UPPER TRIBUNAL (LANDS CHAMBER)

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UTLC Case Number: LRX/104/2018

LANDLORD AND TENANT – service charges – insurance – landlord taking out four separate policies in relation to a building rather than a single policy – whether landlord had insured building in accordance with covenant – whether tenant in any event no longer entitled to challenge premiums for various years having regard to section 27A of the Landlord and Tenant Act 1985 as amended

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN: **NEIL RICHARD HOWE** **Appellant**

and

MOHIUDDIN MAHAMOOD

Respondent

Re: Flat 2,
11/12 Eastern Esplande,
Southend-on-Sea,
Essex, SS1 2ER

His Honour Nicholas Huskinson

Determination on written representations

No cases were referred to in this decision

Decision

1. This is an appeal against the decision of the First-Tier Tribunal Property Chamber (Residential Property) (the FTT) dated 20 July 2018 whereby the FTT concluded it was unable to make any determination within its jurisdiction in respect of the application which had been brought before it by the appellant.

2. By his application to the FTT dated 16 May 2018 the appellant applied for a determination of liability to pay and reasonableness of service charges in respect of his property, namely Flat 2, 11/12 Eastern Esplanade, Southend-on-Sea, Essex. The respondent to the application was his landlord Mr Mohiuddin Mahamood. The matter which the appellant placed before the FTT for its determination was the question of the amount properly payable by way of service charge for the years 2005 to 2017 inclusive in respect of contribution towards insurance premium. The appellant in his application gave details of the nature of the dispute for each year in question. By way of example for the year 2005 the appellant stated that what was in issue was an insurance demand for the period 25 April 2005 to 25 April 2006 namely £188.25. In the box where the appellant was invited to describe the question that he wished to the tribunal to decide he stated:

> "Did the landlord insure the building for this period in strict accordance with section 4.2 of the lease?
>
> And if so, was the premium demanded from me correctly calculated as 1 equal to 1/6th part of the insurance costs as defined in the paragraph 5 in the THIRD schedule of the lease? (as it is this amount that Section 3.2 of the lease requires me to pay)"

The application raised a similar question in respect of all subsequent years up to the year 2014 (in respect of an insurance premium to 25 April 2015).

3. Somewhat different questions were raised in respect of 2015, 2016 and 2017. However once again what was in issue was the question of what if anything was properly payable by the appellant to the respondent as a contribution, through the service charge, towards the relevant insurance costs.

4. In paragraph 1 of its decision the FTT stated:

> "The Tribunal is unable to make any determination within its jurisdiction in respect of this application."

The FTT then went on to make certain observations including observations that the landlord had been in breach of covenant for some years in relation to insurance. The FTT referred to the possibility of a claim for damages for breach of covenant, but observed that that was not a

matter for the FTT. However in its conclusions the FTT stated that it simply could not answer the questions raised because either they were not within the jurisdiction of the FTT or the evidence was incomplete.

5. The application made to the FTT was, as stated above, to decide upon whether certain sums (by way of contribution to insurance costs) were properly payable by the appellant to the respondent as part of the service charge under the lease for certain service charge years. This is a matter within the jurisdiction of the FTT under section 27A of the Landlord and Tenant Act 1985 as amended.

6. Permission to appeal to this Tribunal was granted by the Deputy President on 22 November 2018. He ordered that this appeal should proceed by way of review.

7. I therefore must review the FTT's decision. This decision, namely that the FTT lacked jurisdiction, was incorrect.

8. I therefore must quash the decision of the FTT and decide the case myself upon the material before the Upper Tribunal. It has been ordered, without objection from either party, that this determination shall be upon the written representation procedure. Accordingly I decide the case upon the papers. There has been no hearing before me.

9. The appellant's flat is on the first floor of a building known as 11/12 Eastern Esplanade, Southend-on-Sea, Essex. This building has at all material times comprised a commercial unit on the ground floor with two flats (namely flat 1 and flat 2) on the first floor and a further larger flat (namely flat 3) on the second floor.

10. The appellant holds his flat from the respondent upon the terms of a lease dated 19 September 1986. The lease refers to the building known as 11 and 12 Eastern Esplanade, Southend-on-Sea Essex. In clause 3 (2) the lessee covenants with the landlord to contribute one-sixth part of the costs expenses outgoings and matters mentioned in the third schedule. The third schedule lists various expenses including:

> "5. The cost of the insurance mentioned in sub- clause 4(2) hereof and of insurance against third-party risks in respect of the building if such insurance shall in fact be taken out by the Landlord"

11. Clause 4(2) contains a covenant by the landlord in the following terms:

> "That the Landlord will at all times during the said term (unless such insurance shall be vitiated by any act or default of the Tenant) insure and keep insured the building against loss or damage by fire aircraft explosion storm tempest or (so far as insurable) act of war or accident or by any other peril within the usual comprehensive policy of a

reputable insurance company as the Landlord shall determine at the full value thereof and whenever required produced to the Tenant the policy or policies of such insurance and the receipt for the last premium for the same and will in the event of the building being damaged or destroyed by any of the said risks as soon as reasonably practicable lay out the insurance monies in the repair rebuilding or reinstatement of the same"

12. In summary the case advanced by the appellant in this appeal is to the following effect:

(a) The respondent as landlord has not complied with his obligation under the lease to insure the building in accordance with clause 4(2).

(b) Accordingly the appellant has been under no obligation to make any payment, by way of reimbursement of insurance premium, to the respondent as part of the service charge.

(c) Also and in any event the amount of the total insurance premiums have been wrongly apportioned.

13. The reason why the appellant raises points (a) and (b) is as follows. The appellant draws attention to the lack of documentation from the relevant period (especially a period between 2008 and 2011). However as regards such documentation as does exist, in particular documentation from 2005/6 (i.e. the beginning of the relevant period of time), the appellant says that this documentation indicates that there was a failure by the respondent as landlord to comply with his insurance obligation within clause 4(2).

14. The nature of the alleged failure by the respondent is as follows. The appellant says that the respondent was obliged by the lease to take out an insurance on the entire building; that what the respondent in fact did was to take out separate insurances upon the ground floor commercial premises and upon flat 1 and upon flat 2 and upon flat 3 (i.e. four separate insurance policies); and that this did not amount to an insurance of the building as was required by clause 4(2). In particular it is argued by the appellant that an insurance taken out by way of four separate policies in this form either did fail or may have failed properly to insure the whole of the building – e.g. there may have been some parts of the common parts or structure which fell outside each one of these four insurance policies, such that the building was not properly insured.

15. This was the principal argument raised by the appellant in respect of years 2005 to 2014. I propose to deal with this argument at this stage. I will revert later to years 2015, 2016 and 2017.

16. Despite the passage of time there is in fact a substantial amount of insurance documentation from the earlier years. I take by way of example the documentation for the year from 25 April 2006 to 25 April 2007. There are before me four separate certificates of insurance all issued by AXA Insurance UK Plc. There is a certificate of insurance in respect

of flat 1, 11/12 Eastern Esplanade (sum insured £53,900); a certificate of insurance in respect of flat 2, 11/12 Eastern Esplanade (sum insured £53,900); a certificate of insurance in respect of flat 3, 11/12 Eastern Esplanade (sum insured £76,861); and a certificate of insurance in respect of 11/12 Eastern Esplanade (sum insured £131,606).

17. In his witness statement prepared for the FTT proceedings the respondent states that he had been advised by his insurance brokers, Little N Large, that the building had been insured since he purchased the building in 2005. He produced an email from Mr Solomon Tzouvanni (director of Little N Large) confirming that the property has had building insurance with them since 2005 and that the respondent had been the insured throughout that period.

18. The lease does not require the landlord to place a single insurance in respect of the entire building. What the landlord is required to do is to insure and keep insured the building against certain risks and to do so within a usual comprehensive policy of a reputable insurance company. There is no point raised in the present case as to the repute of the insurer nor as to the nature of the policy (namely whether it falls within the words "usual comprehensive"). The question in the present case is whether the respondent has failed to comply with his covenant by arranging for the insurance to be by way of four separate policies as mentioned above rather than a single policy.

19. Quite apart from the evidence mentioned in paragraph 17 above, I conclude that the insurance which was placed (a typical example of which is given for the year to 25 April 2007 in paragraph 16 above) constituted insurance which did amount to the landlord complying with the words of the covenant. He did insure and keep the building insured against the relevant losses. The building comprises three flats and a commercial unit. All of these entities were insured. It may also be observed that the certificate which did not relate to the flats does not state that the property insured was "commercial unit" or "ground floor unit" at 11/12 Eastern Esplanade. The property which is stated to be insured is 11/12 Eastern Esplanade.

20. Having regard to these four separate certificates of insurance, all issued by a well-known insurance house, I reject the argument that there were some parts of the building which were uninsured. The appellant produces no expert evidence to the effect that such insurance would not properly cover the building.

21. I am confirmed in this view by the evidence mentioned in paragraph 17 above. Separately I do not consider there to be any substance in another concern raised in relation to certain insurance years by the appellant regarding the postcode given in the insurance documents for the building.

22. Accordingly I reject the appellant's principal argument. I find that for the years 2005 to 2014 inclusive (the latter dealing with insurance up to the renewal date in 2015) the building

was properly insured in accordance with the landlord's covenant in the lease. The respondent was entitled to recover from the appellant one sixth part of the total premiums spent on this insurance.

23. This brings me to the point mentioned in paragraph 12(c) above namely the appellant's contention that the insurance premiums have not been properly apportioned in accordance with the terms of the lease.

24. It appears that for 2005 and 2006 the insurances were placed as mentioned above by the respondent and a demand was made to the appellant for reimbursement of insurance premium. For 2007 until and including 2014 it appears from the documents that the insurance premium was collected from the appellant not as part of the service charge but instead by the brokers sending the demand for the premium payable in respect of flat 2 to the appellant who then paid it.

25. It is true that this apportionment of the total premium for the building is not as contemplated by the lease. However I do not consider the appellant has any legitimate grounds for complaint upon this point having regard to the matters mentioned below.

26. For the insurance year ending 25 April 2007 the premiums payable in respect of the four separate policies were as follows: flat 1 £202.94; flat 2 £202.94; flat 3 £306.55; commercial unit £393.57. The total is £1206 of which one-sixth is £201. It is true that the premium upon the policy for flat 2 is slightly more than this namely £202.94. However it appears that the demand for insurance premium for that year that was actually made by the respondent was only £131.20 (see page 84). As regards the insurance year ending 25 April 2008 the premiums payable were: flat 1 £138.13; flat 2 £138.13; flat 3 £230.25; commercial unit £414.40. This gives a total of £920.91. A one-sixth part of this total is £153.49, which is more than the appellant in fact was required to pay. A similar exercise for the insurance year ending 24 April 2012 shows that the total premium payable over all four policies was £1080.65. A one-sixth part of this is £180.11, but the appellant (who paid his premium direct the brokers) was only required to pay £146.21.

27. I do not however consider it is necessary for the Upper Tribunal, upon this appeal, to make a finding, in the light of the matters mentioned above, that the appellant in fact owes more than he has paid. For all the years during which the appellant paid direct to the insurance brokers, rather than paying a contribution towards insurance through the service charge, I conclude that the amount of the relevant insurance premium has been "agreed or admitted" by the appellant so as to bring into operation section 27A (4) of the Landlord and Tenant Act 1985 as amended. It is provided by subsection (5) that a tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment. However in the present case the matter went beyond the appellant as tenant merely making a payment. Instead for the years 2007 to 2014 the appellant and the respondent have both proceeded on the basis of the appellant not making any payment through the service charge in respect of

insurance premium but instead settling the matter directly with the insurance broker by paying the premium for the insurance on flat 2. This involved the parties proceeding in a manner that was clearly not precisely in accordance with the lease. By doing so I conclude that the parties have agreed that the amount so paid by the appellant to the insurance brokers is to be treated between them as the agreed amount of the appellant's liability in respect of insurance premiums for the years in question. The appellant is no longer entitled to challenge these amounts.

28. I now turn to deal with the years in question 2015, 2016 and 2017 (as described in the appellant's application to the FTT).

29. The respondent's statement of case to the FTT stated as follows:

> "For budget period 01/04/15 to 31/03/16 served by Hexagon the demands were served on 11 February 2015. No insurance was demanded by Hexagon. Then the certificate of expenditure from Hexagon for this period shows insurance as an item of expenditure; for Flat 2 was £175.37. This is 33% of insurance premium for period 15/09/15 to 15/09/16 namely 33% of £531.43 (the insurance for period 24/04/15 to 24/04/16 was cancelled on 15/09/15 and a new policy for two flats 2 and 3 was issued starting from 15/09/15 to 15/09/16, please see attached). Mr Howe had requested that the building should be insured as a whole and not with separate policies. Hexagon initiated the process hence the insurance for two flats Flats 2 & 3.
>
> The insurance policy for period 15/09/15 to 15/09/16 was cancelled on 4 July 2016. Then on 4 July 2016 a block insurance was issued for period 4/07/16 to 4/07/17 because Mr Howe had insisted that this needed to be sorted as soon as possible. There is a letter from Mr Howe sent to Hexagon that there should be a block insurance as opposed to separate insurance for each unit. Please see letter attached."

30. As regards the year 2016, which was concerned with the insurance running from 2016 to 2017, there is in the bundle (page 49 and following) an invoice from the brokers and a certificate (from Allianz) indicating insurance for 11-12 Eastern Esplanade for the period 4 July 2016 to 4 July 2017 at a premium of £1349 .04. The appellant's liability was to contribute one-sixth of this, namely £224.84. This amount was correctly demanded by a letter to the appellant dated 21 July 2016.

31. Accordingly for the year 2016 I find that the appropriate amount in respect of insurance premium payable by the appellant through the service charge is £224 .84.

32. As regards the year 2017, which is concerned with the insurance running from July 2017 to July 2018, there is at pages 65 and 66 of the bundle an invoice for £1416.80 and a certificate of insurance in respect of 11-12 Eastern Esplanade again issued by Allianz. The appellant was liable to pay one-sixth of this amount namely £236 .13.

33. Accordingly for the year 2017 I find that the appropriate amount in respect of insurance premium payable by the appellant through the service charge is £236 .13.

34. The position regarding 2015 is less clear to me.

35. In his application to the FTT (and elsewhere in his submissions) the appellant raises a concern as to whether there was a period from 25 April 2015 to 15 September 2015 when there was effectively no insurance cover whatsoever in place for his flat. However there is in the bundle (page 114) a certificate of insurance issued by AXA on 28 February 2015 for the period 24 April 2015 to 24 April 2016 in respect of the appellant's flat (premium £182.39). There is then a further certificate from AXA (page 119) issued on 15 September 2015 for the period 15 September 2015 to 15 September 2016 for flats 2 and 3 (premium £531 .43 for these two flats). It seems from these documents and from the material in paragraph 29 above that the insurance which was to run from 24 April 2015 to 24 April 2016 was cancelled and replaced on 15 September 2015.

36. There is no evidence available to me as to what was the total insurance premium payable in respect of the building for these periods. It is therefore not possible to calculate accurately one-sixth part of this total sum.

37. Also it is unclear to me what if any reimbursement of premium was made when the earlier policy was cancelled.

38. I do however infer from all the material before me that the building continued to be insured during the relevant period. The respondent will have incurred some premium in respect of the other parts of the building. The period to be covered by insurance premium so far as concerns the 2015 accounts is a period of insurance starting on 24 April 2015 and running through until 4 July 2016 - i.e. more than one year.

39. Doing the best I can on the information available to me I conclude that it is proper to infer that the total premium for the whole building during this relevant period was at a rate that was less than the rate applicable for 4 July 2016 to 4 July 2017 – i.e. less than £1349 .04 per annum. It can be noted that for the following year commencing 4 July 2017 the premium was £1416 .80 which is effectively 5% more than £1349 .04. I therefore take a rate of premium per annum which, when increased by 5%, comes to £1349 .04, namely £1284.80. One-sixth of this is £214.13 per annum. The insurance period is 24 April 2015 to 4 July 2016, namely one year and 72 days. Insurance at the rate of £214.13 per annum for this period comes to £256.37.

40. Accordingly I conclude that for the year 2015 the appropriate amount in respect of insurance premium payable by the appellant through the service charge is £256.37.

41. In the result I allow the appellant's appeal. I quashed the decision of the FTT. I re-determine the matter as follows:

(a) For the years 2005 to 2014 I conclude that the respondent did properly insure the building in accordance with the covenant in the lease. The appellant was liable to pay a contribution towards the cost of insurance for these years.

(b) As regards 2005 and 2006 I find that the amount the appellant paid to the respondent was properly payable.

(c) As regards 2007 to 2014 I find that the amount the appellant paid directly to the insurance brokers was properly payable. I also find that as regards these years it is not open to the appellant to seek to challenge the amounts paid because the amounts were agreed or admitted by the appellant within section 27A(4).

(d) As regards 2015 I find that the appropriate amount in respect of insurance premium payable by the appellant through the service charges is £256.37.

(e) As regards 2016 I find that the appropriate amount in respect of insurance premium payable by the appellant through the service charge is £224 .84.

(f) As regards 2017 I find that the appropriate amount in respect of insurance premium payable by the appellant through the service charge is £236 .13.

His Honour Nicholas Huskinson

10 May 2019