UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT- Service charges- Landlord and Tenant Act 1985, section 27A- Reasonableness of insurance premiums- Block policy- Premiums found to be excessive- Appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

COS SERVICES LIMITED

Appellant

and

(1) IRENE M NICHOLSON
(2) WENDY E WILLANS

Respondents

Re: 15 Chiltern Court,
Milton Road,
Harpenden,
Hertfordshire
AL5 5LY

His Honour Judge Stuart Bridge

Royal Courts of Justice, Strand, London WC2A 2LL
15 June 2017

Carl Brewin for the appellant.
The respondents appeared in person.

The following cases were referred to in this decision:

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Avon Estates (London) Ltd v Sinclair Gardens Investments (Kensington) Ltd [2013] UKUT 264 (LC)
Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd (1997) 29 HLR 444
Braganza v BP Shipping Ltd [2015] UKSC 17, [2015] 1 WLR 1661
Forcelux Ltd v Sweetman [2001] 2 EGLR 173
Havenridge v Boston Dyers Ltd [1994] 2 EGLR 73
Waaler v Hounslow LBC [2017] EWCA Civ 45, [2017] HLR 16
Williams v Southwark Borough Council (2001) 33 HLR 22

DECISION

Introduction

1. This is an appeal against the decision of the First-Tier Tribunal (Property Chamber) [hereafter FTT] dated 9 November 2016. Following the decision being given, the appellant sought permission to appeal from the FTT, attaching to its application a letter from its insurers (NIG) dated 23 November 2016.

2. Permission to appeal was granted by the FTT on 16 January 2017, the FTT noting that, had the letter been produced at the hearing before the FTT, the outcome might have been different. The FTT observed that it had considered whether it could set aside or review its decision under the provisions of the Rules, but that it had decided that in order to do justice it would be necessary to re-hear the case with fresh evidence from both sides.

3. Directions were given by this Tribunal on 15 February 2017. The Tribunal directed that the appeal would be conducted as a review of the decision of the FTT under the Tribunal's standard procedure.

4. The hearing of the appeal took place on 15 June 2017. The respondents had maintained the view consistently through the appeal process that no oral hearing was necessary and that they would be content with a review of the FTT decision on the papers. However, at the hearing of the appeal, it was clear that both parties had attended the Tribunal in the mistaken belief that there was to be a re-hearing and the witnesses they intended to call were present.

5. After a discussion with both parties, and an opportunity being given for reflection (and for the respondents to digest the contents of the appellant's skeleton argument which they had not previously seen), it was agreed by all that the appeal should proceed by way of re-hearing.

The factual background

6. Chiltern Court is a purpose-built block of flats in its own grounds. Four storeys high, it comprises 16 flats and a separate garage area of two blocks containing eight garages in each block. It is agreed that the grounds are well cared for, and that the common parts are in good order.

7. The respondents (hereafter "the tenants") are the registered leasehold proprietors of 15 Chiltern Court, which they purchased on 5 September 2014. The appellant ("the landlord") is the freeholder of the block which has been managed by Urbanpoint Property Management Limited ("the agents") since 1989.

8. In these proceedings the tenants have challenged insurance premiums claimed by the landlord through its agents for the years 2014, 2015 and 2016. Before the FTT there was a secondary issue concerning the agents' management charges for the same period, but this is no longer pursued.

The FTT decision

9. Before the FTT the landlord sought to justify, as payable under the terms of the respondents' lease, insurance premiums for the building as follows:

2014/15: £12,598.20

2015/16: £12,670.02

2016/17: £13,561.94

10. Having heard evidence from Mr John Blain FCII (for the tenants) and from Mr Ian Capjon (for the landlord), the FTT determined that the insurance premiums payable for the building should be:

2014/15: £2,803.10

2015/16: £2,819.08

2016/17: £3,017.65

11. The tenants, it is agreed, are liable to pay one-sixteenth of those premiums in accordance with the terms of their lease.

12. The Tribunal was informed by the landlord at the commencement of the hearing that following a review of the re-building costs the premium claimed for 2016/17 had been reduced to £11,150.02. The premiums being claimed for the previous two years remained as before.

The statutory framework

13. The relevant statute is the Landlord and Tenant Act 1985.

14. Section 27A provides (so far as is relevant) that an application may be made to the FTT for a determination whether a service charge is payable, and if it is, the amount which is payable.

15. Section 18(1) defines "service charge" as:

> 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.

16. By 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.

17. The principal issue before the FTT, and in this appeal, has been and is whether the insurance premiums claimed by the landlord from the tenants have been "reasonably incurred."

18. In the statement of agreed facts and issues, at paragraph 11, the tenants submit (and by necessary inference the landlord contests) that a further issue arises, namely whether the Tribunal has an overriding power in law to determine that the premiums are excessive.

19. This is a reference to the power conferred on "the appropriate tribunal" in the Schedule to the 1985 Act to determine that the insurance which is available from the landlord's nominated insurer for insuring the tenant's dwelling is unsatisfactory in any respect, or the premiums payable in respect of any such insurance are excessive. Such a determination gives rise to a discretionary power in the tribunal to order the landlord to nominate another insurer.

20. There is a short answer to the tenants' submission in this regard. No application for the exercise of this power was made before the FTT, and the appeal to the Tribunal, albeit by way of re-hearing, is limited to the application under section 27A. There is no overriding power outside the statutory provisions contained in the 1985 Act, and those provisions have not been invoked in the tenants' application. The Tribunal therefore takes the view that it should not assume jurisdiction to decide this issue.

The provisions of the lease

21. The tenants' lease was granted for a term of 999 years from 29 September 1967 at a rent of £15 per annum together with the service charge.

22. The lessee covenanted, inter alia:

> "not to use the flat or any part thereof or permit the same to be used other than as a private residence only in one occupation; and
>
> "not during the last seven years of the said term to assign or underlet the flat or any part thereof without the consent in writing of the Lessor first obtained."

23. The lease contained no other controls on alienation or disposition binding upon the tenants.

24. The lessor covenanted with the lessee that, subject to the payment by the lessee of one sixteenth of the total cost, the lessor would:

> "At all times during the said term (unless such insurance shall be vitiated by any act or default of the Lessee or the owner Lessee or occupier of any other flat comprised in the Building) insure and keep insured the said Building against loss or damage by fire and such other risks (if any) as the Lessor thinks fit in some insurance office of repute in the full value thereof including insurance to cover architects' and legal fees and two years rent and will whenever reasonably required produce to the Lessee the policy or policies of such insurance and the receipt for the last premium for the same and will in the event of the said Building being damaged or destroyed by fire as soon as reasonably practicable lay out the insurance moneys in the repair rebuilding or reinstatement of the said Building."

When is an insurance premium "reasonably incurred"?

25. The FTT was not referred to any authorities interpreting the relevant statutory provisions. However, in the course of this appeal, the landlord referred the Tribunal to its previous decision in *Avon Estates (London) Ltd v Sinclair Gardens Investments (Kensington) Ltd* [2013] UKUT 0264 (LC) (HH Judge Walden-Smith) [hereafter *Avon Estates*] which itself made reference to previous decisions of the Lands Tribunal and the Court of Appeal. Those decisions can be summarised, in chronological order, as follows.

26. In *Havenridge v Boston Dyers Ltd* [1994] 2 EGLR 73 [hereafter *Havenridge*], the Court of Appeal was required to construe two leases of commercial properties to which section 19 of the 1985 Act had no application.

27. I agree with and adopt the summary of the *Havenridge* decision contained in *Woodfall on Landlord and Tenant* at 7.193:

> Where a lease contained an obligation on the landlord to insure the premises "in some insurance office of repute", and an obligation on the tenants to pay "by way of further and additional rent all yearly or other sums as the Lessor shall from time to time properly expend or pay to any insurance company in respect of or for insuring and keeping insured the premises", it was held that (1)

"properly" did not mean "reasonably"; (2) there was no implied term that the premium recoverable from the tenants should be fair and reasonable; (3) the landlord could not recover in excess of the premium which he had paid and agreed to pay in the ordinary course of business; (4) the fact that the landlord might have been able to obtain a lower premium elsewhere was not relevant; he was not obliged to shop around; and (5) it was sufficient for the landlord to show either that the premium was representative of the market rate, or that the insurance contract was negotiated at arms' length and in the market place.

28. In *Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* [hereafter *Berrycroft*] (1996) 29 HLR 444, management companies had covenanted with the landlord to insure blocks of flats occupied by tenants under long leases "in some insurance office of repute and if directed by the landlord through a company nominated by the landlord." Each tenant covenanted with the management company and the landlord to pay to the company a management charge which included a proportion of the cost of the insurance. The Court of Appeal held that, on a construction of the lease, there was no restriction on the landlord's right to nominate either the company or the agency through which the insurance was to be placed, that right being unqualified. The management company and the tenants were protected by the qualification that the insurance office should be of repute.

29. The Court of Appeal then considered the question of the effect on the rights and liabilities of landlord and tenant of the provisions of the 1985 Act. The Court held that the judge in the court below, having thoroughly reviewed the evidence, had determined that the quotations for insurance obtained were competitive, being neither unreasonable nor excessive, and negotiated in the ordinary course of business. Furthermore, the judge had concluded that the active and responsible management of the agency nominated by the landlord was, taken overall, beneficial to the tenants. That being the case, the Court of Appeal, dismissing the appeal, upheld the decision at first instance that the costs of the insurance were not unreasonably incurred.

30. In *Williams v Southwark Borough Council* (2001) 33 HLR 22, Lightman J held that on a construction of the lease a landlord was not obliged, in calculating the service charge payable by its tenants in respect of insurance, to deduct the commission it had obtained from its insurer by virtue of agreeing a block insurance policy for a period of five years. The charge was, therefore, reasonably incurred.

31. In *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173 [hereafter *Forcelux*], the Lands Tribunal (Mr Paul Francis FRICS), the landlord had covenanted to insure the building containing two flats occupied by the tenants under long leases. The tenants contended before the leasehold valuation tribunal that the costs of insurance (and other works and charges claimed by the landlord) had not been "reasonably incurred", the insurance premiums being excessive.

32. The landlord had insured the whole of its property portfolio under a single policy arranged through brokers who had canvassed a limited number of nationally known insurance companies. A director of the landlord company gave evidence to the

effect that there were advantages to the landlord in having its portfolio covered under one policy, one of which was the guarantee that if one of the properties was left out the policy schedule, cover would still be provided, another was the administrative savings of having to pay a single premium and of using a broker to deal with claims handling. There were additional benefits not usually available in individual policies, such as alternative accommodation cover and specially reduced subsidence excesses. The landlord acknowledged that premiums for a commercial "block policy" such as this could well be significantly higher than those for owner-occupiers, but argued that the comparison was not a fair one. The policies compared were not like for like.

33. The Tribunal stated the applicable principles as follows:

> [39] In determining the issues regarding the insurance premiums and the cost of major works and their related consultancy and management charges, I consider, first, Mr Gallagher's submissions as the interpretation of section 19(2A) of the 1985 Act, and specifically his argument that the section is not concerned with whether costs are "reasonable" but whether they are "reasonably incurred". In my judgment, his interpretation is correct, and is supported by the authorities quoted. The question I have to answer is not whether the expenditure for any particular service charge item was necessarily the cheapest available, but whether the charge that was made was reasonably incurred.
>
> [40] But to answer that question, there are, in my judgment, two distinctly separate matters I have to consider. First, the evidence, and from that whether the landlord's actions were appropriate, and properly effected in accordance with the requirements of the lease, the RICS Code and the 1985 Act. Second, whether the amount charged was reasonable in the light of that evidence. This second point is particularly important as, if that did not have to be considered, it would be open to any landlord to plead justification for any particular figure, on the grounds that the steps it took justified the expense, without properly testing the market.
>
> [41] It has to be a question of degree, and while the appellant [sc. landlord] has submitted a well-reasoned and… in my view a correct interpretation of "reasonably incurred", that cannot be a licence to charge a figure that is out of line with the market norm.

34. The Tribunal held, on the facts, that the costs of the premiums were reasonably incurred, and that there was no evidence upon which it could be concluded that the costs were excessive. The Tribunal was satisfied, from the landlord's evidence, that the block policy was competitively obtained in accordance with the market rates, and that there was an upwards effect on premium rates in view of the limited pool of insurers who were prepared to underwrite commercial cover for commercial landlords.

35. In *Avon Estates*, above, tenants appealed by way of review from a decision of the leasehold valuation tribunal pursuant to an application under section 27 of the 1985 Act that insurance premiums charged to them by the landlords were reasonably

incurred. Having considered the authorities summarised above, the Tribunal concluded that the LVT, in dealing with the evidence before it, had properly directed itself as to the law, setting out the principle that the landlord is not obliged to shop around to find the cheapest insurance. It continued:

> [30]… So long as the insurance is obtained in the market and at arm's length then the premium is reasonably incurred. There is nothing to suggest that the insurance was arranged otherwise than in the normal course of business, and the [tenants] did not seek to adduce evidence to support such a contention. The [tenants'] complaint is that it might be possible to obtain a cheaper rate, but it is not for the landlord to establish (as has been expressly found in *Berrycroft*) that the insurance premium was the cheapest that could be found in order for the costs to have been reasonably incurred. The words "properly testing the market" used by Mr Francis in *Forcelux* in 2001 does not in any way detract from the decisions of the Court of Appeal in *Berrycroft* and *Havenridge* that the landlord must prove either that the rate is representative of the market rate, or that the contract was negotiated at arm's length and in the market-place.

36. The Tribunal accordingly upheld the decision of the LVT that the sums in respect of insurance had been reasonably incurred.

Discussion

37. It is clear from these authorities that the burden is on the landlord to satisfy the relevant tribunal on the balance of probabilities that the costs in question have been reasonably incurred. There does, however, seem to be a degree of conflict between the decisions in *Forcelux* and in *Avon Estates* as to how a tribunal is to assess whether insurance costs have been "reasonably incurred".

38. In *Forcelux*, the Lands Tribunal required two issues to be addressed, first the appropriateness and lawfulness of the landlord's actions in claiming the costs, and secondly the reasonableness of the amount being claimed. In *Avon Estates*, the Upper Tribunal required the landlord to prove one of two things, either that the rate charged was representative of the market rate, or that the contract was negotiated at arm's length and in the market place. According to this test, provided that the landlord had conducted the proper processes it could be that an insurance premium which is itself for an unreasonably high amount was nevertheless "reasonably incurred."

39. In attempting to reconcile these authorities, I have not had the benefit of sustained legal argument from both sides. While the landlord has been ably represented by Mr Brewin of counsel, the tenants have not been legally represented, although I should pay tribute to Mrs Willans, who presented the tenants' case lucidly, forcefully and succinctly.

40. Following the hearing of the appeal, my own researches revealed a recent decision of the Court of Appeal on service charges which, while not itself concerned with the recoverability of insurance premiums, gives express consideration to the

passage in *Forcelux* to which I have referred. I informed both parties of the decision and invited written submissions. Mr Brewin responded, while the tenants did not, save and insofar as the tenants expressed concern that Mr Brewin's submissions had exceeded the remit of the invitation that had been given. I should say that I do not find anything to justify that expression of concern.

41. The recent decision is that in *Waaler v Hounslow LBC* [2017] EWCA Civ 45, [2017] HLR 16. I emphasise that it does not concern insurance. The local authority landlord, having carried out works to the building containing the tenant's flat, sought to recover from her pursuant to the service charge a sum in excess of £55,000, being a proportion of the costs incurred. The Tribunal allowed the tenant's appeal from the decision of the FTT in the landlord's favour, holding that in deciding whether the costs had been reasonably incurred, the authority should have taken into account the length of the leases of the flats, the leaseholders' views of the works and the financial impact of the works upon them.

42. The authority appealed to the Court of Appeal, contending that the views of the leaseholders were immaterial and that the focus of the inquiry must be on the landlord's decision-making process. In the context of works of repair, if the landlord reasonably takes the view that his proposed course of action is a reasonable way of dealing with underlying defects he need not take account of the tenants' views and the costs will have been reasonably incurred. In deciding the question, the landlord submitted that the FTT should judge the landlord by reference to *Wednesbury* principles (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.)

43. The Court of Appeal considered at some length the meaning of "reasonably incurred" within section 19. Examining the concepts of rationality and reasonableness, Lewison LJ explained at [20] that where a contract, such as a lease, has empowered one party to make discretionary decisions which impose financial liability on another, the law will restrict the exercise of that discretion to what is rational. In other words, a term will be implied to the effect that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose; and that the result is not so outrageous that no reasonable decision-maker could have reached it: see *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661. However, rationality is not the only criteria to be applied when considering whether costs are "reasonably incurred", as Lewison LJ explained further:

> [25] If the landlord incurs costs that are not justified by applying the test of rationality, then the costs in question will fall outside the scope of the contractually recoverable service charge. The Landlord and Tenant Act 1985 must have been intended to provide protection against costs which, but for its operation, would have been contractually recoverable. It follows in my judgment that merely applying a rationality test would not give effect to the purpose of the legislation. The statutory test is whether the cost of the work is reasonably incurred.

> [26] Part of the context for deciding whether costs have been reasonably incurred is the fact that, in principle, the cost of the work is to be borne by the lessees…
>
> [27] This is emphasised by the definition of 'relevant costs' in section 18(3)(c) which ties the meaning of that expression to a service charge as defined by section 18(1). In other words no cost is a relevant cost unless it is part of an amount payable by a tenant. When any tribunal considers whether a cost has been reasonably incurred it will always have as its context that, if it has been reasonably incurred, the tenant will have to contribute to it.

44. The Court of Appeal, addressing section 19 in the context of repairs, made the important point at [29] that the provision "must have been intended to protect the leaseholder against charges that were contractually recoverable otherwise it would serve little useful purpose."

45. Having cited paragraphs [39] and [40] of the Tribunal decision in *Forcelux* (see above at [33]), the Court of Appeal commented at [33]:

> 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."

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.

The facts

50. The question for the Tribunal, on a rehearing, was whether the landlord could satisfy the Tribunal that the charges by way of insurance premium which it sought to recover from its tenants were "reasonably incurred".

51. Before the Tribunal, the appellant landlord called Mr Iain Capjon to give evidence, as they had done in the FTT. Mr Capjon is a Property Manager employed by Urbanpoint, the landlord's agents. He was able to explain the position in general terms and to communicate conversations he had had with the insurance brokers retained, namely Genavco Insurance Limited ("Genavco").

52. The landlord's position is encapsulated in its Statement of Case, signed by Mr Capjon and dated 25 August 2016, the conclusion to which reads (so far as is relevant):

> The Applicants [that is, the tenants] has [*sic*] raised a query on the level of the premium and their emails have been responded to each time. There has been an issue with the level of the premium currently being charged which has been affected by the very large claim made in 2012-13 and had to be taken into account when advising on quotations.
>
> The Applicants has [*sic*] asked the method by which the Landlord achieves a competitive premium for insurance. Our client's insurance brokers, Genavco Insurance Ltd, test the market at the renewal date each year and if a more suitable insurance policy is found then they will advise the Freeholder that the policy should be changed. The insurers were changed in 2014 from AXA Insurance to NIG Insurance.

> As we have mentioned, the Freeholder's policy is very comprehensive, which is considered to be essential with a large block policy covering a large number of buildings and flats and at any one time the flats may be let or unoccupied without the Freeholder being aware, and it is deemed necessary to have this level of insurance cover in place in order to fulfil the Freeholder's insurance obligations.
>
> With regards to the Applicants request for details of any commission or repayment of other benefit out of the insurance premium paid or given to the landlord or landlord's agents, we would advise that there is no insurance commission of any type paid to Urbanpoint Property Management Ltd. However, we can confirm that there is an allowance for commission of 10% included in the premium between the freeholder and the insurance brokers for this property.

53. Before the Tribunal, Mr Capjon was asked to expand upon the block insurance policy taken out by the landlord. He was able to say that the portfolio was, to his knowledge, "enormous", that it included properties in a range of locations (he mentioned specifically Teignmouth, Portsmouth, Liverpool and Manchester, although he believed the concentration was in the Home Counties), and that the tenure was predominantly, although not exclusively, long leasehold. His understanding was that the freeholder wanted a comprehensive all-cover policy because it did not want to have to deal with discrepancies and it was crucial that everything was covered.

54. However, Mr Capjon was unable to say how many properties were captured by the policy or how the agreement had been negotiated. He seemed to accept, when referred to the course of correspondence between the parties, that the landlord had not dealt with the tenants' concerns as efficiently or expeditiously as he would have liked. He explained to the Tribunal that there were delays because it was necessary for him to contact the brokers following each specific enquiry as they were relied upon for advice. He accepted that he had not attempted to mediate between the brokers and Mr Blain who had been advising the applicant tenants, and he conceded that he could have spoken to his contact at the brokers to initiate a discussion.

55. Mr Capjon specifically relied upon two letters, one from Genavco dated 23 August 2016 in which the brokers had clarified the background to the premium being determined, and one from NIG, the insurers, dated 23 November 2016, which he said provided some explanation of the advantageous terms believed to be necessary (and included in the NIG policy) in order to ensure the block policy covered all eventualities.

56. The letter from NIG is, it must be said, purely explanatory of the terms of the insurance policy. It is not, in any sense, a side letter amending or adding to the policy's existing terms.

57. The letter helpfully sets out what are the essential protections (the so-called 'advantageous terms') provided by the NIG policy:

"(1) The insurance allows for the property to be sub-let at any time, whether with or without the knowledge of the freeholders…

"(2) We undertake not to cancel or restrict in any way the cover under the policy irrespective of the nature of any sub-letting, and the Insurance will not be invalidated by any increase in risk due to the acts of the leaseholders or any tenants…

"(3) The insurance will not be invalidated or restricted or cancelled in the event of any part of the property becoming unoccupied for any period of time, whether or not insurers are aware of such occupancy, or being used for business or trade purposes…

"(4) We undertake not to cancel the insurance or lapse the policy due to late payment of the premium, and undertake to maintain insurance for the benefit of the freeholders in such event.'

58. The protection offered by paragraphs (1) to (3) is qualified in each case as follows:

"We expect to be notified of any change in risk and interest as soon as the freeholders become aware, but in any event the non-invalidation clause is included in the policy to protect the freeholders against any action taken by leaseholders or occupiers which may increase the risk of damage, without the knowledge of the freeholders. All we ask is that we are advised as and when the freeholders become aware of such circumstances."

59. In relation to paragraphs (2) and (3), the insurers state that they "reserve the right to underwrite any change in risk when we are made aware."

60. The protection offered by paragraph (4) is qualified as follows:

"The exception would be in the event of fraud, criminal act, wilful or malicious act or neglect on the part of the freeholders when we would reserve our right to cancel the insurance, after a full consideration of the facts."

61. The tenants called Mr John Blain FCII to give evidence, as they had done in the FTT. Mr Blain was not called as an expert witness. It is conceded by the respondents that he lacks impartiality, having acted in a professional capacity on behalf of Mrs Willans's husband for over thirty years.

62. Mr Blain challenged the landlord's contention that these 'advantageous terms' offered by the block insurance policy could possibly justify the differential in premium between that charged by NIG and that charged by other insurers for similar policies (offered by Covea and by AXA). It was his case that the NIG policy was not very different from the policies with which he sought to compare premiums. This

(whether the comparison was sufficiently like for like as to be of assistance) became the dominant issue in the proceedings before the Tribunal.

63. It is unfortunate that the landlord did not call any evidence from a broker to challenge what was being said by Mr Blain, Mr Capjon (the one witness called by the landlord) not having any relevant expertise to offer. While Mr Capjon sought to justify the landlord's use of a "block" policy as a matter of principle, he was wholly unable to explain how the individual premiums charged to the tenants had been calculated (other than to assert that they were individually assessed with reference to the particular circumstances of their property and its claims history).

64. Emphasis was placed by the landlord, in argument, on the fact that, under the NIG policy, the property remained covered in the event of sub-lettings or of the property being unoccupied. That said, it is clear, from the insurers' letter quoted above, that the landlord was required to inform the insurers as soon as they became aware of such circumstances, and failure to do so could result in no cover being provided.

65. On consideration of the Covea and AXA policies referred to by way of analogy, it is clear that similar provisions are contained, both policies requiring the freeholder to inform the insurer as soon as they become aware of changes in tenancy or occupation of the property. For example, the Covea policy provides (at P17):

> The insurance by this Section, other than in respect of Damage by theft or any attempt thereof, will not be invalidated by any act or omission or by any alteration unknown to You and beyond Your control whereby the risk of Damage is increased provided that as soon as You become aware of any such act or omission or alteration You will give immediate written notice to Us and pay any additional premium required.

66. Making due allowance for his lack of independence, Mr Blain was an impressive and truthful witness who was clearly at a loss to explain how one insurer could be charging premiums over four times the amount of other insurers for what were similar albeit not identical terms. It could not be justified, in his view, by the fact that the landlord was using a "block" policy, as he believed that one advantage of such a policy would be lower premiums being charged to the tenants.

Conclusion

67. It remains a mystery, having heard the evidence adduced by both parties, why there is such a discrepancy between the premiums charged to tenants under the landlord's block policy and the premiums obtainable from other insurers on the open market. It a mystery which the landlord has been wholly unable to explain.

68. It is clear to the Tribunal that the insurance premiums being charged by the landlord to the tenants were excessive, in the sense that considerably lower premiums for similar protection could have been obtained elsewhere. Moreover, insofar as there may have been certain advantages with the NIG policy, they were so insubstantial that they could not justify the amount being charged.

69. It follows, applying the reasoning set out above, that the landlord has failed to satisfy the Tribunal that the amounts sought to be charged to the tenants were "reasonably incurred". The Tribunal therefore reaches the same decision as the FTT, and the landlord's appeal from that decision must be dismissed.

Dated: 3 October 2017

His Honour Judge Stuart Bridge