FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference:	CHI/00HC/LSC/2022/0057
Property:	Beach Hotel, 1-11 Regent Street and 1 Salisbury Terrace Weston-Super-Mare
Applicant:	Cadogan House Investment Properties Limited
Representative:	Ms N Muir of counsel for Howells Solicitors
Respondents:	Maria Kyriacou and Andreas Kyriacou
Representative:	Mr J Fuller of counsel for Powells Law
Type of Application:	Section 27A and 20C of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002 (Liability to pay service charges) Tenants' application for the determination of reasonableness of service charges for the years 2009 to 2022.
Tribunal Members:	Judge A Cresswell (Chairman) Mr M Ayres FRICS
Date and venue of Hearing:	23 September 2022 by Video
Date of Decision:	27 September 2022

DECISION

The Application

1. This case arises out of the Applicant tenant's application for the determination of liability to pay service charges for the years 2009 to 2022 inclusive.

Summary Decision

2. The Tribunal has determined that, the Respondents conceding the issue, Insurance for loss of rent is not recoverable under the terms of the lease.
3. The Tribunal has decided that the lease requires a payment of 66.6% of the reasonable cost of insuring the whole building as a mixed-use building.
4. The Tribunal allows the Applicant's application under Section 20c of the Landlord and Tenant Act 1985 and Paragraph 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002, thus precluding the Respondents from recovering their cost in relation to the application by way of service charge or administration charge.

Preliminary Issues

5. Mr Fuller took instructions at the outset of the hearing and conceded that the Applicant residential tenant could not be required under the terms of the lease to pay for the Respondent landlords' insurance for loss of rent. The Tribunal was told that this currently cost some £280 per annum. The parties agreed that they could together calculate the value of this cost over the years so as to repay sums already paid for this element of the insurance premium. If they are unable to do so, they can apply to this Tribunal to make a calculation of the sum by writing to the Tribunal within 28 days of the date of this Decision and supplying the Tribunal with all relevant information.

Inspection and Description of Property

6. The Tribunal did not inspect the property.
7. The building is said to be a former hotel which has been converted to flats on the first, second and third floors and has 6 commercial units on the ground floor

Directions

8. Directions were issued on various dates. The Tribunal directed that the parties should submit specified documentation to the Tribunal for consideration. This determination is made in the light of the documentation submitted in response to those directions and submissions made at the hearing. At the end of the hearing, both counsel told the Tribunal that they had nothing further to add.
9. The Tribunal has regard in how it has dealt with this case to its overriding objective:

> The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013
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> Rule 3(1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.
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> (2) Dealing with a case fairly and justly includes:
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> (a) dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties and of the Tribunal;

(b) avoiding unnecessary formality and seeking flexibility in the proceedings;

(c) ensuring, so far as practicable, that the parties are able to participate fully in the proceedings;

(d) using any special expertise of the Tribunal effectively; and

(e) avoiding delay, so far as compatible with proper consideration of the issues.

(3) The Tribunal must seek to give effect to the overriding objective when it:

(a) exercises any power under these Rules; or
(b) interprets any rule or practice direction.

(4) Parties must:

(a) help the Tribunal to further the overriding objective; and
(b) co-operate with the Tribunal generally.

Ownership and Management

10. The Respondents are the owner of the freehold and manage it themselves.

The Lease

11. The Applicant holds the first, second and third floors and part of the ground floor under the terms of a lease dated 17 June 2003, which was made between the Respondents as lessor and the Applicant as lessee.
12. The construction of a lease is a matter of law and imposes no evidential burden on either party: (**(1) Redrow Regeneration (Barking) ltd (2) Barking Central Management Company (No2) ltd v (1) Ryan Edwards (2) Adewale Anibaba (3) Planimir Kostov Petkov (4) David Gill** [2012] UKUT 373 (LC)).
13. When considering the wording of the lease, the Tribunal adopts the guidance given to it by the Supreme Court:

Arnold v Britton and others [2015] UKSC 36 Lord Neuberger:

15. *When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by*

focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.

16. For present purposes, I think it is important to emphasise seven factors:

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances .... should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order

to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. Sixthly, in some cases, an event subsequently occurs which was plainly

not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any … approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22).

23. Seventhly, reference was made in argument to service charge clauses being construed "restrictively". I am unconvinced by the notion that service charge clauses are to be subject to any special rule of interpretation. Even if (which it is unnecessary to decide) a landlord may have simpler remedies than a tenant to enforce service charge provisions, that is not relevant to the issue of how one interprets the contractual machinery for assessing the tenant's contribution. The origin of the adverb was in a judgment of Rix LJ in McHale v Earl Cadogan [2010] EWCA Civ 14, [2010] 1 EGLR 51, para 17. What he was saying, quite correctly, was that the court should not "bring within the general words of a service charge clause anything which does not clearly belong there". (120. I agree, if by this it is meant that the court should lean towards an interpretation which limits such clauses to their intended purpose of securing fair distribution between the lessees of the reasonable cost of shared services.)

14. Lord Neuberger's final point above is a reference to the doctrine of "*contra proferentem*", which had been understood to require an ambiguity in a clause in a lease to be resolved against a landlord as "*proferor*".

15. Clause 5 of the Lease details the requirement for the Lessor to insure the Building:
5.1 The Landlord covenant with the Tenant to insure the Building throughout the Term subject to the Tenant paying the Insurance Rent unless such insurance is vitiated by any act of the Tenant or anyone at the Premises expressly with the Tenant's authority
5.2 Insurance shall be effected
5.2.1 against damage or destruction by the Insured Risks to the extent that such insurance may ordinarily be arranged for properties such as the Premises
5.2.2 in such insurance office or with such underwriters and through such agency as the landlord may from time to time decide
5.2.3 for such sum as the Landlord shall from time to time be advised by the Surveyor is the full cost of rebuilding and reinstatement including architects' surveyors' and other professional fees payable upon any applications for planning

permission or other permits or consents that may be required in relation to the rebuilding or reinstatement of the Premises the cost of debris removal demolition site clearance any works that may be required by statute and incidental expenses

16. 1.3 'the Premises' means the first, second and third floors and part of the ground floor of 1 to 11 (odds) Regent Street and 1 Salisbury Terrace Weston-super- Mare North Somerset shown for the purpose of identification only edged red on Plan 1 and Plan 2 and includes:
1.3.1 all additions and improvements to the Premises
1.3.2 all the Landlords fixtures and fittings and fixtures of every kind that shall from time to time be in or on the Premises (whether originally affixed or fastened to or upon the Premises or otherwise) except any such fixtures installed by the Tenant that can be removed from the Premises without defacing the Premises
1.3.3 the floor of that part of the ground floor as is included in the demise that including the joists beneath the floor but excluding anything below level and the floor of the first floor including the joists beneath the floor but excluding anything below that level
1.3.4 the internal load bearing walls and the doors door frames windows window frames and glass in the doors and windows of the premises
1.3.5 the main structure of the Premises including the main structural walls and the roof
1.3.6 all Service Conduits that exclusively serve the Premises
1.3.7 the balconies situate on the first floor of the Premises including the supporting joists or structure but excluding anything below that level
BUT does not include:
1.3.8 the extractors fans and flues attached to the first and second floors the approximate position of which is shown for the purpose of identification
1.3.9 the Fire Alarm System
And references to the Premises in the absence of any provision to the contrary include any part of the Premises
1.4 'the Building' means all the land and buildings situate at and including the whole of the ground floor, mezzanine floor, first floor, second floor and third floor 1- 11 (odds) Regent Street and Salisbury Terrace Weston-super-Mare North Somerset comprised in the above numbered Title

1.7 'the Insurance Rent Percentage' means 66.6%
1.8 'the Insurance Rent' means:
1.8.1 the Insurance Rent Percentage of the cost incurred by the Landlord from time to time for insuring the Building and
1.8.2 all of any increased premium payable by reason of any act or omission of the Tenant

1.10 'the Insured Risks' means the risks of loss or damage by fire, storm, tempest, earthquake, lighting, explosion, riot, civil commotion, malicious damage, impact by vehicles and by aircraft and articles dropped from aircraft - other than war- risks - flood damage and bursting and overflowing of water pipes and tanks and such other risks, whether or not in the nature of the foregoing, as the Landlord acting reasonably from time to time decides to insure against

3. The Tenants Covenants
The Tenant covenants with the Landlord:

3.1 to pay the Rents on the days and in the manner set out in this lease

17. 6.3 This lease embodies the entire understanding of the parties relating to the Premises and to all the matters dealt with by any of the provisions of this lease

The Law

18. The relevant law is set out in sections 18, 19, 20C of Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002.
19. The Tribunal has the power to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. Service charges are sums of money that are payable – or would be payable - by a tenant to a landlord for the costs of services, repairs, maintenance or insurance or the landlord's costs of management, under the terms of the lease (s18 Landlord and Tenant Act 1985 "the 1985 Act"). The Tribunal can decide by whom, to whom, how much and when service charge is payable.
20. Under Section 20C and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002, a tenant may apply for an order that all or any of the costs incurred in connection with the proceedings before a Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge or administrative charge payable by the tenant specified in the application.
21. The relevant statute law is set out in the Annex below.

Insurance

The Applicant

22. The Applicant says that the Respondents are required by Clause 5 of the Lease to insure the Building:
"*5.2.1 against damage or destruction by the Insured Risks to the extent that such insurance may ordinarily be arranged for properties such as the Premises.*
5. Insurance
5.1 The Landlord covenant with the Tenant to insure the Building throughout the Term subject to the Tenant paying the Insurance Rent unless such insurance is vitiated by any act of the Tenant or anyone at the Premises expressly with the Tenant's authority
23. Insured Risks are defined to include fire, storm, earthquake etc. and such other risks as the Landlord acting reasonably from time to time decides to insure against - Clause 1.10.
24. The Applicant is required to pay:
(1) the "Insurance Rent Percentage" which is 66.6% - Clause 1.7
(2) of the cost incurred by the Respondents from time to time for insuring the Building - Clause 1.8.1
(3) against "the Insured Risks" - Clause 1.10
(4) However, the insurance to be effected by the Respondents is against damage or destruction by the Insured Risks to the extent that such insurance may ordinarily be arranged for properties such as the Premises" - Clause 5.2.1.
(5) "the Premises" are the Beach Hotel comprising residential units on the First, Second and Third floors and part of the ground floor of the Building - Clause 1.3.
25. The Applicant accepts that it is required to pay 66.6% of the cost of insuring the Building to the extent that such insurance may ordinarily be arranged for properties such as a residential block of flats which is what "the Premises" are.

26. However, the insurance currently in place is not for the Insured Risks as may ordinarily be arranged for properties containing residential units. The insurance which has been arranged is for a building which contains residential units and high-risk commercial units such as fish and chip shops. The fact that the insurance attributable to the commercial units which occupy the ground floor is more than double the insurance attributable to the whole of the residential parts which occupy 3 floors illustrates that the insurance for "the Building" has not been calculated on the premise that the whole building is residential.
27. As the Respondents are not insuring the Building on the terms required by Clause 5.2.1 of the Lease, the exercise required by the Lease is:
(1) to determine the cost of insuring the Building against damage or destruction by the Insured Risks to such an extent as may ordinarily be arranged for properties such as the Premises, i.e, a block of flats.
(2) multiply that figure by 66.6% to arrive at the Insurance Rent payable by the Applicant.
28. The Applicant seeks a determination that it is only liable to pay 66.6% of the cost of insuring the Building to the extent that such insurance may ordinarily be arranged for properties such as the Premises. The Applicant is not liable to pay 66.6% of any increase in the insurance premium as a result of the fact that the Building has been insured to the extent that such insurance may ordinarily be arranged for properties such as the Premises and six commercial units including a fish and chip shop.
29. At a meeting with George Kyriacou, the Applicant explained that the Applicant had been unfairly paying the commercial loadings not associated with its residential premises. He appeared to accept that this was the case. Following the meeting, it received a demand for payment of the insurance rent of £5,085.31 from George. This invoice accorded with its understanding that it was only liable for the cost of insuring the residential parts.
30. George is now joint freehold owner of the property and Mr Kyriacou, his father the Respondent, has advised the Applicant that George deals with the management of the building.
31. The amount claimed by George coincided with the amount that Gallaghers brokers stated would be due from the Applicant. A copy of the demand for rent appears at "PR6". The Applicant therefore paid this sum direct to Gallaghers. The Respondents' Solicitors then wrote to the Applicant stating that it owed their clients an additional £5,544.66 because 60% of the £17,716.18 equated to £10,629.71.
32. The Lease to 3 Regent Street, one of the commercial units, dated 17 May 2010 is for a term of just over 11 years. Paragraph 1.11 requires that the Lessee pays "*a fair proportion reasonably attributable to the Premises*" of the premium for insuring the Building including insuring for loss of rent. Similarly, the lease for 9a and 11 Regent Street defines insurance rent as "*proportion reasonably attributable*" to the demised premises and includes loss of rent. A condition of the licence to assign Charlie's Sweet Factory Ltd was: "*The Assignee must pay to the Landlord on demand, and must indemnify the Landlord against, any increased or extra premium payable in respect of the insurance of the Premises or adjoining or neighbouring property of the Landlord resulting from the commencement or continuance of the New Use*."
33. If the commercial premises are responsible for the proportion of the insurance premium attributable to the particular unit including loadings for their particular business type, this is inconsistent with the 66.6% demanded of the Applicant as it would inevitably lead to recovery of more than 100%. The Applicant is subsidising the commercial units, some of which are members of the Respondents' family.

34. The broker, Gallaghers, used by the parties, has said that, if the building was residential only, the cost would be £7,567.43 + IPT. 66.6% of this sum would be £5,040 and 60% would be £4,540.45. The Applicant has been charged £10,629.71 which is which is more than double the sum due under the Lease.
35. It is denied that the Respondents are entitled to insure against loss of rent. This is a business risk, that bears no relation to the residential premises and is not a risk that would "*ordinarily be arranged for properties such as the Premises*", as provided by clause 5.2.1 of the Lease.

The Respondents

36. The Respondents say that 66% was agreed between the parties at the time of the purchase of the leasehold interest by the Applicant. The commercial premises were broadly the same at that time as they are today.
37. In about 2010, the Respondents agreed to use the broker suggested by the Applicant and to then change it at the Applicant's request in 2019. At its request, the Applicant was named as a policy holder rather than somebody with an interest. In recent years, the Respondents has accepted a 60% contribution, but the Applicant has failed to pay in 2021. In October 2021, the Applicant paid to the broker directly, not the sum of £10,629.71 (60%), but £5,544.66.
38. When seeking to make a claim in 2019 for loss of rent, the Respondents discovered that the Applicant had cancelled that element of the insurance without their prior agreement. They are prepared to pay this element themselves.
39. The Respondents agree that the only issue the Tribunal needs to address is the construction of Clause 5.2.1. The sole question for the Tribunal is *66.6% of what?*
40. The Respondents say that Clause 5.2.1 of the Lease requires the risks to be such as might ordinarily be arranged for residential flats situate above commercial premises (which include, amongst other things, restaurants).
41. It is the Respondents' case that it is ordinary for residential flats on top of commercial premises (which include use of parts for restaurants), to be insured for (i) loss or rent, and (ii) the additional risks attributable to the use of residential premises located above commercial premises (which include, amongst other things, restaurants).
42. The Respondents agree that it is usual for a premium to be charged for use of premises for deep fat frying when the building which contains the premises also contains commercial premises (which include restaurants).
43. The Respondents' case is that under the terms of the Lease, the Applicant is liable for an Insurance Rent representing 66.6% of the cost of insuring the Building against damage or destruction by the Insured Risks to the extent that such insurance may ordinarily be arranged for residential blocks of flats situate above commercial premises (which include restaurants). The Respondents say that the Building is a mixed use building and therefore the insurance in place is appropriate for the Building and the Premises.

Legal Submissions

The Applicant

44. For the Applicant, Ms Muir presented a skeleton argument, which she augmented with oral submissions.
45. She said that this year the Respondents claimed £10,629.70 by way of Insurance Rent which is 60% of £17,716.18 – the premium for the Building. However, the amount of that premium attributable to the residential parts of the Building was only £5,085.31.

46. It is the Applicant's case that it is liable to pay the Insurance Rent Percentage of insuring the Building against the Insured Risks to the extent that such insurance may ordinarily be arranged for properties such as the residential units which form the Premises. This would be a sum in the region of 66.6% of £6,720 = £4,475.52. It is the Respondents' case that Clause 5.2.1 requires the risks to be such as might ordinarily be arranged for residential flats "situate above commercial premises (which include, amongst other things, restaurants)".
47. When construing a lease, the aim is to identify the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language of the contract. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of:
48. (i) the natural and ordinary meaning of the clause,
(ii) any other relevant provisions of the lease,
(iii) the overall purpose of the clause and the lease,
(iv) the facts and circumstances known or assumed by the parties at the time the contract was executed, and
(v) commercial common sense, but
(vi) disregarding subjective evidence of any party's intentions – **Arnold v Britton** [2015] AC 1619.
49. The Lease makes a distinction between "the Building" and "the Premises". The definition of "the Premises" expressly excludes the extractor fans and flues attached to the first and second floors and the fire alarm system [Clause 1.3.8 and 1.3.9] but includes all the structural parts of the Premises.
50. Clause 5.2.1 provides that the insurance to be effected by the Respondents is against damage or destruction by the Insured Risks to the extent that such insurance may ordinarily be arranged for properties such as "the Premises" - not such insurance as may ordinarily be arranged for "the Building". As illustrated by the figures at [94] there is a significant difference in the cost of the insuring the properties such as "the Premises" and insuring properties such as "the Building".
51. The construction of Clause 5.2.1 sought by the Respondents essentially requires the word "the Premises" to be replaced with "the Building". The Respondents' alternative suggestion that Clause 5.2.1 should be construed to refer to "the Premises" as "residential flats situate above commercial premises (which include, amongst other things, restaurants)" requires the implication of words which are not there and do not match the commercial reality. If asking the question, are these words necessary for the provision to make commercial sense, the answer is clearly no.
52. The Building was originally a hotel but the upper parts were converted into flats before the Lease was granted. Both parties were therefore aware that the Premises were flats. Both parties would also have been aware (in broad terms) of the extent to which insurance is ordinarily arranged for flats. In particular, it would not be usual to insure flats against the risks of deep fat frying or to insure premises let on a 999 year lease at an annual rent of £100 against loss of rent.
53. The natural and ordinary meaning of Clause 5.2.1 is that the landlord's obligation is to insure by reference to the extent ordinarily required for residential flats. The Insurance Rent (Clause 1.8) is then to be calculated by reference to the cost incurred by the Landlord in insuring the Building to the extent required by Clause 5.2.1.
54. Unlike many leases, there is no recital relating to the use or nature of those parts of the Building which do not form part of the Premises. There is no reference to the

commercial parts of the Building anywhere in the Lease. In the context of insurance, this is significant and supports the Applicant's case that the use to which the Retained Parts is put has no bearing on the Insurance Rent payable by the Applicant. If this was not the case, the landlord could, for example, decide to use the ground floor premises for manufacturing fireworks or, as has happened here, allow three units to be used as fish and chip shops and require the residential tenant to subsidise the cost of insuring against that use. Such uses vastly increase the insurance premium way beyond the usual premium payable for residential premises. (In oral submissions, she corrected that there was a reference to food preparation and sales in Clause 4.5: *PROVIDED always that nothing in this clause shall preclude the Landlord from using the whole or any part of the Retained Premises as restaurants, shops, licensed premises or for catering establishments or for such other purpose as the Landlord may require).*

55. It will also be noted that the Premises include:
(1) the floor of that part of the ground floor as is included in the demise [Clause 1.3.3.]
(2) the doors and windows [Clause 1.3.4]
(3) the main structure of the Premises including the main structural walls and the roof;
(4) the balconies on the first floor together with the supporting joists or structure.

56. In other words, this is a full demise and the tenant is liable for the repair of the whole of the Premises save for damage caused by an Insured Risk. This is not a situation where the landlord has retained the structure and exterior and is responsible for its upkeep subject to a service charge. This is consistent with the Premises being treated as a separate entity to the commercial parts of the Building.

57. The purpose of the insurance covenants is to ensure the premises are insured against the usual risks and that the landlord can recover the full cost of insuring those premises from the tenant via the service charge. The purpose is not to allow the Landlord to make a windfall by double charging for his expenditure – see Tanfield on Service Charges and Management 5th Edition paragraph 1-07.

58. This separate treatment of the Premises and the Applicant's construction of the insurance requirements is mirrored by the commercial leases which require each unit to pay the insurance referable to the particular unit. While some of these leases post-date the Lease, Mr. Kyriacou's evidence is that at the date of the Lease all the commercial units were fully let and the nature of the businesses did not significantly change.

59. She then went on to draw references to some of the commercial leases, all of which are for substantially higher rents and a duty to pay for insurance for loss of rent. Each of these leases refer to reinstatement of the premises, not the building. It is reasonable to assume that all such leases are similarly constructed.

60. The Applicant is a professional landlord of residential premises and owns a number of flats in mixed-use buildings. His evidence is that a split whereby the residential lessee would be responsible for the increased cost of insurance premiums resulting from the use of part of the premises for commercial purposes is not standard. He gives examples of various flats he owns in mixed-use buildings where the insurance is split to ensure that the residential premises are not subsidising the additional load placed on the insurance by the commercial units.

61. The Respondents' insurance broker, Gallaghers, has also confirmed that:
"*where a property is part residential and part commercial for example shops with flats above then the level for risk for each part of the property will be different and therefore the premium should be allocated accordingly*"

62. The Lease should be construed against this commercial norm and in the context of the factual matrix. If there is any ambiguity, a construction which follows the commercial norm and fits in with the general letting scheme at the Building should be preferred over a construction which would result in double recovery for the landlord.
63. A breakdown of the sums attributable to each unit for the year commencing 4th October 2021 is at [97]. The commercial units are collectively responsible £12,630.87 of the total and the leases obtained indicate that the commercial tenants are liable for these sums. If the Respondents' construction of the Lease is correct the Applicant would be liable for a further £11,811.37. This would result in the Respondents recovering £6,726.07 in excess of what they incurred by way of insurance premiums.

Conclusion

64. It is clear from the scheme of the lettings that the parties' intentions were that each tenant should be responsible for the maintenance, repair and insurance of their own premises in accordance with the risks which those particular premises would usually be insured against.
65. A further indication that the tenant of the Premises was only intended to pay insurance based on the cost of insuring residential premises is the fact that the heads of insurance differ in the commercial leases. In particular, express provision is made for "loss of rent". This is only commercially sensible if a rack rent is payable. In the case of the Premises, a substantial premium was paid for the Lease but the rent is only £100 per annum. It would not make any commercial sense to insure against the loss of such a small sum and it is not a usual provision in a residential insuring covenant.
66. On a proper construction of Clause 5.2.1 of the Lease, the Respondents are required to insure the Building against damage or destruction by the Insured Risks to the extent that such insurance may ordinarily be arranged for properties such as residential blocks of flats. If the Respondents choose to let parts of the Building for other purposes which attract a premium in excess of that which would be incurred for a block of flats, it can do so. However, the amount of the premium recoverable from the Applicant is limited to that which would be incurred in respect of a block of flats.
67. In her oral submissions, Ms Muir said that the witness evidence was largely irrelevant and that it was for the Tribunal to construe the terms of the lease.
68. Both parties were agreed upon the legal approach required for interpretation. The Tribunal cannot take account of discussions at the time the lease was entered into.
69. There were now 3 fish and chip shops when there had been none when the lease was entered into (Mr Fuller then reported that there had been two fish and chip shops at the time as well as a restaurant that served chips, in line with the evidence from the Respondents).
70. There was a mismatch with the commercial lease provisions as she had detailed above. It was clear that each unit was responsible for its own insurance costs, all having full repairing covenants to include the interior and exterior.
71. She pointed to a number of the Lease's provisions. The definition of retained premises (1.17) had no recital or plan of the building. There was effectively a sale on a 999 year lease. What needs to be covered in the insurance is the cost of reinstating the premises (5.2.3) and there is no obligation to insure the whole building. Clause 5.4 refers to reinstating the premises, not the building. 5.6.1 refers to actions voiding the insurance of the premises not the building; this dovetails with the requirements of the commercial lease.

72. There is documentary evidence of the cost of insuring a fish and chip shop, a substantial sum.
73. The Applicant's case, essentially, was that the Applicant was not required to pay 66.6% of the cost of insuring the building of mixed commercial and residential premises, but rather that there should be an exercise whereby the cost of insuring the building as if it was all residential was assessed and then the Applicant required to pay 66.6% of that sum.

The Respondents

74. For the Respondents, Mr Fuller presented a skeleton argument, which he augmented with oral submissions.
75. He said that the Applicant acknowledges that the Tribunal does not have jurisdiction to, and cannot, alter the fixed insurance contribution of 66.6%. The Respondents agree with this.
76. The Applicant acknowledges that pursuant to clause 5.2.1 of the Lease, the Applicant is required to pay 66.6% of the cost of insuring the Building "to the extent such insurance may ordinarily be arranged for properties such as the Premises". The Respondents agree with this.
77. The Applicant is not arguing that the insurance is not appropriate for mixed-use premises, but challenges the way the Respondents have failed to divide the insurance premium between lessees to reflect the risk inherent in each leasehold property and the amount the insurance company has charged for each property when calculating its premium for the Building as a whole. The Respondents maintains that they have divided the insurance premium in accordance with the Lease.
78. The contentious issue at the heart of this application is the contractual construction of clause 5.2.1 of the Lease. The Applicant and the Respondents' respective positions can be summarised as follows:
    The Applicant purports that the Respondents have failed to divide the insurance premium between the Lease and the commercial lessees to reflect the risk inherent in each leasehold property and the amount the insurance company has charged for each property when calculating its premium for the Building as a whole.
    The Applicant's position is that it is "only required to pay 66.6% of the cost of insuring the Building to the extent that such insurance may ordinarily be arranged for properties such as a residential block of flats which is what "the Premises" are.
79. The Respondents' position is that under the terms of the Lease, the Applicant is liable for an Insurance Rent representing 66.6% of the cost of insuring the Building against damage or destruction by the Insured Risks to the extent that such insurance may ordinarily be arranged for properties like the Premises which the Respondents maintain are residential blocks of flats situate above commercial premises (which include fish and chip shop restaurants). The Respondents' position is that as the Building is a mixed use building the insurance in place is appropriate for the Building and the Premises and the Applicant is responsible to pay 66.6% of the cost of that insurance the Respondents have put in place for the Building.
80. He then sets out the law on construction of leases, ending with **Arnold v Britton**.
81. He said it follows from **Arnold v Britton** that the insurance machinery in the Lease, as set out above, is the set of rules by which the Respondents can obtain payment for insurance it has put in place. Compliance with such contractual machinery is not optional.
82. The Tribunal has no jurisdiction to interfere with any amount paid under a fixed charge which is defined under the Lease i.e., the 66.6% insurance contribution the

Applicant must pay to the Respondents for the cost incurred by the Respondents for insuring the Building.

83. In considering the construction of clause 5.2.1, the Respondents submit that the meaning the clause would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract (i.e., (i) that the Building was mixed use, (ii) that the Premises were situate on top of commercial premises which included fish and chip shop restaurants, (iii) that residential premises on top of fish and chip shops would have a greater risk of fire caused by a fish and chip shop than those residential premises that are not situate above commercial premises (let alone fish and chip shops), and (iv) that the landlord was responsible to insure the whole Building) would be that the Applicant is liable for an Insurance Rent representing 66.6% of the cost of insuring the Building against damage or destruction by the Insured Risks to the extent that such insurance may ordinarily be arranged for properties like the Premises which are residential blocks of flats situate above commercial premises (which include fish and chip shop restaurants)

84. The Applicant had the benefit of legal representation when it entered into the Lease. The Lease is unequivocal in that the Applicant must contribute 66.6% of the cost incurred by the Respondents in insuring the whole Building. What the Applicant now considers (some 19 years after originally entering into the Lease later) to be fair or unfair, or proportionate or disproportionate, is entirely irrelevant. The Applicant seeks to argue that it pays a disproportionately high percentage – this is not so. The Applicant simply pays the 66.6% of the costs incurred by the Landlord in insuring the mixed-use Building as it agreed to, and is contractually bound, to pay. The Respondents would also highlight that pursuant to the Lease, the Respondents also maintain discretion as to the insurance they wish to put in place as at clause 1.10 provides it may include "such other risks, whether or not in the nature of the foregoing, as the Landlord acting reasonably from time to time decides to insure against." The Respondents can put it no better than set out at paragraph 7 of the Tribunal's directions of 18 July 2022: "*The statement of case suggests that in fact only approximately 30% is attributable to the residential part of the premises. The Applicants should reasonably have been aware of these matters when they entered into the lease and agreed to pay a fixed proportion of the total costs*." The Tribunal should therefore not interfere with the clear contractual provisions set out in the Lease.

85. The Applicant suggests at paragraph 2 of its Reply to the Respondents' Statement of Case that *"[c]ommercial premises, especially fish and chip shops, carry an additional risk for insurers and premiums are structured accordingly. The Respondents' case would mean that the Applicant are subsidising the insurance premium payable by the commercial tenants*". Again, the Respondents submit that the Applicant was well aware of the commercial nature of the Building when it entered into the Lease and that the Applicant has contractually agreed to contribute 66.6%. Should the Lease have meant to provide for some other division of the insurance premium then it would explicitly state that the contribution is to be some other percentage, or would have put in place some other mechanism for calculating the Insurance Rent attributable to each lease than that which is set out in the Lease.

86. The Tribunal should not entertain the Applicant's attempt to renegotiate the insurance provisions in the Lease through the Tribunal. The Tribunal is respectfully invited to dismiss the Applicant's application.

The Tribunal

87. The Tribunal finds itself in agreement with Mr Fuller's arguments, which it does not wholly repeat so as to avoid prolixity.

88. When construing the lease, the aim of the Tribunal was, as the Applicant suggested, to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language of the contract to mean. It did so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning was assessed in the light of:

(i) the natural and ordinary meaning of the clause,

(ii) any other relevant provisions of the lease,

(iii) the overall purpose of the clause and the lease,

(iv) the facts and circumstances known or assumed by the parties at the time the contract was executed, and

(v) commercial common sense, but

(vi) disregarding subjective evidence of any party's intentions

89. The lease requires the Applicant to pay 66.6% of the cost of insuring the building. The natural and ordinary meaning of that is clear. Even the Applicant accepts that to be the case. It then seeks, however, to place upon the words a very artificial construct, whereby the Respondents would have to ignore that plain wording and instead pretend that the commercial units are not commercial units, but rather residential units. It would then have to obtain a quotation as if the commercial units were residential and then take 66.6% of that very artificial figure. If the lease was meant to carry that meaning, then it is inconceivable that it would not say so. The Tribunal finds support for this conclusion in Clause 6.3: *This lease embodies the entire understanding of the parties relating to the Premises and to all the matters dealt with by any of the provisions of this lease*

90. It would be illogical to ignore the existence and nature of the commercial units sitting below (for the most part) the residential units when assessing the building for insurance purposes.

91. There are other relevant provisions of the lease, but the Tribunal finds itself unable to agree with the analysis of the Applicant in relation to them. Where there are restrictions in the lease to "premises", this is clearly to address the duties of the parties in relation to the premises. As Ms Muir pointed out herself, the various leases are directed at the individual units. If there had been an intention to limit the ambit of the building by reference to the premises, then this is clearly achieved by charging only 66.6% of the building's insurance costs and the references to premises in other clauses is irrelevant to the payment required as there is a specific reference to the 66.6% share.

92. Clause 5.1 requires the Respondents to "*insure the Building*" not the Premises only. This supports the definition in the lease of the *Insurance Rent* as being the percentage of the cost incurred by the Landlord from time to time for insuring *the Building* (clause 1.8.1).

93. The overall purpose of the lease is to set out the relationship between landlord and tenant in respect of the premises primarily, but reflecting that this is a mixed-use building shared with commercial tenants. The clause setting out the proportion due from the Applicant tenant for insuring the building is to reflect that reality. Whether

or not the Tribunal believes that 66.6% actually reflects the residential tenants' share of the risk to the building is irrelevant because that was clearly the intention of the parties from the words used, both of whom were legally represented when the agreement was reached. It was always clear that this was a mixed-use building.

94. Whilst there is some divergence between the parties as to how many chip shops there were when the lease was entered into, the lease does allow food units and there were units selling hot food throughout the life of the lease. Both parties were fully aware of that reality when the lease was entered into. Solicitors are expected to advise their clients as to the terms of a lease.

95. The terms do make commercial commonsense in that the Applicant was to take on the responsibility for 66.6% of the building only. Whether that was a sum it was prepared to pay can only be seen in the light of the fact that it carried on paying 66.6% and then 60% for a number of years before complaining about the basis of the split. *The reliance placed in some cases on commercial common sense and surrounding circumstances …. should not be invoked to undervalue the importance of the language of the provision which is to be construed* says the Supreme Court in **Arnold v Britton**. Nor should the imprudence of such an agreement as subsequently ascertained be reason to ignore the clear words of the lease. *The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.*

96. The Applicant suggests that clause 5.2.1 *against damage or destruction by the Insured Risks to the extent that such insurance may ordinarily be arranged for properties such as the Premises* means that the premises have to be seen as purely residential. However, the Tribunal regards this clause as wholly consistent with its finding that there should be no artificial construct as suggested above because "*properties such as the Premises*" means, it finds, properties in mixed use buildings. This would have been the perfect place to build the construct advocated by the Applicant by adding something along the lines of "*as if it was not within a mixed-use building*". The fact that no such addition exists adds weight to the Tribunal's interpretation.

97. There is no evidence before the Tribunal to show that the Respondents actually recover more than 100% of the costs of insuring the building once all of the contributions of the various tenants have been totalled. Even if they were to do so, that is not a matter for this Tribunal and nor is it a reason for construing the lease in question in a different way.

98. Accordingly, the Tribunal finds that the Applicant is required to pay to the Respondents 66.6% of the reasonable costs of insuring the mixed-use building against the risks detailed in the lease. The Tribunal is aware that the parties have moved to an arrangement whereby 60% only is paid, but the Tribunal was not asked to reflect upon that arrangement between the parties.

Section 20c and Paragraph 5A Application

99. The Applicant has made an application under Section 20C Landlord and Tenant Act 1985 and Schedule 11 Paragraph 5A Commonhold and Leasehold Reform Act 2002 in respect of the Respondents' costs incurred in these proceedings.

100. The relevant law is detailed below:

Section 20C Landlord and Tenant Act 1985: Limitation of service charges: costs of proceedings

(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 … … leasehold valuation tribunal, ….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.

101. *The … tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.*

Commonhold and Leasehold Reform Act 2002 Schedule 11 Paragraph 5A Limitation of administration charges: costs of proceedings

(1) A tenant of a dwelling in England may apply to the relevant court or tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers to be just and equitable.

(3) In this paragraph—
(a) *"litigation costs"* means costs incurred, or to be incurred, by the landlord in connection with proceedings of a kind mentioned in the table, and
(b) *"the relevant court or tribunal"* means the court or tribunal mentioned in the table in relation to those proceedings.

Proceedings to which costs relate

First-tier Tribunal proceedings

"The relevant court or tribunal"

The First-tier Tribunal

Section 20C

102. The Tribunal first examines the lease to determine whether the Respondents are able to recover its costs via the Service Charge or by way of Administration Charge in accordance with the lease. The Tribunal has followed the guidance of the Upper Tribunal in **Geyfords Ltd v O'Sullivan, Grinter, Shaw, Morgan, Bonsor** [2015] UKUT 0683 (LC) and has interpreted the lease in accordance with the guidance of the Supreme Court in **Arnold v Britton and others** [2015] UKSC 36.

103. The Tribunal has concluded, and the Respondents have conceded, that there is no provision within the lease permitting the recovery by the Respondents of their costs, so that the Respondents cannot recover all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings by way of a demand for service charge or administration charge.

RIGHTS OF APPEAL

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application by email to rpsouthern@justice.gov.uk to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.

3. If the person wishing to appeal does not comply with the 28 day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28 day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.

4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking.

ANNEX

Landlord and Tenant Act 1985 as amended by Housing Act 1996 and Commonhold and Leasehold Reform Act 2002

27A Liability to pay service charges: jurisdiction

(1) An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to—

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

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

(3) An application may also be made to a leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, 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 postdispute 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.

(6) An agreement by the tenant of a dwelling (other than a post-dispute arbitration
agreement) is void in so far as it purports to provide for a determination—
(a) in a particular manner, or
(b) on particular evidence,
of any question which may be the subject of an application under subsection (1) or (3).
(7) The jurisdiction conferred on a leasehold valuation tribunal in respect of any matter by virtue of this section is in addition to any jurisdiction of a court in respect of the matter.