1998

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	LON/00AD/LSC/2016/0428
Property	:	35 & 35A Downbank Avenue, Bexleyheath, DA7 6RT
Applicants	:	Mr Paul Facey and Ms Karen Alexander
Representative	:	Mr Stephen Facey
Respondents	:	Regis Group (Barclays) Freeholds Ltd
Representative	:	Pier Management
Type of application	:	Liability to pay service charges
Tribunal member	:	Judge Vance
Date and venue of Hearing	:	8 February 2017 at 10 Alfred Place, London WC1E 7LR
Date of Decision	:	17 March 2017

DECISION

Decision of the Tribunal

1. I determine that the amount payable by the applicants towards the insurance premium for the 2016 service charge year is £348.96 for each of the two flats at 35 & 35A Downbank Avenue.
2. I also determine that the sum of £19.99 demanded in respect of each flat as an insurance administration charge is not payable by the applicants through the service charge.
3. I make an order under section 20C of the Landlord and Tenant Act 1985 so that the respondent may not pass any of its costs incurred in connection with these proceedings through the service charge.

Introduction

4. The applicants seek a determination pursuant to s.27A of the Landlord and Tenant Act 1985 ("the Act") as to the amount of service charges payable by them in respect of two maisonettes situated in the same building and known as 35 & 35A Downbank Avenue, Bexlyheath, DA7 6RT ("the Flats"). The only issue in dispute is the reasonableness and payability of a buildings insurance premium incurred by the respondent for the service charge year 2016
5. The applicants are the long lessees of the Flats. The respondent is the freehold owner of the building in which the Flats are located. I have been provided with a copy of the lease for Flat 35 which is the ground floor maisonette. The lease is dated 31 January 1994 and was entered into by Eagle Star Life Assurance Company Limited ("Eagle Star") and Avril Patricia Bellchambers ("the Lease"). My understanding is that the provisions of the lease for flat 35A is identical in all material respects.
6. By clause 1(ii) of the Lease the tenant covenants to pay:

> *"by way of future rent a yearly sum equal to the due proportion of the sum or sums which the Lessor shall from time to time pay by way of premium (including any increased premium payable by reason of any act or omission of the Tenant) for keeping the building of which the demised premises forms part insured against all loss or damage by fire and such other risks as are provided in the covenant on the part of the Lessor hereinafter contained such further rent to be paid on the twenty-fourth day of June in each year".*

7. The relevant lessor's covenant is at clause 4(2) of the Lease and requires the landlord:

"To keep insured at all times throughout the said term the building of which the demised premises forms part (unless such insurance shall be vitiated by any act or default on the part of the Lessee) against loss or damage by fire explosion storm tempest earthquake aircraft and articles dropped therefrom and all other risks usually included in an index-linked comprehensive insurance policy to be placed through the agency of the Lessor with Eagle Star Insurance Company Limited in the full reinstatement value thereof subject to Clause 2(14) hereof including an amount to cover professional fees including Architects and Surveyors fees and cost of removal of debris and other incidental expenses in connection with the rebuilding or reinstatement...."

8. Clause 2(14) contains a covenant by the tenant to notify the landlord of any improvements or additions carried out to the demised premises and is not relevant to this application.

9. The respondent secured buildings insurance cover for the period 30 May 2016 to 29 May 2017 with AXA Insurance ("Axa"). This was a multiple-property policy that covered a portfolio of 36 properties in Downbank Avenue ("the Policy"). The total premium payable shown in the Certificate of Insurance dated 12 April 2016 was £15,703.20.

10. A demand for payment was sent by the respondent's agents, Pier Management, to the applicants on 15 April 2016. The sum demanded for each of the Flats was £456.19 which comprised £436.20 towards the apportioned costs of the insurance premium and an insurance administration fee of £19.99.

11. Directions were issued by the tribunal on 17 November 2016 which required the respondent to send to the applicants and to the tribunal a statement of case which was to set out, amongst other matters: the way in which insurance had been obtained including what steps had been taken to survey the market; and whether or not to the knowledge of the respondent or his representative any commission has been paid in respect of the insurance and, if so, the amount and to whom it was paid. The applicants were directed to provide a statement of case in reply which should set out their objections to the insurance premium and details of any alternative quotes being relied upon. The applicants have provided a statement of case dated 16 December 2016 and a further statement of case dated 26 January. The respondent has provided a statement of case dated December 2016 and a further statement of case dated January 2017. I allowed the parties to rely on their January statements of case as I considered both had sufficient time before the hearing to consider their contents and that no prejudice was caused to either of them by their admission.

12. The relevant legal provisions are set out in the Appendix to this decision.

Inspection

13. Neither party requested an inspection and the tribunal did not consider this to be necessary or proportionate to the issues in dispute.

The Hearing, Decision and Reasons

14. At the start of the hearing the tribunal clarified the grounds on which the applicants were challenging the payability of these service charge costs. Mr Facey confirmed that there were five grounds, namely that:

    (a) the amount of the premium was excessive;

    (b) the insurance taken out included cover for unnecessary perils and did not cover required perils such as employer's liability insurance cover;

    (c) there was a failure to consult with lessees before taking out the policy;

    (d) there was no obligation on the lessor to insure the building as the Lease required insurance to be taken out with Eagle Star who are no longer in existence. As such, Mr Facey contended that the lessees were free to take out their own insurance;

    (e) the respondent had failed to disclose details of the amount of commission received for taking out the insurance policy which he believed had inappropriately increased the premium incurred.

15. In their application notice the applicants had indicated that they considered the insurance administration fee of £19.99 breached Financial Conduct Authority regulations but did not specifically challenge whether this fee was recoverable as a service charge under the terms of the Lease. On consideration of this case after the hearing I concluded that the applicants had made it clear that they were disputing this insurance administration fee but that as the question of payability under the terms of the Lease had not been referred to in their Statements of Case, and nor was the point discussed at the hearing, that further direction were needed.

16. Those directions were issued on 20 February 2017 and requested representations on the point by both parties. The directions also required the respondent to clarify whether insurance commission had been paid to the landlord/associated landlord, its broker or other agents in respect of the policy taken out with Axa and, if so, by whom, in what amount and for what reason. I considered that the information provided by the respondent in response to the tribunal's directions of 17 November 2016 was inadequate in explaining the position regarding commission.

17. Regrettably, the respondent did not comply with these further directions and no explanation as to its failure to do so has been provided. Mr Facey has responded stating that he agreed with my provisional view, referred to in my directions, that whilst the Lease makes provision for payment by the tenant towards the costs of an insurance premium it makes no provision for recovery of the administration fee

demanded by the respondent. He also referred to a determination of the Midland Leasehold Valuation Tribunal dated 8 February 2012 (*BIR/00FY/LIS/2011/0027*) brought by Suzanne and Matthew Moore against Regis Group (Barclays) Ltd in which the tribunal determined that a similar insurance administration fee was mot payable by the applicants in that case.

The Applicant's Case

18. In support of his contention that the insurance premium with Axa was excessive Mr Facey relied on alternative insurance quotes provided by NIG and Direct Line. He also made his own enquiries with Axa.

19. His representations concerning the NIG quote were based on insurance that his company, Capitol Properties, secured in respect of Flat 35 for the period 27 May 2016 to 30 November 2016. NIG did so by adding Flat 35 to an existing insurance policy taken out by Capitol over a portfolio of properties. The additional annual premium charged was £128.10. Mr Facey obtained this quote by telephoning his broker, Alan Boswell Insurance brokers, and asking him to obtain a quote based on a £200,000 insured value for both Flats. He subsequently removed Flat 35 from the portfolio to avoid potential difficulties with double insurance. His broker also provided him with a provisional quote of between £7,500-£8,500 to insure 20 properties owned by the respondent, including the Flats, under this portfolio policy.

20. As for Direct Line, he telephoned them and was provided with a quote of £246.61 for Flat 35 **[123]**. He also telephoned Axa and was given a quote of £315.60 for insuring the same Flat.

21. In Mr Facey's submission the fact that these quotes were substantially less than the £436.20 demanded for each Flat was clear evidence that the costs of the insurance taken out by the respondent was excessive.

22. He also considered that the Policy covered unnecessary perils namely explosion of steam pressure plant, fire extinguishment and alarm resetting expenses, fly-tipping, replacing lost keys and sprinkler costs. He did not consider the terms of the Lease required the landlord to obtain terrorism cover and nor, in his view, did they accord him a discretion to do so.

23. It was also his view that the respondent should notify and provide evidence of market testing carried out to every lessee before taking out insurance. He considered that market testing should take place every year.

The Respondent's Case

24. The respondent's position was that entry into the Policy was negotiated by the respondent's insurance broker, Lockton. In a letter dated 13 January 2017 to Pier Management **[59]** Lockton indicate that prior to the 2016/17 insurance renewal it tested the market by carrying out a benchmarking exercise with three insurers, Amlin, Aviva and QBE. Their conclusion was that AXA remained the most

competitive insurer for the Regis portfolio and insurance was therefore taken out with them.

25. In the respondent's view the insurance premium was reasonably incurred and was reasonable in amount. It relies on the decisions in *Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* [1997] 1 EGLR 47, *Havenridge Ltd v Boston Dyers Ltd* [1994] 2 EGLR 73, and *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173 in support of that contention.

26. Mr Gadd submitted that whilst it was correct that the Policy included cover for risks that were not specifically relevant to the Flats, such as the provisions relating to steam pressure plants, the respondent was entitled to take out a portfolio policy. There was, he said, no obligation in the lease requiring the landlord to consult with lessees prior to taking out insurance. He also asserted that it was clear that the lease required the landlord to insure the building and that it was lessees' obligation to contribute towards those costs. He also submitted that none of the alternative quotes obtained by the applicants were like for like quotes when viewed alongside the provisions of the Policy.

27. When questioned about insurance commission Mr Gadd stated that this was not paid to the landlord but was paid to Regis Group and that the commission related to discounts in the insurance premium.

Decision and Reasons

28. I agree with Mr Gadd that the covenant at clause 4(2) of the Lease imposes a clear obligation on the landlord to insure the Flats. Construing clause 4(2) as a whole, that obligation, in my view, should be read disjunctively with the requirement to place insurance with Eagle Star. As such, the landlord's obligation to insure is not rendered void by the fact that Eagle Star no longer exists. Instead, the landlord is obliged to seek insurance elsewhere to cover those perils identified in clause 4(2). I consider that it should be implied that this must be with an insurer of repute (see the decision in *Berrycroft).* Under clause 1(ii) of the Lease, the tenants are obliged to contribute towards such costs.

29. I also agree that there is no obligation on the landlord under the terms of the Lease to consult with tenants before taking out insurance. Nor is there any relevant statutory consultation procedure. Whilst I agree that a prudent landlord should carry out market testing on a regular basis to ensure that the costs of buildings insurance it incurs remain competitive there is no obligation on a landlord to consult with its tenants regarding that exercise. Nor is there an obligation to carry out market testing each time insurance needs to be renewed.

30. I do not accept the applicants' suggestion that it was inappropriate for the respondent to take out a policy that included insurance cover for such matters as explosion of steam pressure plant, fire extinguishing and alarm-resetting expenses and the other perils they consider unnecessary. In my view a landlord is entitled to effect insurance through a 'block' insurance policy on standard terms that covers a portfolio of properties even where some of the risks insured are not relevant to some of the properties covered under the policy. Such polices may benefit from economies of scale that can result in a lower premium being offered than if a landlord were to seek to purchase individual policies for each flat in the portfolio. I do not consider it to be unreasonable for a landlord to accept the standard terms of such a policy rather than seek to negotiate an alternative premium by removing cover for perils that are not required. In any event, even if I am wrong in that conclusion, there is no evidence before me that the premium incurred by the respondent was higher than it would have been if the perils in question had been omitted from cover. I cannot, therefore, conclude that the cost incurred by the respondent was unreasonable as a result of the inclusion of these perils in the Policy.

31. As for terrorism cover, I do not consider that securing such cover was unreasonable or outside the scope of the landlord's covenant at clause 2.4. In my judgment the obligation in that covenant to insure against loss or damage by explosion includes insuring against a terrorist attack, with the word 'explosion' to be given its ordinary meaning (see the decision in *Qdime Ltd v Bath Building (Swindon) Management Company Ltd* [2014] UKUT 0261 (LC) referred to in the email from Pier Management to Mr Facey dated 25 July 2016 **[37]**). Furthermore, clause 2.4 requires the landlord to insure against all other risks usually included in an index-linked comprehensive insurance policy. The evidence before me does not establish that terrorism cover would not usually be included in such a policy. I also bear in mind that the RICS Service Charge Residential Management Code of Practice (2016) recommends at paragraph 12.5 that *"serious consideration be given to taking out such cover"*.

32. I am not satisfied that the respondent acted unreasonably in omitting to secure cover for employer's liability insurance or loss of rent as asserted by Mr Facey. The landlord's covenant at clause 2.4 does not require this and there is no evidence that this is a risk that would usually be included in an index-linked comprehensive insurance policy for a residential property portfolio such as the one held by the respondent.

33. I agree with Mr Gadd that the alternative quotes obtained by the applicants were not like for like quotes with the Policy. The NIG quote concerned the addition of Flat 35 to an existing insurance policy taken out by Capitol over multiple properties. It is not like for like with the Policy which covered a quite different portfolio of properties. Nor can the two quotes obtained over the telephone be considered to be like for like quotes as on neither occasion was there any assessment by the insurer of the properties comprising the respondent's portfolio. Instead, both Direct Line and Axz provided a quote in respect of a single property not across the respondent's portfolio.

34. As contended by the respondent a landlord is accorded a very wide discretion in terms of choice of insurer. Whilst cheaper insurance may have been available, in my view the respondent was not obliged to shop around to find the cheapest insurance. Previous legal authorities establish that so long as insurance is obtained in the market and at arm's length then the premium will have been reasonably incurred.

35. In *Forcelux* the Lands Tribunal set out the test as to whether insurance is "reasonably incurred" for the purposes of s.19 of the 1985 Act and considered that the relevant question was *"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".*

36. In *Havenridge* the Court of Appeal held that it was unnecessary for a landlord to "shop around" and that it was sufficient if insurance was taken out in accordance with the lease; with an insurer of repute; and *either* that the rate was representative of the market rate *or* that the contract was negotiated at arm's length and in the market-place. Evans J. held:

> *"...the question remains, what limits should be placed upon the tenant's obligation to indemnify the landlord. The limitation, in my judgment, can best be expressed by saying that the landlord cannot recover in excess of the premium which he has paid and agreed to pay in the ordinary course of business as between the insurer and himself. If the transaction was arranged otherwise than in the normal course of business, for whatever reason, then it can be said that the premium was not properly paid, having regard to the commercial nature of the leases in question, or, equally, it can be supposed that both parties would have agreed with the officious bystander that the tenant should not be liable for a premium which had not been arranged in that way.*
>
> *If this is the correct test, as in my judgment it is, then the fact that the landlord might have obtained a lower premium elsewhere does not prevent him from recovering the premium which he has paid. Nor does it permit the tenant to defend the claim by showing what other insurers might have charged. Nor is it necessary for the landlord to approach more than one insurer, or to "shop around". If he approaches only one insurer, being one insurer of "repute", and a premium is negotiated and paid in the normal course of business as between them, reflecting the insurer's usual rate for business of that kind then, in my judgment, the landlord is entitled to succeed. The safeguard for the tenant is that, if that rate appears to be high in comparison with other rates that are available in the insurance markets at the time, then the landlord can be called upon to prove that there was no special feature of the transaction which took it outside the normal course of business...in my view, [that] if the plaintiff proves either that the rate is representative of the market rate, or that the contract was negotiated at arm length and in the*

market-place, whether literal or metaphorical, he establishes that it was a genuine contract, that he has acted "properly" and that the sum was "properly paid".

37. This approach was also followed in *Williams v Southwark Borough Council (2001) 33 HLR 22*, where Lightman J held that a landlord was not obliged to find the lowest premium payable. It was sufficient to agree a premium at the market rate or to negotiate the insurance contract at arm's length and in the market place.

38. The applicants did not dispute that insurance was taken out with an insurer of repute. It is my view that there is no evidence before me to establish that the premiums being challenged were negotiated otherwise than at arm's length and in the market-place.

39. There was, therefore, no obligation on the respondent to shop around for a cheaper insurance provider even though, as the respondent acknowledges, one may well have been available. Nor, in any event, do I consider that the premium secured by the landlord was rate unrepresentative of the market rate. I see no reason to doubt the evidence from Lockton that it carried out a market testing exercise before concluding that the Axa policy represented best value.

40. I am not, however, satisfied with the respondent's explanation regarding the payment of commission in respect of the insurance cover obtained for these Flats. It is common knowledge amongst those involved in the property field that landlords with property portfolios often obtain discounts from insurers for block and repeat business. In *Williams v Southwark London Borough Council* the court indicated that a landlord is entitled to retain genuine commission payments paid, for example for claims handling services carried out by the landlord, but that any discount in the premium should be passed on to the tenant so that the tenant pays the actual net cost of insurance.

41. In their December statement of case the respondent states that *"Regis Group owns a large portfolio of over 30,000 units and that it's the ability to 'bulk buy' that enables them to benefit from commissions on the portfolio as a whole"*. It appears therefore that commission is paid by Axa to Regis Group for the taking out of insurance in respect of a portfolio of properties, including the Flats. The respondent did not comply with my directions asking it to clarify the amounts of commission that had been paid to the landlord or associated landlord, broker or other agents in respect of the Policy and the reason for such payments.

42. The inference I draw from that non-compliance is that insurance commissions were received by the respondent or an associated company that were not genuine commission payments but which amounted to a discount that should have been passed on to the applicants. In my experience as a judge in this expert tribunal I believe such commission is commonly in the range of 10 to 20% of the premium. The respondent has not explained the amount of the commission received. In the absence of such evidence I determine that 20% sum of £436.20 demanded from the applicants towards the costs of the premium are not payable by them on the basis

that the sum represented a discount, the benefit of which should have been passed on to them. The sum payable in respect of each flat is therefore £348.96.

43. I do not consider there is any provision in the Lease that entitles the respondent to recover an insurance administration fee through the service charge. The sum of £19.99 demanded in respect of each flat is therefore not payable by the applicants

Application under Section 20C

44. The applicants sought an order that the costs incurred by the respondent in connection with these proceedings should not be regarded as relevant costs when determining the amount of service charge payable by him.

45. When exercising its discretion as to whether or not to make a s.20C order the tribunal has to have regard to what is just and equitable in all the circumstances. The circumstances include the conduct and circumstances of all parties as well as the degree to which the applicant has succeeded in this application.

46. After the conclusion of the hearing I invited the respondent to confirm whether or not it considered that the terms of the Lease entitled it to recover its costs of these proceedings through the service charge. By letter dated 9 February 2017 Pier Management confirmed that it would not be seeking to recover its costs through the service charge.

47. In light of that concession and for the avoidance of doubt I nonetheless determine that it is just and equitable in the circumstances for an order to be made under section 20C of the 1985 Act so that the respondent may not pass any of its costs incurred in connection with the proceedings before the tribunal through the service charge.

Name: Amran Vance **Date:** 17.03.17

Annex

Appendix of relevant legislation

Landlord and Tenant Act 1985

Section 18 - Meaning of "service charge" and "relevant costs"

(1) In the following provisions of this Act "service charge" means an amount payable by a Tenant of a dwelling as part of or in addition to the rent –

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable

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(3) For this purpose -

(a) "costs" includes overheads, and

(b) costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19 – Limitation of service charges: reasonableness

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -

(a) only to the extent that they are reasonably incurred, and

(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;

and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the

relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A – Liability to pay service charges: jurisdiction

(1) An application may be made to the appropriate tribunal for a determination whether a service charge is payable and, if it is, as to –

(a) the person by whom it is payable,

(b) the person to whom it is payable,

(c) the amount which is payable,

(d) the date at or by which it is payable, and

(e) the manner in which it is payable.

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

(3) An application may also be made to the appropriate tribunal tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified description, a service charge would be payable for the costs and, if it would, as to -

(a) the person by whom it would be payable,

(b) the person to whom it would be payable,

(c) the amount which would be payable,

(d) the date at or by which it would be payable, and

(e) the manner in which it would be payable.

(4) No application under subsection (1) or (3) may be made in respect of a matter which -

(a) has been agreed or admitted by the Tenant,

(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,

(c) has been the subject of determination by a court, or

(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.

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

[.....]

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—
- (a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
- (aa) in the case of proceedings before a residential property tribunal, to that tribunal;
- (b) in the case of proceedings before a residential property tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any residential property tribunal;
- (c) in the case of proceedings before the Upper Tribunal, to the tribunal;
- (d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.

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

Leasehold Valuation Tribunals (Fees)(England) Regulations 2003

Regulation 9

(1) Subject to paragraph (2), in relation to any proceedings in respect of which a fee is payable under these Regulations a tribunal may require any party to the proceedings to reimburse any other party to the proceedings for the whole or part of any fees paid by him in respect of the proceedings.

(2) A tribunal shall not require a party to make such reimbursement if, at the time the tribunal is considering whether or not to do so, the tribunal is satisfied that the party is in receipt of any of the benefits, the allowance or a certificate mentioned in regulation 8(1).