12793

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	CHI/43UG/LIS/2017/0045 CHI/43UG/LDC/2018/0032
Property	:	84 Ongar Place. Addlestone, Surrey KT15 1JG
Applicant	:	Runnymede Borough Council
Representative	:	Andrew Atkinson, Solicitor
Respondent	:	Mrs Gillian Williams
Representative	:	-
Type of Applications	:	(1)Liability to pay insurance service charge (2) Dispensation from requirement to consult
Tribunal Members	:	Judge E Morrison Mr N I Robinson FRICS
Date of Decision	:	14 May 2018

DECISION

The applications

1. In September 2017 the Applicant landlord ("the Council") applied to the Tribunal, pursuant to section 27A Landlord and Tenant Act 1985 ("the Act") for a determination of the Respondent tenant's service charge over a 7 year period, 2011-12 to 2017-18. There is only one element to the service charge, namely the cost of insuring the property. None of the service charges have been paid by the Respondent ("Mrs Williams").

2. In March 2018 the Council applied to the Tribunal under section 20ZA of the Act for dispensation from the requirement to consult with the tenant before entering into a qualifying long term agreement ("QLTA") in respect of insurance which applied during service charge years 2010-11 to 2012-13.

Summary of decision

3. The service charges recoverable by the Council from Mrs Williams are set out at paragraph 46 below.

4. In respect of service charge years 2010-11 to 2012-13 the Council is granted dispensation from the consultation requirements under section 20 of the Act.

The lease

5. 84 Ongar Place is a shared ownership property, the Council and Mrs Williams each holding a 50% share. The Respondent's share is held under a lease granted to her on 18 April 1997.

6. Under clause 4(2) of the lease the Landlord is responsible for insuring the property "to its full reinstatement value (including all professional fees in connection with reinstatement and two years' loss of rent)".

7. Under clause 2 of the lease the Tenant is required to pay to the Landlord a sum equal to that expended by the Landlord in complying with its covenant in clause 4(2) ... on demand by the Landlord".

Procedural Background

8. On 4 October 2017 the Tribunal issued directions in relation to the application under section 27A. They provided for the application to be determined on written submissions and without a hearing unless a party objected within 28 days. There was no such objection, but having seen the original bundle the Tribunal subsequently considered that an oral hearing would be appropriate and informed the parties that a hearing would be listed. Further directions were issued giving the parties an opportunity to file further evidence and submissions. Both

parties then reiterated their request for a decision on the papers. This was accepted but the Tribunal issued a third set of directions requiring further written evidence from the Applicant on specific points which would otherwise have been raised by the Tribunal at an oral hearing.

9. On 21 March 2018 the Tribunal issued directions in relation to the application under section 20ZA. These again provided for a written determination unless an oral hearing was requested. Although Mrs Williams completed her Response form in a way which suggested she wanted an oral hearing, she subsequently confirmed that she did not.

10. This determination has therefore been made solely on the written evidence and submissions of the parties. There has been no inspection of the property by the Tribunal.

The Law and Jurisdiction

11. The tribunal has power under section 27A of the Act to decide about all aspects of liability to pay service charges and can interpret the lease where necessary to resolve disputes or uncertainties. The tribunal can decide by whom, to whom, how much and when a service charge is payable.

12. By section 19 of the Act a service charge is only payable to the extent that it has been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

13. Section 20 of the Act and regulations thereunder provide that where costs of more than £250.00 per lessee have been incurred on qualifying works, or more than £100.00 per lessee under a qualifying long term agreement, the relevant contributions of tenants will be limited to those sums unless the consultation requirements have been either complied with or dispensed with by the determination of a Tribunal.

The Evidence

14. The evidence for both applications ended up in a single bundle, not received by the Tribunal members until the morning of the determination, although the contents had either been in an earlier bundle or sent to the Tribunal by email. In any event the Tribunal has taken into account everything in the final bundle, even though it was provided late.

15. The bundle includes written submissions and three witness statements on behalf of the Council, statements from Mrs Williams, and copy documents and correspondence relied on by the parties. The Council has also provided copies of some legal authorities.

The Facts

16. The essential facts as set out by the parties in their statements or revealed by the correspondence are not disputed and may be summarised as follows:

- Over 8 years from 2010 – 2017 inclusive the insurance premium payable by Mrs Williams has steadily risen from £221.47 to £340.92. The excess under the policy is £250.00.

- The Council has, since 2002, obtained insurance through Zurich Municipal ("Zurich"), under a block policy covering all the Council's shared ownership properties. The number of such properties has been reducing over the years; as of July 2017 there were 63 properties.

- After a period of rising premiums, in Spring 2010 the Council asked their insurance brokers Heath Lambert to undertake a re-tendering of the insurance, but only one tender was received, from Zurich.

- A three year contract was then entered into with Zurich under which the rate of calculating premiums did not increase for 3 years, although the actual cost to Mrs Williams continued to rise due to increases in the sum insured, to reflect higher rebuilding costs, and due to increases in insurance premium tax ("IPT").

- Although Zurich told Mrs Williams of the proposed re-tendering exercise in March 2010, and of the result in June 2010, it did not carry out any formal consultation as required by section 20 of the Act, despite the agreement with Zurich being a qualifying long termagreement. The three year agreement operated from 1 July 2010 – 30 June 2013.

- The premium for 2010-2011 was paid by Mrs Williams but in June 2011 Mrs Williams visited the Council and made it clear she was unhappy with the level of premium she was being asked to pay for the following year.

- She wrote to the Council in July 2012, and on 31 July 2012 the Council replied saying that "We will be entering into discussions with Zurich Municipal next spring about possible renewal terms, though if these do not appear favourable we shall once more approach the market place to see if there is any more interest in the portfolio".

- In August 2012 Mrs Williams wrote to the Council saying she could obtain "directly comparable" cover on the open market for £69.00.

- The Council did not return to the market at the end of the three year contract with Zurich. For the next two years Zurich did not change the basic charging rate, but the premium continued to rise due to increases in the building costs indices and IPT.

- In June 2015 Mrs Williams wrote to the Council saying that she had obtained a "comparable" quote from Zurich for £91.00.

- In July 2015 and July 2016 Zurich increased the basis charging rate, by 6.8% and 3% respectively. According to the witness statement of Chris Mitchell, the Council's Housing accountant, the Council decided in around June 2015 that it would re-tender the shared ownership portfolio in 2017, at the same time as the Council's main insurance policies were being retendered.

- The result of the re-tendering process, which has only just been completed, is that Zurich's bid is likely to be accepted and it "looks like it will result in a significant reduction (of around 30-40%) in the annual costs to the shared ownership clients" according to Chris Mitchell.

- In June 2017 Mrs Williams took out her own buildings insurance policy with Liverpool Victoria at an annual premium of £65.21.

The Issues

17. The issues identified by the Tribunal are

    (i) Whether Mrs Williams is required to pay any service charge for buildings insurance or whether she may instead arrange and pay for her own policy
    (ii) If she is required to pay a service charge for insurance, whether the sums demanded have been reasonably incurred
    (iii) If she is required to pay a service charge for insurance, whether the insurance provided has been of a reasonable standard
    (iv) Whether dispensation from consultation in respect of the 2010-13 agreement with Zurich should be granted.

    These issues will be addressed in turn.

Whether Mrs Williams is required to pay any service charge for buildings insurance or whether she may instead arrange and pay for her own policy

18. For some years Mrs Williams has maintained in correspondence with the Council that she is entitled to arrange her own building insurance. She relies on section 164 of the Commonhold and Leasehold Reform Act 2002. The Council has reiterated to her its position that section 164 does not apply to her lease. The Council is correct. Section 164 applies "where a long lease of a house requires the tenant to insure the house with an insurer nominated or approved by the landlord". The lease of 84 Ongar Place does not require Mrs Williams to insure the property. Instead it specifically requires the Council to do so, Mrs Williams' obligation simply being to pay for the cost of that insurance. That obligation is not the same as an obligation to insure. The Council is accordingly entitled

to recover from Mrs Williams as a service charge the reasonable cost of insuring the house.

19. Mrs Williams also relies on an information sheet provided to her by the Council before she purchased her share in the property. This sheet gave the impression that she would be able to choose her own insurer. However that is contradicted by the very clear provisions in the lease, which is the contract which governs the respective rights and obligations of the parties. The Tribunal is not required to take any account of the information sheet.

Whether the sums demanded have been reasonably incurred

20. Mrs Williams' contention is that the insurance premiums are unreasonable because they are excessively expensive; she could arrange insurance herself for a fraction of the cost charged to the Council by Zurich. Her evidence refers to quotes she has obtained, in 2012, 2015 and 2017. None of these quotes are actually in evidence; neither is there any evidence as to whether they were really comparable quotes i.e. with comparable risks, and comparable cover for not just Mrs Williams but also for the Council. No copy of the actual policy she took out with Liverpool Victoria in 2017, or the policy schedule, has been provided.

21. Chris Mitchell says the Council "did all that it reasonably could have done to keep the leaseholders' premiums to a minimum and that the amounts charged to the Respondent were reasonable sums reasonably incurred". The Council relies on the 2010 tendering exercise as evidence that it tested the market. However there is a very little detail about the exercise e.g. how many companies were approached, and no direct evidence from the consultants who undertook this. No copy of the 2010 agreement with Zurich has been provided.

22. In its first submission the Council relied on the approach taken in *Avon Estates (London) Ltd v Sinclair Gardens Investments (Kensington) Ltd* [2013] UKUT 264 (LC), where the Upper Tribunal stated at [30]:

The LVT was dealing with the evidence it had before it and properly directed itself to the relevant and correct law, setting out the principle that the landlord is not obliged to shop around to find the cheapest insurance. So long as the insurance is obtained in the market and at arm's length then the premium is reasonably incurred.... 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.

23. In its second set of directions the Tribunal specifically drew the parties' attention to the more recent decision of *Cos Services Ltd v Nicholson* [2017] UKUT 382 (LC) and invited them to submit any additional evidence and submissions with regard to the points raised that case. In *Cos Services* the test in *Avon Freeholds* was found to be too narrow.

Instead, relying on the earlier decision in *Forcelux Ltd v Sweetman* [2001] 2 EGLR 173 and the much more recent decision of the Court of Appeal in *Waaler v London Borough of Hounslow* [2017] EWCA Civ 45, the Upper Tribunal found it was necessary to consider both process and outcome in deciding whether insurance costs had been "reasonably incurred":

37. It is clear ... 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...

47 .... 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.

24. In response to the directions the Council made further submissions, stressing that it had no choice but to insure the property, that no other insurer had bid in 2010, and that the only way the Council could see to reduce the insurance costs was to insure all its shared ownership properties as part of the Council's wider insurance portfolio which "cannot happen until 2018".

25. The Tribunal's final directions of 4 April 2018 asked the Applicant to provide a further witness statement (i) reporting on the result of its retendering exercise and what level of premium will be charged to the Respondent for the period commencing 01.07.18 as a result, and (ii) reporting on the level of premium paid by the Applicant over the period in question for a similar property in its own housing stock. The resulting witness statement stated, without providing any specific figures, that the re-tendering process would result in a reduction in premiums of 30-40%. It also stated that for the year commencing July 2017 the Council paid an average premium of £54.00 for its own housing stock, although this insurance has no subsidence cover, the excess is £1000.00, and other aspects of the policy are narrower than the cover on Mrs Williams' house e.g. no cover for subletting.

26. The evidence submitted by both sides has to be viewed in light of the two stage approach set out in *Cos Services*. The burden of proof is on the Council.

27. So far as process and decision-making are concerned, the Council has not satisfactorily explained why it was necessary to wait until 2018, eight years since it lasted tested the market, to re-tender the shared portfolio insurance. As to outcome, despite being given every opportunity, the Council has failed to show that use of a block policy has not resulted in substantially higher premiums than those available on the open market on an individual property basis. Nor has the Council put forward any evidence whatsoever that a block policy, albeit more expensive, might offer some compensating advantages.

28. Mrs Williams' evidence is also lacking. She has failed to show that any of her quotes are truly comparable. She has not produced her current policy to establish she has protected not only her own but also the Council's interest.

29. The Tribunal has considered whether, in light of the concerns about the quality of evidence in this case, it should list the matter for an oral hearing with directions for more evidence to be adduced on specified points. However we have concluded it would be disproportionate to do so. A considerable amount of Tribunal time and resources have already been expended on this case in which the sums in dispute are modest. Accordingly we do the best we can on the evidence the parties have chosen to make available.

30. In our view, as an expert body, and relying on our knowledge and experience, the premiums charged by the Council over the period in question, for a straightforward modern semi-detached house, are much higher than we would have expected. However in respect of the first two years in dispute (2011-12, and 2012-13), the premium was the result of a tendering exercise and there is undisputed evidence that only Zurich tendered. There is no evidence at all, save one quote Mrs Williams says she obtained in August 2012 but which has not been produced, to suggest that the premium might be unreasonably high. The Tribunal finds in respect of these years that the Council has proved, on a balance of probabilities, that it adopted a rational process and that the resulting premium was in a reasonable amount. It has therefore been reasonably incurred.

31. In respect of the subsequent five years we reach a different conclusion. In our view the Council did not act rationally or reasonably when it failed to test the market in any way after the three year agreement with Zurich expired. It seeks to justify that stance by saying that Zurich did not increase the premium rate for another two years. However, it does not follow that the market had necessarily remained static or that it was reasonable for the Council to assume that it had. Moreover, there are other aspects of the evidence which, while not carrying much weight in isolation, when considered together are sufficient to persuade us that the Council has not satisfied its burden of proof in respect of the reasonableness of the premiums charged. These are:

(i) The quotes obtained by Mrs Williams in 2012 and 2015. Notwithstanding that we cannot be satisfied that they are like for like quotes, they are some indication of the market.
(ii) The premium of £65.21 paid by her to Liverpool Victoria for the current year, even though it is unclear whether the Council's interest is protected.
(iii) The fact that in the current insurance year of 2017-2018 the Council is only paying an average of £54.00 per property on its own housing stock, compared with £340.92 charged to Mrs Williams. The difference in cover and excess cannot, in our expert view, fully explain the huge discrepancy.
(iv) The fact that as a result of the current re-tendering process, premiums for 2018-19 are likely to reduce by up to 40%, even with the same insurer.
(v) The lack of any evidence that the advantages of a block policy might justify higher premiums or that there are insurance industry concerns about insuring shared ownership properties.

When these matters are considered together, the Tribunal is not persuaded that the premiums charged to Mrs Williams from July 2013 onwards, without any attempt whatsoever to check what other premiums might be available on the market, are in a reasonable amount.

32. It remains to determine what amount may be recovered by the Council for the five years 2013-14 to 2017- 18 inclusive. We conclude that the costs should all be reduced by 40%. This is in line with anticipated reductions in the coming year and results in premiums which, while still much higher than the quotes obtained by Mrs Williams, are in our expert view well within the range of reasonable cost for the cover required under the lease.

Whether the insurance provided has been of a reasonable standard

33. Mrs Williams' complaint is that her property has been under-insured. Although the first building insurance proposal form signed by Mrs Williams stated within it that the sum to be insured was £60,000.00 as the full rebuilding cost, and this sum has been subject to annual increases in line with industry indices for house-building costs, Mrs Williams says it has been under-insured. The sum insured for the current year is £147,764.00. Mrs Williams says the real rebuilding cost is £183,000.00. She also denies completing the figure of £60,000.00 in the proposal form in the first place.

34. The Council's position is that £60,000.00 was the figure selected by Mrs Williams, that there have been annual increases, and that although she was free at any time to request that the sum insured be increased, she did not do so.

35. Whether or not Mrs Williams selected the initial figure of £60,000.00 it does not appear unreasonable when viewed against the total price paid for the (modern estate-built) house of £68,250.00. Contrary to the Council's position it is clear from clause 4(2) of the lease that it is the Council's responsibility, and not up to Mrs Williams, to make sure the house is insured to its full reinstatement value. Indices of house-building costs are only a guide, based on an average property. A prudent person would arrange a formal revaluation of the property on a periodic basis instead of just relying on an index. However there is no reliable evidence that the insured sum of £147,764.00 is too low. Mrs Williams appears to have obtained her figure of £183,000.00 from a November 2017 "Compare the Market" internet comparison site search which uses the property postcode and basic property details. However it goes on to say "While £183,000.00 is a reasonable estimate of the rebuilding cost of a good quality property, the cost of rebuilding a 7 room, 3 bedroomed house can vary between £131,000.00 for a smaller house of basic quality to £249,000.00 for a larger, excellent quality house". This evidence alone is insufficient to establish that the sum insured for 84 Ongar Place is too low.

36. Even if the property has been under-insured Mrs Williams has suffered no loss and there is no evidence of anything else substandard in relation to the policy. Furthermore, if the sum insured had been higher, then so would have been the premiums, which Zurich base on each

thousand pounds of sum insured. We conclude there is no reason to disallow any of the service charge on the basis of under-insurance.

Whether dispensation from consultation in respect of the 2010-13 agreement with Zurich should be granted

37. The agreement entered into between the Council and Zurich is a long term qualifying agreement as defined in section 20ZA of the Act because it was for a term of more than 12 months. Unless dispensation is granted the amount recoverable from Mrs Williams for each of these three years will be limited to £100.00.

38. The Tribunal issued directions with regard to the section 20ZA application that required the Council to send a copy of the application to "each affected leaseholder". The Council only sent the application to Mrs Williams, who contends that it should have been sent to all the other shared ownership lessees of the Council. It is the Council's position that only Mrs Williams need be served; the application was made only because the omitted consultation was noted while dealing with the main section 27A application.

39. While applications for dispensation under section 20ZA are often served on all lessees subject to the same charge, there is nothing in the statutory framework which mandates this. Rule 29(4) of the Tribunal's Procedure Rules state that notice of an application must be given to "any person whose name and address is known to the Tribunal whom the Tribunal considers is likely to be significantly affected by the application". In the usual case, where a charge applies to a group of lessees in the same building or development, who are all subject to the same service charge regime, notice will be given to all the lessees. However Mrs Williams lives in an individual house. Although the Council has other shared ownership properties, they do not have any connection with 84 Ongar Place, and the Tribunal has no knowledge of their leases, service charge or insurance obligations. The Tribunal must deal with cases in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and resources of the parties and of the Tribunal. According to the Council, only Mrs Williams has challenged the insurance service charge. The Tribunal does not consider that it was necessary to inform the other shared ownership lessees of the application.

40. Under section 20ZA the Tribunal may grant dispensation if it is reasonable to do so.. The Supreme Court has given guidance on how the tribunal should approach the exercise of its discretion under section 20ZA: *Daejan Investment Limited v Benson et al* [2013] UKSC 14. The tribunal should focus on the extent, if any, to which the tenant may be prejudiced in either paying for inappropriate works or services or paying more than would be appropriate as a result of the failure by the landlord to comply with the regulations. The factual burden of proving some relevant prejudice is on the tenant, who must identify what he would

have said if given the chance to participate in a consultation process. Dispensation may be granted on terms.

41. The Council state that it was only during the preparation of the 27A dispute with Mrs Williams that it was recognised that the 2010 agreement with Zurich was an agreement on which there had been no consultation. In her response to the 20ZA application Mrs Williams asks the Tribunal "to refer to my correspondence and other copies in the original bundle which is what I would have done if the Applicant had complied with the full statutory consultation process".

42. The Tribunal has considered all the documentation provided by Mrs Williams. Although not consulted as required the Council wrote to her in March 2010 setting out its own concerns about the increasing cost of insurance, and explaining "We have decided to put the above policy out to the markets in an attempt to obtain more favourable terms". In June 2010 the Council wrote again explaining that only Zurich had tendered, and providing details, including the cost, of the three year contract. There is no evidence that Mrs Williams replied to either letter or expressed any concern about the level of premium at that time. She paid the premium for the first year of the 2010 agreement. It was not until June 2011 that she first contacted the Council querying the cost.

43. While the Tribunal should adopt a sympathetic stance towards tenants on the issue of prejudice, it cannot put words into their mouths. The correspondence and documents to which Mrs Williams has referred the Tribunal simply do not establish that, had she been consulted as required in 2010, she would have done anything at all.

44. Although it did not follow the statutory consultation process the Council did inform Mrs Williams before and after the re-tendering process and, while the Tribunal has been given very little detail about the process itself, it is reasonable to infer that a number of companies were invited to tender. There is simply no evidence before the Tribunal that, at that time, appropriate insurance could have been obtained elsewhere at a lower cost.

45. Accordingly the Tribunal finds it is reasonable to dispense with all consultation requirements in respect of the three year agreement entered into by the Council with Zurich in 2010.

Calculation of service charge

46. As a result of the Tribunal's determinations the service charges payable by Mrs Williams are as follows:

Year	Demanded	Payable
2011-12	236.19	236.19
2012-13	243.28	243.28
2013-14	248.38	149.02
2014-15	258.32	154.99
2015-16	286.87	172.12
2016-17	320.50	192.30
2017-18	340.92	204.55

14 May 2018 **Judge E Morrison**

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application 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.