

10892



**FIRST – TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : **BIR/00CN/LIS/2014/0001**

Property : **Apartment 27 Blakesley Mews, 460 Bordesley Green East, Stechford, Birmingham B33 8PN**

Applicant : **Mr King of Ink Land King Body Art The Extreme Ink – Itc**

Joining Applicants : **See Appendix.**

Respondent : **Freehold Managers (Nominees) Limited**

Representative : **Ms Rebecca Fowler of LPC Law (agent for Bond Dickinson LLP)**

Type of Application : **1) An Application for the determination of liability to pay and reasonableness of service charges pursuant to section 27A of the Landlord and Tenant Act 1985 and**
2) An Application for an order for the limitation of the landlord's costs in the proceedings under section 20C of the Landlord and Tenant Act 1985

Tribunal Members : **Mr V Ward FRICS (Chairman)**
Judge D R Salter

Date and venue of Hearing : **8 October 2014**
The Tribunal Hearing Suite
Fifth Floor Priory Courts
33 Bull Street
Birmingham B4 6DS

Date of Decision : **5 December 2014**

DECISION

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Introduction

1. This Application dated 2 May 2014 is made under sections 19 and 27A of the Landlord and Tenant Act 1985 (“the Act”), as amended by The Transfer of Tribunals Functions Order 2013. The Applicant seeks determinations by the Tribunal as to whether the service charges demanded by the Respondent in respect of Apartment 27 Blakesley Mews, 460 Bordesley Green East, Stechford, Birmingham B33 8PN (“the Property”) in respect of the service charge year 2013/2014, are payable and as to the amounts which are reasonably payable with particular reference to the payment of insurance.
2. Prior to the above Application, an initial application was made by the Applicant on 24 December 2013. Subsequent to the submission of this application, lessees of 24 other apartments in the development were joined to that Application. These Applicants are listed in the appendix to this decision. Following an Order by the Tribunal on 16 April 2014, an amended Application (the Application), which is the subject matter of this determination, was made by the Applicant on 2 May 2014’.
3. There is, additionally, an Application under section 20C of the Act that requires the Tribunal to determine whether any, or all, of the costs incurred by the Respondent in connection with these proceedings are to be taken into account in determining the amount of any service charges payable by the Applicant.
4. Following Directions issued by a procedural Chairman on 19 June 2014, it was directed that the Application be dealt with by way of an oral hearing. Prior to the Hearing, written representations from the Applicant and the Respondent were received. The latter including witness statements. These representations were copied, as appropriate, to either side.

Background

5. The Applicant, Mr King of Ink Land King Body Art The Extreme Ink – Ite, is the Lessee of the Property and holds the residue of a 125 year lease from 1 February 2004 in respect of the same at a rent of £50.00 per annum. The Respondent, Freehold Managers (Nominees) Limited, holds the freehold interest in the development of which the Property forms part.

Inspection

6. The Tribunal carried out an inspection of the development in which the Property is situated on 8 October 2014 in the presence of Mr Adam Davis of the managing agents, Messrs Bright Willis. The Tribunal noted that the development comprised 49 residential units with a subterranean car park. The Property is located on the ground floor.

The Law

7. The Act provides:

Section 19 Limitation of service charges: reasonableness

- a) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period – only to the extent that they are reasonably incurred, and 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;
- b) and the amount payable shall be limited accordingly.
- c) 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 of subsequent charges or otherwise.

Section 27A Liability to pay service charges: jurisdiction

- 1) An application may be made to a leasehold valuation tribunal [*now the First-tier Tribunal Property Chamber (Residential Property)*] 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 [First-tier 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 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.
- 4) No Applications 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 as having agreed or admitted any matter by reason only of having made a payment.

Subsections (6) and (7) are not relevant to the Application under this provision.

Section 20c Limitation of service charges: costs of proceedings

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 or any other person or person specified in the application.

The Hearing

8. Following the Inspection, a Hearing was held on 8 October 2014 at the Tribunal Hearing Suite, Priory Court, Birmingham. The following were present at the Hearing, namely the Applicant accompanied by Ms Pat Simpson (“Ms Simpson”), who is the Lessee of 17 Blakesley Mews, and, Ms Rebecca Fowler, solicitor of LPC Law (“Ms Fowler”) representing the Respondent, Ms Shirelle Harris, an in-house solicitor for the Respondent, Mr Alistair Wardrop, a director of Oval Insurance Broking Ltd (Oval), insurance brokers for the Respondent (“Mr Wardrop”) and Ms Lesley Andrews (“Ms Andrews”), who is employed by the Respondent as an insurance manager. The Applicant confirmed that he could be referred to as “Body Art”.

9. Both in his submissions and also at the Hearing, the Applicant’s principle contention was that every year there was an increase in the buildings insurance premium relating to the development and, further, the insurance was placed with the same company, Zurich Insurance, every year.

10. Brief details of the insurance policy challenged by the Applicant were as follows:

| | |
|-----------------------------------|------------------------------------|
| Broker | Oval |
| Insurer (For the buildings) | Zurich Insurance plc (UK) (Zurich) |
| Insurer (For the terrorism cover) | Lloyds of London |
| Period of insurance | 1 September 2013 – 31 August 2014 |
| Sums insured – building - | £7,563,959 |
| Contents of common parts - | £189,099 |
| Property Owner’s liability - | £15,000,000 |
| Total Premium (including IPT) | £13,518.95 |

11. On behalf of the Applicant, Ms Simpson, stated that the issues with the insurance related to a) the level of premium, b) the sum insured for both the buildings and the common parts and c) the level of public liability cover.

12. The Applicant provided information to the Tribunal which essentially comprised of alternative quotations obtained on behalf of the Applicant by Ferguson Green Insurance Services. Ferguson Green obtained quotations based on:

| | |
|------------------------------|------------|
| Sums insured – building - | £7,563,959 |
| Contents of common parts - | £80,000 |
| Property Owner’s liability - | £5,000,000 |

The level of property owner’s liability and contents cover were set at levels that Ferguson Green considered appropriate for the development.

13. The quotations obtained were as follows:

Aviva - £13,894.48
Gravity - £9,582.26

On the basis of this information, Ms Simpson confirmed that the Applicant considered that the premium obtained by the Respondent was excessive and added that she could not see why the insurance had been placed with the same insurer for nine years.

14. In response to this evidence, Ms Fowler referred the Tribunal to the witness statement of Ms Andrews. She asked Ms Andrews to confirm the contents of that statement which she did. Thereafter, Ms Fowler drew the Tribunal’s attention to that part of Ms Andrews’ witness statement (para. 7) which outlined the claims history in respect of the development. This was as follows:

| | |
|------|---|
| 2009 | Accidental damage to drains £2,541.80 |
| 2010 | Burglary £326, accidental damage £195.14 |
| 2011 | Escape of water £5,191.84, burglary £1,214, accidental damage to drains £3,842 |
| 2012 | Escape of water £580, malicious damage £2,510, escape of water £448, escape of water £400 |

Ms Fowler pointed out that the alternative quotations obtained by the Applicant were not founded on this claims history, but upon two relatively minor claims made in the last three years. Therefore, the alternative quotations could not be relied upon as they were based upon incorrect information.

15. In her submission, Ms Fowler referred the Tribunal to respective decisions of the Court of Appeal in *Havenridge Ltd v Boston Dyers Ltd (1994) (Havenridge)* and *Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd (1996) (Berrycroft)*. In essence, *Havenridge* decided that where a lease allowed the landlord to claim from the tenant insurance premiums, there was no implied term that the landlord ‘must shop around for the lowest premium available’. It was sufficient that the insurance company was reputable, the premiums were at the usual market rate offered by the insurance company and were paid by virtue of an arm’s length transaction. *Berrycroft* applied *Havenridge* and, also, confirmed that there was no basis upon which to imply a term that there should be any limit on the

landlord's right to nominate where the insurance was to be placed other than that the insurer should be reputable. The Court of Appeal also stated that the fact that the rates proposed by the chosen insurance company in that case were higher than might have been secured by the management company was irrelevant. Ms Fowler submitted that the placing of the insurance with Zurich by the Respondents was in accordance with these decisions.

16. Ms Fowler then called Mr Wardrop who, when asked to do so, confirmed the contents of his witness statement. Initially, he explained that every three years Oval completely re-quote the Respondent's entire portfolio and whilst cover had been placed with Zurich for the last nine years, prior to that it had been placed with other insurers. Further, Zurich had provided a good service over the years and was regarded as offering the most competitive and best cover.
17. He also referred the Tribunal to a risk management survey for the development which had been carried out by Cardinus Risk Management Ltd (Cardinus) on 23 January 2012. That assessment indicated a rebuilding cost of £7,385,647 as the estimated rebuilding cost including allowance for paths, electronic gate, the underground car parking and block paving. This amount also included VAT. Mr Wardrop indicated that this is what the building sum insured was based upon.
18. In respect of both the communal contents cover and public liability cover, he stated that the level of cover in respect of these items did not influence the overall level of premium. Further, he indicated that due to the level of some recent claims which had been in the order of £10,000,000, public liability cover in the order of £15,000,000 was required.
19. Considering the alternative quotations obtained by the Applicant, Mr Wardrop said that whilst he knew of Aviva, he had not heard of Gravity and, hence, he could not comment as to whether Gravity was a reputable insurer or not. He agreed with the submission of Ms Fowler that the alternative quotations were not comparable as they had not been based on the full claims history of the development. He added that, in any event, the Aviva quotation obtained by the Applicant, even without the complete claims history, was in excess of the premium payable to Zurich.
20. Summing up on behalf of the Respondent, Ms Fowler said that Zurich is known as a reputable insurer and the insurance was placed with Zurich by an independent broker at arm's length. The reinstatement cost value had been professionally calculated and the Applicant had offered no contrary evidence in this regard. The evidence provided by the Applicant was not comparable and was flawed. No background had been provided about Gravity and, moreover, an experienced insurance broker did not know anything about that company. Ms Fowler also noted that the Aviva quote provided by the Applicant, even though it was based on an incomplete claims history, was, in fact, higher than the Zurich premium. Therefore, she did not consider that the Zurich premium was excessive and even if it was, on the basis of *Havenridge* and *Berrycroft*, there was no necessity on the part of the Respondent to place the insurance with the company offering the lowest premium.
21. In his closing remarks the Applicant, supported by Ms Simpson, stated that he had found the information provided by Mr Wardrop useful and he had not realised, in

particular, that the level of insurance premium was not influenced by the level of contents or property owners' liability. However, he felt that the insurance would be better placed with a local broker who would be more aware of the circumstances of the development. He also felt that there should be greater transparency on the part of the Respondent when dealing with insurance matters.

The Lease

22. Within the lease, the lessee covenants under clause 4 to perform the obligations laid out in Part Two of the Eight Schedule:

4. THE LESSEE'S COVENANTS

THE LESSEE for the mutual protection of the Lessor and of the lessees of the Properties HEREBY COVENANTS:

4.1 With the Lessor to observe and preform the obligations on the part of the Lessee set out in Parts One and Two of the Eight Schedule and to observe and preform all covenants and stipulations contained or referred to in the Charges Register (if any) of the Title above referred to so far as the same relate to or affect the Demised Premises and to indemnify the Lessor against all actions proceedings costs claims and demands in respect of any breach non-observance or non-performance thereof

4.2 With the lessees of the Properties to observe and preform the obligations on the part of the Lessee set out in Part Two of the Eighth Schedule

23. Clause 2 of Part Two of the Eighth Schedule imposes the following obligation:

2. To pay to the Lessor or its authorised agent the Lessee's Proportion at the times and in the manner herein provided.

24. The Lessee's Proportion is described in clause 1.2 of the Seventh Schedule (The Lessee's Proportion of Maintenance Expenses):

1.2 The Part B Proportion of the amount attributable to the costs in connection with the matters mentioned in Part B of the Sixth Schedule and of whatever of the matters referred to in Part C of the said Schedule are expenses properly incurred by the Lessor or his agent which are relative to the maters mentioned in Part B of the said Schedule

25. Clause 6 of Part B of the Sixth Schedule is as follows:

6. Insuring and keep insured the Building and other structures at all times against fire lighting explosion riot civil commotion earthquake malicious damage storm flood escape of water and oil impact theft glass falling trees and aerials subsidence heave land slip accidental

damage including accidental damage to underground services and such other risks as the Lessor may reasonably decide from time to time in the full reinstatement value

The Tribunal's determination

26. The Tribunal finds that, in accordance with the lease, the Applicant is liable to pay an appropriate proportion of the cost of insurance for the development. The appropriate proportion is defined within the lease.
27. Moreover, it finds in relation to the cost of that insurance that the Respondent in placing the insurance with Zurich followed a practice that was compatible with the reasoning of the Court of Appeal in the cases cited at the Hearing by the Respondent's Counsel. In particular, this practice involved the engagement of the services of an independent broker, Oval, and an independent risk management survey of the development undertaken by Cardinus Risk Management Ltd. In the latter regard, it was evident that the buildings insurance premium was determined by the level of cover and, in that regard, the Respondent had been diligent in obtaining a professional estimate of the reinstatement cost value of the development produced by Cardinus. Further, it was clear from the Respondent's evidence that the insurance had been placed with Zurich as a result of an arm's length transaction that took account, inter alia, of the previous good service provided by Zurich. The Applicant did not contest that Zurich is a company of repute.
28. The Tribunal placed little weight on the comparative quotations provided by the Applicant in view of the fact that these quotations were based on an incomplete claims history for the development. It noted, however, that the quotation from Aviva, notwithstanding the provision of an incomplete claims history, was in excess of the cost of the insurance provided by Zurich.
29. In view of the above, the Tribunal determines that, in placing the insurance with Zurich, the Respondents followed an appropriate practice that led to the securing of insurance in return for a reasonable level of premium. For the purposes of the Application, it concludes that this level of insurance premium is reasonable and that it is payable by the Applicant in accordance with the terms of the lease.
30. At the Hearing, it was clear to the Tribunal that the resolution of the issues raised in these proceedings might have been enhanced if there had been more effective communication between the parties as to the manner in which the placement of insurance for the development had been undertaken.

Section 20C application

31. As indicated in paragraph 3 above, the Applicant has applied for an order, in accordance with section 20C of the Act, that the costs incurred by the Respondent in connection with the proceedings before this Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable.

32. The Tribunal has found that the insurance premium is payable and reasonable, and that, therefore, the Respondent's response to the Application is successful. In view of this finding, the Tribunal determines that the Applicant has not discharged the burden of proof imposed under section 20C. Accordingly, the Tribunal finds that it would not be just or reasonable to grant an order under Section 20C in these proceedings.

Appeal

33. A party seeking permission to appeal this decision must make a written application to the Tribunal for permission to appeal. This application must be received by the Tribunal no later than 28 days after the date this decision is sent to the parties. Further information is contained within Part 6 of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (S.I. 2013 No. 1169).

Vernon Ward
(Chairman)

APPENDIX

Joining Applicants:

Mr S. Wright (Apt 2)

Mr Derek Davis (Apt 3)

Mr & Mrs Maharay (Apt 4)

Dr S. R. Hussain (Apt 6, 7 & 9)

Mr Gary & Mrs Vivian Round (Apt 16)

Mr Rashmikant Shah (Apt 15)

Ms Pat Simpson (Apt 17)

Mr Imran Azam (Apt 20)

Mr Adrian Kettle (Apt 22, 37 & 44)

Ms Ann Scott (Apt 23)

Ms Linda Jones (Apt 26)

Mr R Gill (Apt 28)

Ms Angela Morahan (Apt 30)

Mr & Mrs C. Higgins (Apt 31)

Mr Paul Anthony Cox (Apt 33)

Ms Rachel Pearce (Apt 41)

Ms Daniela Albini (Apt 42)

Mr Paul Tiche (Apt 47)

Ms Sarah Nickell (Apt 48)

Mr A Singh (Apt 49)