THE RESIDENTIAL PROPERTY TRIBUNALSERVICE
SOUTHERN RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

Residential Property TRIBUNAL SERVICE

S.27A & S.20C Landlord & Tenant Act 1985(as amended)("the 1985Act")

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| **Case Number:** | **CHI/00ML/LSC/2009/0110** |
| **Property:** | **45 Russell Square<br>Brighton<br>East Sussex<br>BN1 2EF** |
| **Applicants:** | **Nadav Limited<br>A. Eversfield<br>J. Macpherson<br>R. Brabiner<br>C. White<br>E. Turner** |
| **Respondent:** | **Sinclair Gardens Investments (Kensington) Limited** |
| **Appearances for the Applicants:** | **Jeremy Donegan of Osler Donegan Taylor Solicitors (ODT)** |
| **Appearances for the Respondent:** | **J. Summers of Counsel** |
| **Date of Inspection /Hearing** | **12th November & 1st December 2009** |
| **Tribunal:** | **Mr R T A Wilson LLB (Lawyer Chairman)<br>Mr N Robinson FRICS (Valuer Member)<br>Mr T Sennett MA (Lay Member)** |
| **Date of the Tribunal's Decision:** | **20th December 2009** |

## THE APPLICATION

The applications made in this matter are as follows:

1. For a determination pursuant to section 27A of the 1985 Act of the applicant's liability to pay service charges arising out of insurance excesses for the years 2005 to 2008 inclusive.

2. For a determination pursuant to section 20C of the 1985 Act that the respondents' costs incurred in these proceedings not be relevant costs to be included in the service charge for the Property in future years.

3. The tribunal is also required to consider, pursuant to regulation 9 of the Leasehold Valuation Tribunals (Fees) (England) Regulations 2003 whether the respondent should be required to reimburse the tribunal fees incurred by the applicants in these proceedings.

## THE DECISION.

4. Subject to paragraph 38 below, the insurance excesses incurred by the respondents of £400 in 2005, £750 in 2006 and £1500 in 2007 and 2008 per claim are recoverable from the applicants as service charge.

5. An order is made pursuant to section 20C of the 1985 Act.

## JURISDICTION

Section 27A of the 1985 Act

6. The Tribunal has power under Section 27A of the 1985 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 service charge is payable.

7. By section 19 of the 1985 Act service charges are only payable to the extent that they have been reasonably incurred and if the services or works for which the service charge is claimed are of a reasonable standard.

## INSPECTION

8. The tribunal inspected the property on the morning of the hearing in the presence of two of the applicants and their solicitor. The property is a five-storey end of terrace grade 2 listed house, built circa 1825. It has painted brick front elevations, a front first-floor balcony and rendered flank and rear elevations under a tiled main roof. It is situated on the south side of Russell Square, Brighton and at some stage has been converted into five self-contained flats. The condition was generally considered only fair with steel straps across vertical cracking visible to the flank wall and a rear back to wall fire escape is in poor condition. Access to the rear was obtained through the basement flat and to the ground and top floor flat through the common ways. The tribunal was also shown a mezzanine landing storeroom where the ceiling/flat roof joists were exposed along the west side of the room and whilst the roof covering was understood to have been replaced relatively recently, the joist ends were noted to be in very poor condition. Attention was also drawn to the layout of the ground floor flat in connection with the leaks to the flat below and damp staining within the top flat.

## PRELIMINARIES

9. Both parties had set out their positions on the issues in their statements of case and both parties had submitted bundles of evidence which also contained their legal authorities.

10. Prior to the commencement of the hearing the parties had been able to considerably refine and reduce the issues to be determined by the tribunal and both parties had made concessions. In particular the respondent had waived its claim for administration charges and the applicants had accepted that the insurance premiums incurred in the years 2005 to 2008 were reasonable.

11. The only issues thus left for the tribunal to determine were firstly the insurance excesses (as opposed to the premiums) for the years 2005 to 2008 inclusive and secondly the section 20C application. Each of these issues is considered below.

## INSURANCE EXCESSES.

### The Applicants' case.

12. The applicants' case simply put was that the excesses claimed were not recoverable under the terms of leases. The wording of the leases was clear with only the insurance premiums being chargeable to the maintenance account. In the absence of clear wording referring to insurance excesses there was no ability to charge the excesses to the service charge account.

13. As a separate point the applicants' contended that the level of excesses were too high and therefore not reasonably incurred. The applicants had obtained an alternative quotation for the buildings insurance of £371.96 with an excess of only £100 per claim. This demonstrated that the excesses of £400 rising to £1500 in years 2007 and 2008 were plainly unreasonable.

14. The applicants also contended that two invoices, claimed as service charge in 2006, related to internal damage where the liability for repair rested with the lessees responsible for causing the water damage and not the respondent. The cost of this work should therefore not fall on the service charge account.

15. In 2007 two invoices charged to the service charge account appeared to relate to internal damage to flats caused by the escape of water. For the same reasons as in paragraph 14 above, the cost of these works should not be recoverable as service charge. Furthermore in one case the repairs detailed in an invoice were not carried out in 2006 but two years later.

16. The applicants' contended that numerous small claims made by the respondents had resulted in increased premiums and excesses. They contended that no claims should have been submitted in respect of internal flat damage and the respondent's agents should not have submitted claims to the insurers, the cost of which fell below the excess.

17. In summary the excesses should therefore be disallowed in their entirety.

### The Respondent's case.

18. Counsel for the respondent accepted that the applicant's obligation to pay for insurance excesses through the service charge turned on the proper construction of the leases. Clause 3 (2) (i) of the lease stated that the tenant's obligation was to contribute and pay to the respondent his share of the annual costs and expenses and outgoings

incurred by the respondent in complying with his obligations contained in the fourth schedule of the lease. The question therefore was whether the insurance excesses were "*a cost expense or outgoing.*" Counsel contended that they plainly were.

19. The second issue was whether or not the excesses themselves were reasonable? Counsel contended that they were. Insurance had been placed firstly with ACE an A+ rated insurance company. From 2006 the property was insured by Endurance Worldwide which was also an A rated insurance company. Both these companies were therefore well known insurers of repute.

20. Counsel cited a number of Court of Appeal cases including Berrycroft Management Company Limited v Sinclair Gardens Investments (Kensington) Limited which established that the landlord was not obliged to shop around to obtain the cheapest premium in the market. He could in effect approach just one insurer of repute and provided the premium was negotiated and paid in the normal course of business and reflected the insurer's usual rates, then the landlord was entitled to recover.

21. The line of cases also supported the ability of the landlord to place his entire property portfolio with one company for reasons of good estate management.

22. Counsel contended that the ratio decendi set out in the Berrycroft case applied precisely to the facts in this case, which meant that the excesses in each of the contested years was recoverable as service charge.

23. The applicants had merely produced one lower insurance quotation in support of their case. For reasons set out in the respondent's statement of case this insurance quotation could not be considered as comparable and was therefore of no probative value. In contrast, the respondent had provided in their evidence a full and extensive explanation of how the premiums and excesses had come about. The respondents had tested the insurance market each year and then placed their portfolio with an insurance company of repute upon commercial terms in the normal course of business. The terms negotiated were neither unreasonable nor excessive and thus the premiums and excesses were recoverable.

## THE TRIBUNAL'S CONCLUSIONS.

24. The excesses being challenged were as follows:

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| 2005 | - | £400 |
| 2006 | - | £750 |
| 2007 | - | £1500 |
| 2008 | - | £1500 |

25. The tribunal began by considering the lease terms in so far as they related to the payment of insurance. Both parties accepted that the ability of the respondents to charge the excesses to the maintenance account turned on the proper construction of the lease. The applicants contended that in the absence of clear wording in the lease covering the excesses, they were not recoverable and they contended that there was no specific reference to insurance excesses in the lease. They pointed to clause 5(a) of the lease where the respondent is required to observe and perform the stipulations set out in the fifth schedule. The respondent is required to insure the block under paragraph 3 of the fifth schedule. The premiums in respect of insurance policies

covering property owner's comprehensive third-party employers' liability and other risks and lessors' fixtures and fittings are an expense that the applicants have to contribute to via the service charge. They contend that there is no obligation for the applicants to contribute towards excesses in the fifth schedule and therefore the excesses are not recoverable. This is their starting point.

26. The respondents point to the lessee's obligation in clause 3 (2) (i) of the lease, which is to contribute and pay to the lessor his share of the annual costs, expenses and outgoings incurred by the lessors in complying with his obligations contained in the fourth schedule and of the other matters set out in the fifth schedule.

27. Paragraph 5 of the fourth schedule contains an obligation upon the lessor to insure the building and also the flats.

28. Relying upon these clauses they contend that the excesses can properly be regarded as a cost expense or outgoing to which the applicants must contribute.

29. On the issue of payability the tribunal prefers the arguments of the respondent. The tribunal concludes that the combined effect of clauses 3(2), paragraph 5 of the fourth schedule and paragraph 3 of the fifth schedule to the lease is to make the reasonable cost of the excesses chargeable to the maintenance account. This is the case even though the lease does not make explicit reference to excesses. In the tribunal's experience excesses are now an inevitable feature of property insurance and they can, on the proper construction of this lease, be properly regarded as a cost or expense of insurance. The commercial rationale is that the existence of an excess leads to a lower premium than would otherwise be the case if there were no excess. The leaseholders therefore benefit from the excess. The tribunal is persuaded that having regard to the lease terms referred to above, excesses can properly be regarded as a cost or expense of insurance.

30. We draw support in this interpretation from paragraph 15.15 of the new RICS Service Charge Residential Management Code which states that an excess should be considered part of the cost of insurance otherwise it would be impossible to insure certain buildings without an excess or alternatively the premium would be extraordinarily high.

31. Next the tribunal considered if the excesses themselves were reasonable in amount. In so doing the tribunal were mindful of the fact that the applicants had, somewhat late in the day, accepted that the premiums themselves were both contractually payable and reasonable in amount.

32. The applicants, in their evidence, point to what they considered to be an alternative quotation obtained by them for £372 with an excess of £100. They suggest that this quotation proves that the excesses negotiated by the respondent were unreasonable and should be capped to this figure.

33. The respondent, relying upon the principles set out in the Berrycroft case, contend that the excess should be allowed in full.

34. In the tribunal's experience, an insurance excess can range anywhere between £100-£1500 depending on the construction of the building and its claims record. £1500 is therefore at the highest end of the scale of what the tribunal considers to be reasonable.

35. In this case it is accepted that there has been a high incidence of claims; some twelve in only two years. The respondents have been criticised by the applicants for notifying its insurers of low-level claims, that is to say claims below the excess. The tribunal does not find this criticism to be justified. We think it right that the managing agents should advise insurers of claims if there is an obligation to do so regardless of the size of the claims as initially diagnosed. This is especially the case if the terms of the policy of insurance require them to do so. The bundle of evidence submitted by the respondents included a summary of the insurance terms, which included an obligation to notify the insurers of all events which could give rise to a claim. Bearing in mind this insurance term, the tribunal does not consider that the applicant's criticism is sustainable.

36. The tribunal also accepts that the judgement handed down in the Berrycroft case applies on the facts of this case. The landlord is not obliged to shop around for the cheapest insurance quotation. The test is whether the charge made was reasonably incurred.

37. On the facts of this case we are of the opinion that the excesses in each of the years in question, whilst very high, were reasonably incurred. The respondents have tested the market each year, applied to an insurer of repute and negotiated insurance in the normal course of business, the excesses of which just came within the band of what the tribunal consider to be reasonable. The tribunal therefore upholds the excesses in each of the years in question.

38. Whilst the tribunal concludes that the levels of excesses are reasonable, the ability of the respondent to charge them to the service charge account depends on whether the work carried out in connection with the insurance claim, giving rise to the excess, was the landlord's responsibility pursuant to the terms of the leases. If it is the landlord's responsibility then the excess is recoverable. If however the work is the sole responsibility of a lessee, then the excess will not be recoverable as service charge. The tribunal noted that paragraph 5 of the fifth schedule of the lease provides for the landlord to insure the building and flat against amongst other things damage occasioned by the busting or overflowing of water tanks apparatus or pipes. However the tribunal could not find in the lease a covenant by the landlord to lay out the insurance proceeds in making good damage caused to the internal fabric of a flat. We believe this omission is probably an oversight. The tribunal also noted clause 2(15) of the lease, which states that it is the lessee's responsibility to make good water damage caused to another flat with the exception of damage covered by the landlords insurance policy effected in accordance with schedule 5. The parties should have regard to the combined effect of these clauses when determining the allocation of insurance excesses.

## SECTION 20 C APPLICATION AND REIMBURSEMENT OF FEES.

39. Both of these matters can be taken together as the tribunal's considerations in relation to both are largely the same. The legislation gives the tribunal discretion to disallow in whole or in part the costs incurred by a landlord in proceedings before it being treated as relevant costs to be taken into account when determining the amount of future service charges payable. The tribunal has a wide discretion to make an order that is just and equitable in all the circumstances.

40. In arriving at its decision, the tribunal has had due regard to the representations and legal authorities submitted by both parties and has taken into account both the conduct and circumstances of the parties and the outcome of the case.

41. As to the outcome, both parties had made concessions prior to the hearing. The applicants had conceded that the levels of premiums were reasonable but not the excesses. The respondents had conceded that the administration charges levied by them were not recoverable. The tribunal recognized that the value of items conceded by the applicants was higher than the value of the items conceded by the respondents.

42. As to the conduct of the parties, the tribunal considered the respondents had not been forthcoming in answering the applicant's reasonable queries relating to insurance. Furthermore in the tribunal's judgement, the respondents had not been proactive in investigating the numerous water claims made in respect of the property over a short period of time. In some cases the managing agents had simply authorised repair work and had not notified the leaseholder, whose flat had caused the claim, that there had been a problem. Furthermore no attempt had been made to recover the costs from those responsible for causing the water damage.

43. The respondent's position on the insurance issue only became evident when they filed a defence to the statement of claim. Prior to the issue of the application the respondents had not been forthcoming with insurance information and at the hearing sought to defend their refusal to divulge insurance information on the grounds that it would breach the Data Protection Act. However in cross-examination they were unable to say which section of the Act would have been breached. The tribunal considers that much of the respondent's evidence to support the level of insurance premiums and excesses could have been voluntarily disclosed to the applicants at a much earlier stage. Had this disclosure been made earlier, then it is possible that the application would not have been necessary. In these circumstances the tribunal would have had more sympathy with the respondents on the question of costs. As it is the tribunal is of the opinion that the application was necessary given the history of the property, the way in which it was being managed and the impasse reached between the parties.

44. Taking all these factors into account the tribunal considers that the just and equitable solution is that both parties should in effect be responsible for their own costs. The tribunal therefore makes an order under section 20C of the 1985 Act. However the tribunal does not consider that it would be just and equitable for the respondents to have to repay the applicants' tribunal fees and therefore makes no order under regulation 9.

Chairman _____

RTA Wilson LLB

Dated 20th December 2009