if that had led to a clearly unreasonable outcome. In *Cos*, the insurance premium incurred was four times the level which market evidence indicated was the norm. In the absence of any good explanation from the landlord, this was held to be unreasonable.

41. The starting point is the terms of TRP's obligation to insure under the Head Lease. This is set out in sub-paragraph 5(3), which states (so far as material) that the landlord covenants:

> "*(3)(a) To insure and keep insured the Building in an insurance office of repute against loss or damage by fire and all other normal comprehensive risks and such other risks as in the opinion of the Lessor are necessary to be insured against (herein referred to as "The Insured Risks") in the full reinstatement value thereof ….*
>
> *(c) Whenever reasonably required by the Lessee and at the Lessee's cost to provide a duplicate of the policy or policies of the said insurance and to produce the receipt for the last premium for the same."*

42. Notably, TRP are obliged to insure against "*all other normal comprehensive risks*", and the clause also gives TRP a wide degree of discretion in determining what other risks are "necessary" to be insured against. This is relevant to determining whether the premium costs

[7] [2017] EWCA 45, [2017] HLR 16

incurred were reasonably incurred. TRP are not obliged under the lease to provide details of the market testing they have carried out. However, such evidence is relevant to demonstrating reasonableness on this application.

43. TRP relied on the evidence of Mr Gay and of its insurance broker Mr Symes of Reich Group ("Reich") in support of its position that the insurance premiums were reasonably incurred.

44. Mr Gay explained that TRP owns a number of property assets and have engaged BMO to administer them. Mr Gay is employed as the direct property fund manager to undertake that work. BMO had decided to use an insurance broker to negotiate all building insurance required across all TRP's properties. Most of TRP's properties were commercial: the Property was unusual in being mixed residential/commercial use.

45. Mr Gay said they had chosen to use a broker rather than him obtaining insurance quotes because he was not qualified to place commercial insurance in the market. BMO had a longstanding relationship with Reich and did not consider it would be productive to change brokers from time to time – there was added value from a longstanding relationship with a broker who knew the client. Mr Symes also said that there would be no purpose to changing brokers in an effort to get a better quote from insurers. In his experience any particular insurance company would give the same quote to different brokers if the property offering was the same. He said cost was not the only factor in choosing a broker – service and performance were a large part, and Reich had provided BMO and TRP with a good level of service, which the Head-Lessees had benefitted from, in particular in having had recent claims accepted.

46. Mr Gay said in response to cross-examination by Mr Embrey that he and BMO do not receive any commission from insurers on the insurance placed, nor do they receive any gifts or other payments. TRP's written evidence states that the insurer pays Reich 20% of the premium before tax (this applies to both the main property insurance and the separate terrorism insurance). This is intended to cover Reich's work in handling the account, collecting premiums, administering any claim and undertaking a broking exercise once every 3 years. Mr Symes confirmed this in evidence.

47. Insurance for the Property/1 Ferrier Street was negotiated by way of a block policy together with 4 other properties. The other properties were all commercial and not all were in London. Although insurance for the portfolio of 5 properties was arranged together, Mr Symes said the premiums were fixed separately for each property by reference to the characteristics (including claims history) of each. However the same policy terms and conditions applied across all properties. Mr Gay and Mr Symes considered there were advantages in terms of convenience in having the same terms apply across all the different properties. Mr

Symes also said he had been able to negotiate wider cover than would generally be available, for example for storm damage without the insured having to prove causation.

48. Mr Symes explained that their strategy was to renegotiate premiums every three years, locking the premiums down for the intervening years so they only increased by a fixed amount. At the 3 year point, he said Reich carried out full market testing, sending details to between 10 and 20 insurance companies for quotes (which would have included Aviva), asking for the best possible premium based on the level of cover required. His experience was that, in commercial building insurance, this resulted in better deals and better customer service overall than seeking to renegotiate every year, which was counterproductive because it undermined relations with the insurers. He said their sole aim in arranging insurance was to provide full and comprehensive cover for properties. TRP's written evidence stated that all the usual large insurers were approached as part of this process, and were selected applying requirements for: financial strength, specialism in property insurance, a willingness to subscribe to Reich's specified policy wording and a reputation for settling claims quickly and fairly.

49. In 2015 Mr Symes said NIG had given the best quote after the market testing process, so a 3 year agreement had been made with them. In 2018 Reich had retested the market. Zurich Commercial had given the most competitive quote, so a 3-year agreement had been made with them. A claim had been made in 2019 for storm damage, which had been paid even though the exact mechanism between the storm and the damage was unclear. In addition, two claims for water ingress had been paid in 2019. This claims history was likely to affect the premium charged when the market was next tested, and he noted this history had not been taken into account in the two alternative quotes obtained by Mr Embrey.

50. The premium included a separate premium for terrorism cover. TRP's written evidence states this is obtained through Convex Insurance. Mr Embrey challenged the inclusion of this cover as being unnecessary from his perspective as a flat-owner. Mr Gay and Mr Symes said that terrorism cover was included and considered necessary because the Property was in central London, near a transport hub.

51. The tribunal accepts that it was reasonable for TRP to include terrorism cover, taking into account the broad discretion which TRP has under the lease to decide what risks are necessary to be insured against.

52. Mr Symes said that for the terrorism cover, Reich was paid an additional 17.5% of the premium by the insurer to administer the policy (i.e. produce policy documents and bordereaux, invoice charges etc.). This was in addition to the 20% commission, so for 2020-2021 Reich received a £98.11 administration fee and £112.12 commission on that cover.

53. Mr Embrey also complains that the policy includes cover for loss of rent/alternative accommodation if the Property becomes uninhabitable, which he says is not relevant to owner occupiers such as himself. The tribunal accepts the evidence of Mr Symes that TRP was entitled to conclude such insurance was reasonably necessary (within the terms of clause 5(3)(a)) since it would benefit both owner-occupiers and those who rented out their flats, who would benefit either from the loss of rent cover or payments for alternative accommodation. The evidence was that two flats were owner-occupied and two were sub-let by their owners, so it would be appropriate for TRP to take out insurance which covered either situation.

54. Mr Symes also explained that the insurance obtained was "all risks" rather than covering only specified events. He said that this was considered preferable by him and Mr Gay, even though this was more expensive than insurance for specified risks, because it made it simpler to make a claim and less likely that the insurer would seek to contest a claim. Given the reference in paragraph 5(3) of the lease to "*all other normal comprehensive risks and such other risks as in the opinion of the Lessor are necessary to be insured against*", the tribunal considers it was at the very least within the scope of TRP's discretion to choose to take out an "all risks" building insurance policy.

55. The tribunal also considers that it was reasonable for TRP to choose to use a broker to arrange building insurance rather than BMO arranging insurance itself. The RICS Service Charge Residential Management Code (3rd edition) includes advice on insurance matters in section 12. This warns landlords and their agents (which would include BMO) that they should not carry out any insurance-related business, including placing insurance, unless they are authorised by the FCA to do so, and to do otherwise is unlawful. Since Mr Gay says he is not qualified to place commercial insurance, the tribunal considers it was plainly reasonable for BMO to use an authorised broker to do this.

56. The tribunal accepts the evidence of Mr Symes and Mr Gay as to the process which was followed by TRP, BMO and Reich in obtaining building insurance for the years from 2014/2015 to 2020/2021. The tribunal further considers that overall, this process was a reasonable one to have been followed given (a) the mixed use nature of the Property; (b) the perceived benefits of using a broker and negotiating 3-year agreements; (c) the fact that premiums were set separately for the different properties in the portfolio; and (d) the degree of discretion which TRP had under the lease to determine the risks to be covered. The RICS Code states in this regard at 12.5 that: "*Insurance procured may not necessarily be the cheapest available, but should cover appropriate risks and be subject to market testing. You should regularly review the extent of cover and level of premiums for all insurances under your control.*"

57. Where an insurer has paid commission on premiums to a landlord which is for the provision of brokerage services by the landlord, it has been held that the landlord does not have to deduct the amount of that commission from the premiums recharged to the tenants – see decision of Lightman J in *Williams v. Southwark London Borough Council*[8]. If there is no obligation to give credit for such a commission for services which is paid to the landlord, it necessarily follows that there equally cannot be an obligation to give credit where the commission is paid by the insurer direct to a broker. Since Reich has provided services for the commission paid, as outlined by Mr Symes, the tribunal is also satisfied that the inclusion in the premium of a 20% element representing payment for those services was reasonable.

58. As outlined above, the tribunal must also consider whether the amounts actually incurred by TRP were reasonable, in light of market evidence.

59. The tribunal accepts the evidence of Mr Symes that Reich carried out market testing in 2015 and 2018 by submitting the required policy terms to a significant number of insurers, and accepted the lowest quote. Mr Embrey criticises Mr Symes and Mr Gay for the fact that no minutes of the briefings between Reich and BMO, nor documentary records of the market testing carried out by Reich have been produced in evidence. While it would have been good practice for Reich and TRP to have retained records of the market testing carried out, the absence of such records does not cause the tribunal to reject the oral and written evidence of Mr Symes and Mr Gay of the market testing carried out, which it accepts.

60. On this evidence therefore, the tribunal concludes that the premiums paid were at market rates, for the scope of the "all risks" policy sought by Reich on behalf of TRP.

61. Mr Embrey relies on the two quotations referred to above, from Aviva and QBE, in support of his position that the insurance taken out was at an excessive premium. In their written evidence at Appendix II, TRP set out their response to the comparison. They noted that there was no policy wording which could be compared for either quote. They noted that the Aviva policy included a strict claims condition which was not the case with the policies placed by Reich. Mr Symes confirmed that TRP wished to avoid policies with tricky claims conditions, which would make putting in a claim onerous or difficult to make good, or require the insured to produce evidence which would be difficult to obtain.

62. During the hearing, the parties and tribunal downloaded the Aviva policy conditions referred to in the quotation, which were considered during an adjournment. Mr Symes then observed that the Aviva policy was not an "all risks" policy, but rather gave protection against specified risks, such

[8] (2001) 33 H.L.R. 22

as property damage. He said this meant it was not comparable, especially since this made the process of submitting a claim more onerous and more likely to be contested by an insurer. There were also a number of respects in which he pointed out that the cover under the Zurich policy was greater.

63. The tribunal also noted that both quotations referred only to the Property address and did not refer to 1 Ferrier Street. While Mr Embrey said that he had simply provided the insurers with a copy of the existing schedule, it nevertheless appears more likely than not that the physical property that these quotations related to was therefore different from and smaller than the policies taken out by Reich. This was through no fault of Mr Embrey, who no doubt thought that giving the Property address would be sufficient, but the policies placed by Reich all included 1 Ferrier Street, because they knew this was necessary. One would clearly expect a quotation which did not extend to 1 Ferrier Street to be cheaper.

64. For all of these reasons, the tribunal concludes that the quotations obtained by Mr Embrey were not sufficiently comparable, and that overall this evidence was not sufficient to displace the conclusion that the policies taken out by TRP were at market rates, following market testing, and that their scope was within the terms of clause 5(3) of the Head Lease. Unlike in the *Cos* case, there is evidence in this case that full market testing was done.

65. The tribunal further accepts that allocating one third of the total premium for the Property and 1 Ferrier Street (together) is reasonable given that the Property makes up 72% of the whole, when assessed by either area or reinstatement value. Accordingly, since the Head-Lessees have only been invoiced for one third of the total premiums the tribunal concludes that the sums invoiced are payable, in circumstances where the other two thirds of the premiums have been met by the commercial tenants. However, the tribunal does not consider that it necessarily follows that invoicing 48% of the total to the Head-Lessees would also have been a reasonable approach: 1 Ferrier Street is a commercial property for which the building insurance rate would be expected to be proportionately higher.

66. The tribunal notes that Mr Embrey has included in his bundle a letter from LVB Cleaning in which they claim that there has been an overcharging of building insurance to them, and that the cover is more extensive than they consider is necessary. The present application does not relate to 1 Ferrier Street, and LVB Cleaning are not a party to it. However, this letter does indicate that there is no guarantee that LVB Cleaning will continue to be willing to pay one third of a premium assessed for the combined properties.

67. One factor which clearly is and should be relevant to TRP's decision-making process is the fact that under the terms of the Head-Lease, it is

the tenants of the flats who have the obligation to pay the majority (two-thirds) of the insurance premium for the Property. It is therefore necessary for TRP to ensure that the building insurance policy taken out is appropriately tailored for a property which is predominantly residential, and they do not allow the choice of policy for this Property to be driven by the fact that the remainder of their portfolio is commercial. The tribunal considers that TRP have achieved this to date by only requiring the Head-Lessees to pay one third of the combined premium. However, if the informal agreement with Costa Coffee and LVB Cleaning that they will meet two thirds of the premiums for the combined unit breaks down, TRP will need to find other ways of properly allowing for the predominantly residential nature of the Property when placing the building insurance. In those circumstances and depending on the rates available in the market, it may no longer be reasonable for TRP to take out a single policy which covers 1 Ferrier Street as well as the Property. Any change to the proportions payable under the Head-Lease would of course require the consent of all the parties to that Head-Lease, and cannot be mandated by the tribunal.

Application under s.20C and refund of fees

68. At the end of the hearing, the Applicant made an application for a refund of the fees that he had paid in respect of the application/ hearing[9]. Having heard the submissions from the parties and taking into account the determinations above, and in particular the fact that TRP has essentially been successful on this application, the tribunal does not order any Respondent to refund any fees paid by the Applicant.

69. In the application form, the Applicant applied for an order under section 20C of the 1985 Act. Having heard the submissions from the parties and taking into account the determinations above, the tribunal determines that no such order shall be made. However it records that Mr Gay stated on behalf of TRP that no costs would be passed on to the Head-Lessees through the service charge.

Name: Judge N Rushton QC **Date:** XX January 2021

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.

[9] The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013

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).

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.

(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.

Section 20

(1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsection (6) or (7) (or both) unless the consultation requirements have been either—
(a) complied with in relation to the works or agreement, or
(b) dispensed with in relation to the works or agreement by (or on appeal from) the appropriate tribunal .

(2) In this section “relevant contribution”, in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

(3) This section applies to qualifying works if relevant costs incurred on carrying out the works exceed an appropriate amount.

(4) The Secretary of State may by regulations provide that this section applies to a qualifying long term agreement—

(a) if relevant costs incurred under the agreement exceed an appropriate amount, or
(b) if relevant costs incurred under the agreement during a period prescribed by the regulations exceed an appropriate amount.

(5) An appropriate amount is an amount set by regulations made by the Secretary of State; and the regulations may make provision for either or both of the following to be an appropriate amount—
(a) an amount prescribed by, or determined in accordance with, the regulations, and
(b) an amount which results in the relevant contribution of any one or more tenants being an amount prescribed by, or determined in accordance with, the regulations.

(6) Where an appropriate amount is set by virtue of paragraph (a) of subsection (5), the amount of the relevant costs incurred on carrying out the works or under the agreement which may be taken into account in determining the relevant contributions of tenants is limited to the appropriate amount.

(7) Where an appropriate amount is set by virtue of paragraph (b) of that subsection, the amount of the relevant contribution of the tenant, or each of the tenants, whose relevant contribution would otherwise exceed the amount prescribed by, or determined in accordance with, the regulations is limited to the amount so prescribed or determined.]

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.

(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are

not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;

(aa) in the case of proceedings before a residential property tribunal, to that tribunal;

(b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;

(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

(3) The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.