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MAN/00BR/LIS/2009/0008

LEASEHOLD VALUATION TRIBUNAL  
OF THE  
NORTHERN RENT ASSESSMENT PANEL

DECISION OF THE LEASEHOLD VALUATION TRIBUNAL

LANDLORD AND TENANT ACT 1985  
SECTIONS 27A AND 20C

Property: N V Buildings, The Quays, Salford M50 3BB

Applicants: Lessees of N V Buildings  
Represented by: Mr D Norris Complete Property Management Solutions Ltd

Respondent: Freehold Managers (Nominees) Ltd  
Represented by: Ward Hadaway Solicitors  
Mr S Ilyas of Counsel

Hearing Date: 25 January 2010

Parties Present: Mr D Norris  
Mr D James Leaseholder and Director of  
N V Buildings (Salford Quays) Management Co Ltd  
Mr S Ilyas

Tribunal: Mrs E Thornton-Firkin  
Mr N R Thompson

## **Application and Preliminary**

1. The application received by the Leasehold Valuation Tribunal (LVT) on 24 August 2009 was originally from N V Buildings (i.e. the management company) but was altered to all the lessees at N V Buildings. The lessees were represented by Mr Darren Norris of Complete Property Management who acts on behalf of N V Buildings (Salford Quays) Management Ltd (management company).
2. The application concerned the insurer, insurance terms and the premium payable for the service charge years of 2006 to 2009.
3. In reply to the LVT's directions both parties produced written evidence and were represented at the inspection and the hearing by Messrs Norris, James and Ilyas as indicated above.
4. The inspection confirmed the written evidence submitted; namely that N V Buildings (the property) consists of 3 blocks, each of 82 flats of modern design, built in 2004, 2005 and 2006 within the docks area of Salford and walking distance of excellent shopping, theatre, museum and football facilities.

## **Lease Terms**

5. The leases of the flats were made in common form between the lessor, the management company and the lessee. The management company was formed for the purpose of maintaining, managing and administering the estate and each lessee is a member of the management company.
6. The management company's obligations under the lease in clause 5 are to provide services appropriate to the property to the lessee, but if the management company shall reasonably consider that in the general interest of the lessees it should discontinue any of the matters specified in the fifth schedule (the service charge schedule), it shall have that power save in relation to the obligation to effect insurance in accordance with paragraph 8 of that schedule.
7. Clause 6.3 states that if the management company shall fail to carry out its obligations, the lessor will comply with those obligations.
8. Clause 8.12.2 states that the lessee accepts, save as referred to in clause 6.3, the obligations of the management company for the performance of the matters specified in the fourth, fifth and sixth schedules are in substitution for and to the exclusion of any implied obligations on the part of the lessor in respect of any such matters.

9. The fourth schedule states that the service charge shall consist of a reasonable sum to remunerate the lessor or the management company for its administrative and management expenses (including a profit element).
10. The fifth schedule, paragraph 5, provides payment for costs and expenses incurred by the lessor or management company.
11. The fifth schedule, paragraph 8, provides the terms for insurance as follows:-

*To keep the Block and the Development (including the Lessor's fixtures and fittings and the furnishings of the common parts thereof but not the contents of any property therein) insured against loss or damage by fire, lightning, explosion, terrorism, earthquake, storm, flood, escape of water, riot, civil commotion, subsidence, heave or landslip and such other risks as the Lessor shall think fit for a sum equal to not less than the full replacement value thereof including loss of ground rent and all architect's, surveyor's and others fees necessary in connection therewith in some insurance office of repute and through such agency as the Lessor in its discretion shall decide and to have the Lessee and the lessees of other flats included in the policy as insured persons and to produce to the Lessee on request the policy of insurance and the receipt for the current premium and forthwith to utilize the proceeds received of any such policy as far as the same will extend to rebuild or reinstate the Block and the Development and the Lessee hereby authorises the Lessor to receive the insurance monies for this purpose but without prejudice to the Lessee's liability to pay or contribute to the costs thereof as herein before provided in the event of the insurance money being wholly or partially irrecoverable by reason of any act or default of that Lessee his servants agents guests invitees or licensees PROVIDED THAT the Block shall be deemed to be insured to a sum equal to the full replacement value thereof notwithstanding that any policy of insurance in force contains a provision whereby the first part of any loss shall not be borne by the insurers (hereinafter called the "an excess provision") so long as the Lessor is satisfied that the inclusion of such an excess provision in any policy of insurance is in the general interest of the lessees of the flats in the Block having regard to the additional costs of insuring without such an excess provision*

12. Paragraph 9 provides:-

#### *THIRD PARTY INSURANCE*

*To effect insurance against the liability of the Lessor or the Management Company to third parties against such other risks and in such amount as the Lessor shall think fit (but not against the liability of individual lessees as occupiers of the flats in the Block).*

## Law

13. Section 27A (1) of the Landlord and Tenant Act 1985 provides that "an application may be made to an LVT for a determination whether a service charge is payable and, if it is, as to ..... the amount which is payable".
14. Section 27A (3) provides that an application may also be made "if costs were incurred....."
15. Section 18 (1) states that "service charge" means an amount payable by a tenant.....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

Section 18 (2) states the relevant costs are the costs.....incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable
16. Section 19 (1) states that "relevant costs should be taken into account in determining the amount of the service charge payable for a period :-
  - (a) only to the extent that they are reasonably incurred, and
  - (b) where they are incurred on the provision of services....., only if the services....are of a reasonable standard.and the amount payable shall be limited accordingly"
17. Section 19 (2) states that, "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".
18. Section 20C (1) states that "a tenant may make an application for an order that all or any of the costs incurred.....by the landlord in connection with proceedings before a LVT.....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."

## Hearing

### Applicant's Evidence

19. Mr Norris had not ticked the box in the application form to indicate that the applicant was also seeking an order under section 20C of the Landlord and Tenant Act 1985. He was given 14 days by the Tribunal to make a written application and the respondent a further 14 days to reply.
20. Mr Norris said his application to the LVT was straightforward. 25% of the service charge budget was for insurance and the issue was whether the cost of the premiums was reasonable. The administration of the insurance was the responsibility of the directors of the management company. Mr Norris gave evidence that he was not treated as the client by the freeholder's broker, Mr Alisdair Wardrop, of Oval Insurance Broking Limited (Oval). Mr Norris said that Freehold Managers dealt with the Chichester office of Oval and he had asked for the insurance arrangements to be transferred to their Wakefield office, where he knew the staff with whom he had had previous dealings. This was not accepted.
21. The terms of the insurance, the scope of the risks covered and the sums insured were all accepted as reasonable by the Applicants.
22. Mr Norris had obtained a quotation of £52,555.90 from AXA in 2007/8 to test the market. The terms were not like-for-like with the respondent's policy but Mr Norris said that the vast difference in premiums would not account for the slight difference in terms.
23. Mr Norris withdrew the application in respect of the future service charge year 2010/11 as a matter to be determined by the Tribunal.

### Respondent's Evidence

24. Mr Ilyas, for the freeholder, stated at the hearing that the people with an interest in the property, in the matter of the insurance, were the landlord and tenant. In practice, the management company's role was to receive the invoice from the landlord and pass it on to the lessees.
25. The amount of the premium was determined by the insurer chosen by the landlord's agent (Oval). The management company has been listened to, and the landlord's block policy was renewed every three years after fully testing the market. AXA refused to quote for a stand-alone policy for the property in 2008.
26. In their written submissions, the parties gave an outline of the insurance history of the property and the large increase in the cost of insurance following the sale of the freehold to Freehold Managers in 2006. The property had been the subject of significant insurance claims, some of which were still outstanding, and the insurance obtained was limited by the method of construction and the materials used in the building. These

aspects appeared to have severely restricted the number of insurers who were prepared to quote for providing cover and this had led to the respondents (in conjunction with the brokers) to arrange for the property to be insured on a stand-alone basis with Zurich (the landlord's nominated insurers) rather than as part of the block policy.

## **Decision**

27. The respondent had cited many cases, both of the Leasehold Valuation Tribunal and the Courts, all of which the Tribunal considered before coming to its decision.
28. As agreed between the parties at the hearing, there were no issues concerning the terms of the insurance, the scope of risk covered and the sums insured.
29. The issues remaining in contention between the parties were the right to nominate the insurer and broker, the premium charged, the commission paid to the landlord by the broker and the right of the landlord to add the costs of the proceedings before the Tribunal to a future service charge (section 20(C) of Landlord & Tenant Act 1985).
30. The right to nominate the insurer and broker were set out in paragraph 8 of the fifth schedule of the lease. Paragraph 8 set out clearly that the management company must insure with an insurer and agent of the landlord's choice for the risks stated in that paragraph including any other risks "as the lessor shall think fit". Paragraph 9 concerning the third party insurance did not give the landlord the same right to nominate the insurer or the agent and therefore these nominations are left with the provider of the services – that is, the management company. This was reinforced by the fact that the only service that the management company was not allowed to discontinue under clause 5 was the insurance under paragraph 8. Paragraph 9 however did provide for the landlord to decide the risks to be insured and the amount to be insured under that provision.
31. In this case, at the request of the management company, the insurance broker had obtained other quotations and had removed the insurance of NV Buildings from the block policy of the landlord which was in place from the freeholder's purchase in 2006 until the policy renewal in 2009. Mr Wardrop, in his witness statement to the Tribunal, wrote that the reason for the removal was "to insure the blocks did not impact on the remainder of the respondent's portfolio". The landlord had put to the Tribunal those insurance companies which had refused to quote. The question of the increase in premium due to the claims made and the construction of the building were dealt with in Mr Wardrop's first witness statement. The insurance company's surveyor had provided details of the issues that were of concern in relation to the construction of the property. Mr Norris had produced the construction specification after the hearing. This was not a matter put to the insurance company whilst quoting for the

premium and the Tribunal was not convinced that the insurance company would have taken it into account due to the market attitude to this type of construction. Neither party had put this evidence to the insurers. The Tribunal considered the premium reasonable incurred based on the parties' knowledge at the time of placing the insurance.

32. With regard to the landlord's right to nominate the insurance company and broker the Tribunal finds that this is clearly permitted by the terms of the lease. With regard to the premium charged the Tribunal accepted that the broker had taken all reasonable steps to effect the best insurance possible and that the terms and premium charged by Zurich were reasonable.
33. The Tribunal understood that the insurance premium was broken down into the three blocks of flats and the proportion attributable to each block was charged to the tenants of that block. This was important as the premium for Block A was not the same as the other two. The Tribunal accepted the evidence that a different renewal date applied to Block A.
34. With regard to the commission, the respondent contended that the sharing of commission was a personal contract between the freeholder and the broker. The Tribunal understood that within the insurance market, it was common practice, as in this case, that many brokers paid the person placing the insurance a percentage of the broker's commission. Mr Norris gave evidence confirming this, that when he placed insurance, he would be offered a percentage of the broker's commission which he would return to his clients.
35. The Tribunal considered that under the terms of the lease (the management company to provide the services named in the fifth schedule including insurance), the insurer/client was the management company and, as such, should have been the recipient of any part of the broker's fee which was remitted. It was clear from the hearing, the written submissions and Mr Wardrop's witness statements that he regarded Freehold Managers as his client, so much so that his witness statements were made on behalf of Freehold Managers.
36. In *Williams v. Southwark London Borough Council* (2001) 33 HLR 22, a commission was allowed to be retained by an insurer who performed management functions in relation to the insurance. In the present case Freehold Managers decided on the named insurer according to the needs of their company and chose the insurers of their block policy accordingly. The lease did not require them to take the lessees' needs into their management consideration.
37. Mr Norris has had considerable trouble fulfilling the management company's requirements following up on the outstanding claims with the broker. Mr Norris has suggested a change of insurance company and it was he who dealt with Mr Wardrop in trying to obtain alternative quotations.

38. Under the terms of the lease, it was the freeholder who nominated the insurance company, risks covered and the agent. The management company took out the insurance policy and as the lease was silent regarding the administration of the policy, it left the management function of dealing with any policy claims and administration lying with the management company (under Clause 8. 12. 2) through the broker. As it was the broker's custom to remit part of the commission to his client, it was reasonable in this case that this amount should be attributable to the management company.
39. Any management function which the freeholder performed in selection of the block policy and the broker were to do with the business of managing many properties and the amount in consideration the freeholder gave to any one property was *de minimis*. The involvement of the freeholder in removing NV Buildings from the block policy was shown by the correspondence to have been a rubber-stamping exercise. Thus the freeholder was not performing administration of insurance in consideration of any share of the broker's commission paid to the freeholder.
40. The management company carried out the management functions as far as it was able although it appeared to be hampered in this by the reluctance of the brokers to recognise the role of the management company.
41. Oval received commission of 25.55% in the years 2006/9 of which 22.22% was passed on to Freehold Managers and 30% in the year 2009/10 of which 25% was passed on. The Tribunal considered the amount retained by Oval was a reasonably retained expense. By contrast the amount paid to Freehold Managers was not a cost incurred by or on behalf of the landlord in relation to the insurance but was pure profit and, as part of the costs of insurance, was not reasonably incurred.
42. The parties were given 14 days each after the hearing to address the matter of the application under Section 20C with regard to the cost of the proceedings before the LVT. The applicant's submission was not helpful to the Tribunal. The Tribunal noted the respondent's submission that they had written to the applicant regarding costs at an early stage of the proceedings and had not acted unreasonably, but consider that the applicants have succeeded in their Application and, therefore, the costs of proceedings before the Tribunal will not be chargeable to the service charge account.



**Order**

- 43. The tribunal orders that the amounts to be paid by the lessees of N V Buildings in respect of their insurance payments will be limited as shown on the attached schedule**
- 44. The application for an order under section 20C with regard to costs incurred in connection with proceedings before the LVT is granted and accordingly such costs will not be chargeable to the service charge account of any of the applicants.**

*Elizabeth Thornton Firkin*

Mrs E Thornton-Firkin  
Chairman  
9 April 2010



## N V Buildings

### Insurance Schedule

Year		Block A	Block B	Block C
		£	£	£
2006/07	premium	20,780.92	20,915.54	all as Block B
	less tax	<u>989.56</u>	<u>995.97</u>	
		<u>19,791.36</u>	<u>19,919.57</u>	
	77.78%	15,393.72	15,493.44	
	add tax	<u>989.56</u>	<u>995.97</u>	
	<b><u>16,383.28</u></b>	<b><u>16,489.41</u></b>		
2007/08	premium	25,428.70	30,359.94	all as Block B
	less tax	<u>1,210.89</u>	<u>1,445.71</u>	
		<u>24,217.81</u>	<u>28,914.23</u>	
	77.78%	18,836.61	22,489.49	
	add tax	<u>1,210.89</u>	<u>1,445.71</u>	
	<b><u>20,047.50</u></b>	<b><u>23,935.20</u></b>		
2008/09	premium	27,876.69	27,945.86	all as Block B
	less tax	<u>1,327.46</u>	<u>1,330.76</u>	
		<u>26,549.23</u>	<u>26,615.10</u>	
	77.78%	20,649.99	20,701.22	
	add tax	<u>1,327.46</u>	<u>1,330.76</u>	
	<b><u>21,977.45</u></b>	<b><u>22,031.98</u></b>		
2009/10	premium	37,029.83	35,579.72	all as Block B
	less tax	<u>1,763.32</u>	<u>1,694.27</u>	
		<u>35,266.51</u>	<u>33,885.45</u>	
	75.00%	26,449.88	25,414.09	
	add tax	<u>1,763.32</u>	<u>1,694.27</u>	
	<b><u>28,213.20</u></b>	<b><u>27,108.36</u></b>		