

DECISION

re: 40 Queen's Avenue, Muswell Hill, London N10 3NR

Applicant Lessees : Mr A Ellis and others
Respondent Lessor : Pledream Properties Ltd
Represented by : Mr J Swirsky of counsel

Tribunal: Mr NK Nicol - Chairman
Mr D N Huckle FRICS
Mrs MB Colville JP LLB

1. 40 Queens Avenue is a three-storey Edwardian semi-detached house converted into seven flats let on leases running for 125 years from 25th March 1988. The lessees, with Mr Ellis of Flat 1 taking the lead, applied to the Tribunal for a determination as to the payability of insurance premiums and associated management fees contained in service charges levied on behalf of the lessors by their agents, Sable Estates Ltd, for the years 1998/99 to 2002/3. A hearing was held on 7th December 2004 at which the Tribunal heard from Mr Ellis and Mr Brooks (Flat 4) on behalf of the Applicants and Mr Swirsky and Mr Jenkins (managing director of the lessor company) on behalf of the Respondent.

The Law

2. It is important to note that the Leasehold Valuation Tribunal is a creature of statute, which means that it has only the power to determine those issues which statute specifically sets out. The relevant parts of s.27A of the Landlord and Tenant Act 1985 (inserted by the Commonhold and Leasehold Reform Act 2002) state as follows:-

- (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.

Preliminary Issue

3. At the pre-trial review held on 15th September 2004, the Tribunal directed that the Respondent's contention that the Tribunal had no jurisdiction to hear the application should be heard as a preliminary issue at this main hearing. Mr Swirsky helpfully provided a written skeleton argument and made oral submissions to expand on it. The parties were informed at the hearing that the Respondent's argument was rejected and the reasons are now given here.

4. With all due respect to Mr Swirsky, and the cogency and forcefulness with which he put his arguments, the Tribunal feels that the Respondent's contention was entirely misconceived. It relied on the fact that the Applicants' application was made in August 2004 under s.27A (set out above). This section had been inserted into the Act by s.155 of the Commonhold and Leasehold Reform Act 2002 with effect from 30th September 2003 in accordance with the Commonhold and Leasehold Reform Act 2002 (Commencement No.2 and Savings) (England) Order 2003. Service charges, including insurance premiums, could previously have been challenged under s.19(2A) and (2B) of the Act which were repealed. However, if the Applicants had brought their application earlier, under s.19(2A) or (2B), the Respondent would have had an absolute defence. This is because all the charges in this

case have been paid and, according to the Court of Appeal in *R -v- London Leasehold Valuation Tribunal ex p Daejan Properties Ltd* [2002] HLR 25, the Tribunal had no jurisdiction under s.19(2A) or (2B) to hear a challenge to service charges which had been paid. This disability has been expressly removed for s.27A by s.27A(2). Mr Swirsky argued that the Respondent had an accrued right not to have their service charges challenged once they had been paid and to allow a challenge now under s.27A would involve the retrospective application of the law.

5. However, the Tribunal feels that this is the wrong approach to the change in the law. Prior to the change in the law, although lessees could not have challenged in the Tribunal the payability of service charges which they had actually paid, they could have done so in the courts. Neither the old law under s.19(2A) and (2B) nor the new law under s.27A provide lessees with a substantive right which they did not have before. They merely define the jurisdiction of the Tribunal for the periods before and after 30th September 2003 respectively. Under s.27A, the Tribunal now has a wider jurisdiction which had previously been the exclusive province of the courts but which the Tribunal now shares concurrently. The only effect of the change in the law is to provide the parties with the option of a different venue for the resolution of their dispute. There is no retrospective application of the law in any sense.

Insurance Premiums

6. As described in Mr Jenkins's witness statement, the Respondent acquired the freehold of the property at 40 Queen's Avenue on 23rd July 1992. At the time, the property was insured with Royal Insurance which later became the Royal & Sun Alliance. Following a change in RSA's administration, the Respondent felt their service had fallen below the standard they required and decided to change to Norwich Union with effect from 1st April 1999. The insurance premiums levied and paid in the relevant years in respect of the property were:-

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| 1998/99 | £3,003.11 | RSA |
| 1999/2000 | £3,274.55 | NU |
| 2000/01 | £3,821.40 | NU |
| 2001/02 | £4,904.38 | NU |

2002/03

£5,706.25 NU

A management charge of 15% was levied on top of each premium. The Applicants did not challenge the percentage for the management fee but argued that it should be applied in each year to a lower sum as referred to further below.

7. For the year 2004/5, the Respondent's insurance brokers, Midway Insurance Services Ltd, recommended acceptance of a premium of £5,956.18 (excluding terrorism cover) from Norwich Union. In June 2003 Mr Ellis began a lengthy correspondence with Sable Estates, by letter and e-mail, in which he queried the amount of the premium. Sable Estates refused to test Norwich Union's premium against the market by obtaining other quotes from other brokers or insurers and so Mr Ellis and his fellow lessees decided to do so themselves. They obtained alternative quotes from AXA, Allianz Cornhill, NIG and even Norwich Union through a different broker, Wise Insurance Services Ltd. All the quotes were significantly lower, ranging from £2,592.25 to £4,016.25.

8. At Mr Ellis's insistence, Sable Estates met the lessees to discuss the premiums. Paul Robertson of Sable Estates had concerns as to whether the alternative quotes could be properly compared with the existing insurance arrangements and insisted that full proposal forms were completed and sent to the alternative insurers for revised quotes. This was done in respect of AXA and Allianz Cornhill. AXA provided a revised quotation of £2876.10 and Allianz Cornhill £3174.15 but AXA increased applicable excess amounts and Allianz Cornhill attached conditions relating to pre-existing condition with regard to subsidence cover would be excluded.

9. The Tribunal has not been told exactly how Norwich Union were involved in this process but, in the event, they decided to offer a reduced premium of £3,465. In turn, the Respondent decided to recover only £3,174.15, the amount of the Allianz Cornhill quote, from the Applicants. The parties were unable to assist the Tribunal as to why Norwich Union lowered their quote. Mr Ellis contended that their original quote had been above the market and they had simply lowered their quote to the market rate. Mr Swirsky put forward the Respondent's contention that Norwich Union had come below what they would normally be prepared to offer in order to

retain the substantial business which accompanies the Respondent's large property portfolio.

10. More significantly, Mr Swirsky put forward the Respondent's reasons for refusing to switch the insurance away from Norwich Union. The area in which the property is located rests on a clay soil which is often affected by subsidence, particularly due to the drying effect of the London Plane trees which decorate Queen's Avenue and other local roads. The local authority has been obliged to carry out a regular pollarding programme in order to reduce the risk. This has not prevented six occurrences of subsidence problems in the road to the Respondent's knowledge. Also, the area has always been rated by the insurers used by the Respondent as one of the highest possible risks due to the potential for subsidence. The property itself has not suffered from subsidence – a claim was made in 2002/3 due to cracks which had appeared but it was rejected by Norwich Union's appointed loss adjusters. Mr Jenkins pointed to the condition attached to Allianz Cornhill's quote (referred to in para 8 above) and said that he would not accept insurance on that basis. Further, he described the difficulty he had experienced in the past following changes, or "churning", of insurers of other properties when claims in respect of subsidence and other problems were disputed on the basis that they arose from conditions which existed before they took over the insurance. He said that he had an ongoing relationship with Norwich Union, which had always provided a good service, and would not want to switch from them in the circumstances.

11. In any event, the Applicants accepted the lower charge proposed by the Respondent and their dispute in respect of 2004/5 was settled. However, the Applicants were disturbed to find that the insurance premium could be reduced so radically and now questioned the preceding years as well. They did not obtain the assistance of an expert broker and did not seek to get any comparative quotes for previous years. Instead, they extrapolated what earlier premiums should have been by taking the agreed sum of £3,174.15 and reducing it in line with the AA British Insurance Premium Index for Buildings Insurance. The Applicants then contended that for the Respondent to have charged in excess of the revised figures was unreasonable. They put the amount of overcharge for the whole period in dispute at

£11,689.27. Alternatively, they put the amount of overcharge at £10,136.06 or £8,815.30 if higher figures were taken for the premium in 2004/5 as the starting point for the calculation.

12. The Respondent's defence was that they had acted entirely reasonably in obtaining the premiums for the previous years. They had insured with a reputable company, namely Norwich Union. Although there was no market testing, the premium had been reviewed each year in the light of the claims history by the brokers, Midway, together with Norwich Union. Indeed, Mr Swirsky pointed to the claims history itself as explaining much of the increase which happened in certain years. There were no claims under the insurance until one in January 2001. There were then three claims in each of the following insurance years, between which the premiums increased by 14% and 20%.

13. The real difficulty for the Applicants' case is that it starts from a debatable starting point and proceeds on skimpy evidence. There is simply no evidence that the starting point, namely the premium agreed for 2004/5 is the true market rate. Mr Jenkins pointed out in his witness statement that the alternative quotes may well have included special new business discounts, such as are often available under brokers' schemes, which are not replicated in later years. This is in addition to the Respondent's arguments that they did not reflect the subsidence risk or the true benefit from the consistency and reliability of staying with the same insurer. We just do not know why Norwich Union were prepared to drop their quote. It is just as credible, if not more so, that they acted from fear of losing business with the Respondent than from some estimate that they had previously been charging above the market.

14. Further, the Applicants' method of calculating what should have been charged in previous years is not strong. The AA Index covers the whole of the UK, not just the area in question where insurance premiums probably did not move over the years in the same way as other areas. There are a number of factors in calculating a premium which might have affected each year, including the claims history and the rebuilding cost, which do not seem to have been considered adequately.

The Applicants contended that the rebuilding cost insured by Norwich Union was too high but this was based only on some rough calculations by Mr Ellis which he did not put forward with any great enthusiasm.

15. In the circumstances, the Tribunal is not satisfied that the insurance premiums included in the service charges on behalf of the Respondent for the years 1998/9 to 2002/3 were unreasonably incurred or unreasonable in amount. The Tribunal is satisfied that they were payable in accordance with the undisputed provisions of the relevant leases and so the Applicants' application must be dismissed.

Costs of the proceedings

16. In addition to their main application, the Applicants also made an application under s.20C of the Landlord and Tenant Act 1985 the relevant parts of which state:-

- (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 ...

17. In support of this application, Mr Ellis claimed that the Respondent and their solicitors had failed to do all they could to avoid the litigation. Mr Swirsky pointed out that the initial letter of claim was dated 24th May 2004 while the claim was issued around three months later. He said that this was not a long pre-litigation stage.

18. In the Tribunal's opinion, there is insufficient evidence to suggest that the Respondent failed to do all they could to avoid litigation. While it might well be preferable for parties to litigation to act more quickly, the Applicants appear to have an unrealistic idea of just how quickly it can and normally is conducted. This is not intended as a criticism and might simply be a reflection of their inexperience with litigation. In any event, the Applicants have failed in their principal application and there is no sufficient basis for disallowing the Respondent their proper costs.

19. Mr Swirsky confirmed that the Respondent intended to recover the costs of

the proceedings through the service charge but rightly conceded that this could not include any costs related to the preliminary issue which the Tribunal found against them. In the circumstances, and to take account of the result of the preliminary issue only, the Tribunal will allow the s.20C application to the extent of 40% of the Respondent's costs, i.e. the Respondent may recover up to 60% of the costs of the proceedings through the service charge.

Conclusion

20. In comparison with challenges to other service charges, it is difficult for lessees to challenge successfully insurance premiums. They will often lack the necessary knowledge or experience of buildings insurance. The current application was better presented than most and clearly represented a great deal of work by the lessees, particularly Mr Ellis, for which he should be commended. However, even in these circumstances, the Tribunal felt that the evidence was inadequate to support the arguments made. In the Tribunal's opinion, few applications such as the current one are likely to succeed without the support of suitable evidence, which will normally have to be presented by an expert in the field.

21. In conclusion, the Tribunal is satisfied that it had jurisdiction to hear the application but rejects it, both in respect of s.27A and s.20C.



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N.K. Nicol
Chairman
16th December 2004

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11. In any event, the Applicants accepted the lower charge proposed by the Respondent and their dispute in respect of 2004/5 was settled. However, the Applicants were disturbed to find that the insurance premium could be reduced so radically and now questioned the preceding years as well. They did not obtain the assistance of an expert broker and did not seek to get any comparative quotes for previous years. Instead, they extrapolated what earlier premiums should have been by taking the agreed sum of £3,174.15 and reducing it in line with the AA British Insurance Premium Index for Buildings Insurance. The Applicants then contended that for the Respondent to have charged in excess of the revised figures was unreasonable. They put the amount of overcharge for the whole period in dispute at

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Costs of the proceedings

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the proceedings through the service charge but rightly conceded that this could not include any costs related to the preliminary issue which the Tribunal found against them. In the circumstances, and to take account of the result of the preliminary issue only, the Tribunal will allow the s.20C application to the extent of 40% of the Respondent's costs, i.e. the Respondent may recover up to 60% of the costs of the proceedings through the service charge.

Conclusion

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