UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – SERVICE CHARGES – insurance – policy in joint names – implication of terms – conditional obligations in a lease

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

BETWEEN:

BRICKFIELD PROPERTIES LTD

Appellant

and

DEMETRIS GEORGIADES **Respondent**

Re: 22 Oakwood Close,
Southgate,
London, N14 4JY

Judge Elizabeth Cooke
Determination on written representations

Mr Edward Denehan for the appellant, instructed by GCS Solicitors LLP

The following cases are referred to in this decision:

Atherton and others v MB Freeholds Ltd [2017] UKUT 497 (LC)

Green v 180 Archway Road Management Co Ltd [2012] UKUT 245 (LC)

Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Limited [2016] AC 742

Yorkbrook Investments Limited v Batten (1986) 52 P & CR 51

Introduction

1. This is an appeal by Brickfield Properties Limited from a decision of the First-tier Tribunal ("the FTT") about the reasonableness and payability of service charges. The decision was made in response to an application by Mr D Georgiades, the lessee of 22 Oakwood Close. The appellant is the landlord. Mr Georgiades' application related to charges demanded of him in respect of insurance; the FTT decided that the insurance charges in question were reasonable, but were not payable because they were not due under the contractual terms of the lease. The FTT granted permission to appeal its decision on payability.

2. I heard the appeal by video link on 14 April 2020; the respondent has chosen not to take part in the appeal and therefore, once it became clear that a hearing at the Royal Courts of Justice would be impossible because of the current pandemic, I suggested that the matter be dealt with on written representations. The appellant asked for the hearing to go ahead, and I am grateful to Mr Denehan of counsel for his helpful arguments and to the appellant's solicitors for providing an electronic bundle.

3. The appeal succeeds and the insurance charges for the years 2018/19 and 2019/20, in the sums determined by the FTT to be reasonable, are payable by the respondent. In the paragraphs that follow I set out the factual background and summarise the FTT's decision; I then consider the grounds of appeal and explain my decision.

The factual background and the FTT's decision

4. 22 Oakwood Close is an upstairs maisonette in a block of four maisonettes. The respondent holds a long lease dated 8 November 2001. Clause 3(2) of the lease requires the lessee to pay a service charge in respect of insurance as follows:

> "To pay unto the Lessor on demand a sum equal to all such sums as the Lessor may from time to time pay for insuring and keeping insured the demised premises against loss or damage by firestorm and tempest and such other risks as may be insured by the Lessor in the full rebuilding costs (or otherwise as provided in Clause 5(ii))…"

5. By Clause 5(ii) the respondent covenanted:

> "At all times throughout the term hereby granted to keep the demised premises and the Lessor's fixtures and fittings therein insured against loss or damage by fire storm and tempest and such other risks covered under a comprehensive insurance policy in the joint names of the Lessor and the Lessee in such sum as shall from time to time be considered to be the full rebuilding cost."

6. The respondent made his application because he believed that he had been overcharged for insurance for a number of years; but his application related only to the service charge year from 1 August 2018 to 31 July 2019, and to the year from 1 August 2019 to 31 July 2020.

He raised a number of challenges to the reasonableness of the charges, all of which failed; the FTT found all the charges (actual for the year from 1 August 2018 and estimated for the year from 1 August 2019) to be reasonable. However, the respondent also challenged the payability of the charges.

7. As the FTT put it at its paragraph 14,

> "Clause 5(ii) of the lease requires the insurance policy to be in the joint names of the Applicant and the Respondent. It is not in joint names. The interest of the Applicants is noted on the policy, but that is not the same."

8. The FTT went on to consider *Green v 180 Archway Road Management Co Ltd* [2012] UKUT 245 (LC), where the lease in question required the lessee to pay for the cost of the landlord's insuring the building "In accordance with" clause 4(ii). That clause required the policy to be in joint names. The policy was not in joint names and therefore the Tribunal held that the lessee was not required to pay for it.

9. The FTT continued:

> "17. It is true that in these proceedings clause 3(2) of the lease does not in terms provide that the Applicant is to pay the cost of insuring the maisonette "in accordance with" clause 5(ii) of the lease. To that extent the instant case differs from *Green*.
>
> 18. However, it would be strange if liability to pay for the insurance did not dovetail with the obligation to insure. Moreover, the insured loss in clause 3(2) is identical for all purposes to the insured loss in clause 5(ii).
>
> 19. In our judgment, it is to be implied in clause 3(2) that the obligation on the Applicant to pay for insurance is for that insurance which the Respondent is required to effect under clause 5(ii). Otherwise, the Respondent would be able to breach clause 5(ii) yet recover its costs. There would be no incentive to comply with the joint names obligation, which obligation would become otiose. Accordingly, we hold that the Applicant was under no obligation to pay for insurance costs for 2018."

10. The FTT then went on to consider the reasonableness of the charges in case it was wrong about that.

The grounds of appeal

11. There are two grounds of appeal. The first is that the FTT should not have implied a term in the lease to the effect that the tenant was only liable to pay for insurance if the landlord insured in accordance with the terms of clause 5(ii). The second is that the FTT was wrong to conclude that the landlord's insurance did not comply with clause 5(ii).

The implication of terms in the lease

12. Mr Denehan for the appellant says that the effect of the FTT's decision is to re-write clause 3(2) of the lease, adding by implication the words that would make it match the covenant in the Green case so that it would read as follows (with the added words underlined):

> "To pay unto the Lessor on demand a sum equal to all such sums as the Lessor may from time to time pay for insuring and keeping insured the demised premises <u>in accordance with Clause 5(ii)</u> against loss or damage etc"

13. Mr Denehan points out that it is clear law that contractual terms can only be implied where it is necessary to do so. The modern authority is *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Limited* [2016] AC 742, which reiterated the principle that a term will be implied in a contract only where it is necessary to do so in order to give it business efficacy, or where the term is so obvious that it goes without saying.

14. In this case, says Mr Denehan, the implication is not necessary because the lease works perfectly well without it. The lessee is obliged to reimburse the landlord for sums spent on insurance. If in fact the landlord's insurance did not accord with the terms of clause 5(ii) then the lessee can claim damages for any loss so caused, or can seek an injunction or claim specific performance of the landlord's obligation.

15. Nor is there any suggestion in the lease that the lessee's obligation to pay for insurance is conditional upon the landlord insuring in joint names. *Woodfall: Landlord and Tenant* at paragraph 11.018 says:

> "The due performance of one party's covenant may be a condition precedent to the obligation arising upon the other party's covenant, in which case the covenants are said to be dependent. Where covenants are independent, a covenantor cannot set up non-performance of the other party's covenant as a defence to an action upon his own. Dependent covenants may be so expressed as to be mutually dependent, or so that only the covenant of one party constitutes a condition precedent. The modern tendency is to construe covenants as being independent rather than dependent."

16. The authority cited for the final proposition of that paragraph is *Yorkbrook Investments Limited v Batten* (1986) 52 P & CR 51.

17. The appellant's arguments on this point are unanswerable. There was no basis for the implication of words in clause 3(2), whether those underlined above or any other words to make the clause match the one in *Green*. The clause works without it. The additional words are not ones that "go without saying"; if the precise terms of clause 5(ii) are not complied with the lessee has remedies, but that does not absolve him from the obligation to pay for insurance. The obligation to pay in clause 3(2) is not expressed to be conditional upon the landlord insuring in joint names, and there is no reason why that conditionality

should be implied. *Yorkbrook* was a decision about service charges, and is cited in *Woodfall* at paragraph 7.185:

> "In the absence of express provision to the contrary, the obligation to provide services is independent of the obligation to pay a service charge, so that arrears of service charge will not entitle the landlord to cease providing services. Thus, where the landlord's obligations were preceded by the words "subject to the lessee paying the maintenance charge pursuant to the obligations under clause 4 hereof …", it was held that payment of the maintenance charge was not a condition precedent to the landlord's liability to provide services. Where the tenant fails to pay service charge the landlord's proper course is not to cease to provide services but to pursue his remedies for the recovery of the arrears."

18. If the landlord's obligation to provide the service is not conditional upon the tenant's paying for it, even where the words "subject to" are used, we can conclude that very clear words would be needed to make the tenant's obligation to pay for a particular service dependant upon the landlord's compliance to the letter with the detail of clause 5(ii).

19. Accordingly the appeal succeeds on ground 1, the decision of the FTT is set aside, and the Tribunal substitutes its own decision that the respondent is liable to pay the insurance costs as demanded by the landlord which the FTT decided were reasonable.

Was the appellant in breach of clause 5(ii)?

20. The appellant's second ground of appeal is that it was not in breach of clause 5(ii).

21. The FTT found that the appellant had not insured the demised premises "in the joint names of the Lessor and the Lessee" as clause 5(ii) required. The policy, it said "is not in joint names. The interest of the Applicants is noted on the policy, but that is not the same."

22. The appellant accepts that a crucial difference between a policy taken out by P, on which Q's interest is "noted", and a policy in the joint names of P and Q, is that in the latter case Q can make its own claim on the policy. See paragraph 55 of the Tribunal's decision in *Atherton and others v MB Freeholds Ltd* [2017] UKUT 497 (LC).

The terms of the RSA policy

23. The appellant insures the property under a policy with RSA, copies of which for the two years in question were before the FTT and are in the appeal bundle. The pages relating to 2018/19 begin with a "Summary of cover", which lists the policyholder as "The Freshwater Group of Companies" (of which the appellant is a member) and sets out the "Address of Residential Property" as 22 Oakwood. At the top of the page the following words appear:

> "General interests

> The interests of freeholders lessees underlessees assignees and/or mortgagees of Buildings are noted in the insurance provided subject to their names being disclosed to the Company in the event of any claim arising.

24. There follow five pages beginning with the heading "Property Insurance Policy Schedule"; the first of those pages sets out the date and the policy number and says that the "Name of Insured" is "the Freshwater Group of Companies", and refers to "Various Residential Properties – refer to separate listing of premises insured". I understand from Mr Denehan that some 1400 individual residential units are insured under this policy.

25. On page 5 of those five pages, under the Heading "Variations in Cover" there is a heading "Joint Insureds" followed by the words:

> "In so far as required under the terms of the Leases the Lessees of the units are noted as the Joint Insured in respect of their units".

26. There follows a "Summary of Cover" for the year 2019/20, and then further pages including on page 5 the words just quoted. The last three pages of the insurance policy in the bundle are headed "Folio Summary B001"; they identify the "Risk Location" as 22 Oakwood Close" and conclude with the heading "Joint Insured Status" and the words "The leaseholder of each maisonette is noted as Joint Insured on the policy, in so far as it relates to their demise".

27. Mr Denehan relies upon the references to "Joint Insureds" in the words quoted at paragraphs 23 and 24 above. He says that the effect of those provisions is to vary the general provision in the policy summary for 22 Oakwood, quoted above at paragraph 21, so that instead of the respondent's interest being noted on the policy he is a joint insured.

The arguments on the appeal

28. In the grounds of appeal the appellant said at paragraph 6.21 that "the Respondent is in every sense in the same position as if the insurance policies put in place were expressed to be in his name and the Appellant's name; the policies are the same in substance, they just have different names." But Mr Denehan in his skeleton argument puts it differently; at paragraph 8.6 he says:

> "At all time A has insured Flat 22 in the joint names of the lessor and lessee and thereby complied with the obligation imposed by clause 5(ii)."

29. So the appellant's argument has changed; in the grounds of appeal it said that the respondent's position under the policy was just as good as if it had been effected in joint names, whereas at the hearing Mr Denehan argued that the insurance policy *is* in the joint names of lessor and lessee as required by clause 5(ii).

30. That is an important change of tack on the part of the appellant. To see why we have to look again at *Green v 180 Archway Road Management Co Ltd* [2012] UKUT 245 (LC),

where HHJ Huskinson had to consider whether the lessor was any worse off under a policy effected by the tenant which was not in joint names as required by the lease. At paragraph 18 he said:

> "it may be that the appellant's position is just as secure under a policy such as that placed by the respondent as her position would be under a policy strictly in accordance with clause 4(ii). However that in my view is not the relevant question. The relevant question is whether insurance has been placed in accordance with clause 4(ii). It has not been."

31. A policy that is just as good as one effected in joint names as clause 5(ii) requires remains a policy that does not comply with the requirements of that clause. Accordingly the appellant's argument as set out in the grounds of appeal would have run into difficulties.

32. But Mr Denehan says that in fact this *is* a policy "in joint names" – not merely a policy with the same effect as a policy in joint names - by virtue of the words quoted at paragraphs 23 and 24 above. Instead of having his interest merely noted, the respondent is a joint insured. And Mr Denehan submits that "joint names is the equivalent of being a joint insured".

33. Mr Denehan develops that submission by explaining that a lessor and lessee cannot hold a joint policy of insurance because their interests are different. Instead what is required by clause 5(ii) is a composite policy, that is, a policy where there are two insureds, each with independent rights under the policy, even though their interests are different.

34. The policy in this case, says Mr Denehan, is a composite policy. The respondent has an independent right to claim on the policy. His rights are unaffected by, for example, any misrepresentation on the part of the appellant and by the insolvency of the appellant.

Discussion

35. I accept that a policy of insurance for the demised premises "in the joint names of the lessor and the Lessee", to quote paragraph 5(ii), will be a composite policy. The 14th edition of *MacGillivray on Insurance Law* states at paragraph 22-046 that:

> "A joint insurance in the names of both lessor and lessee is very commonly arranged. In such cases a court may hold that each party has insured for his respective interests and is entitled to the money in proportion to his interest."

but as I understand it that has to be read in the light of what was said at paragraph 1-202:

> 1-203 Where the interests of different persons in the same insured subject-matter are diverse interests, a policy expressed to insure all interested persons must be construed as a composite policy which is intended to insure each co-insured separately in respect of his own interests. Not only does the policy wording show that it is intended to cover the different co-insureds separately for their respective

interests, but perforce the elements of joint risk, joint interest and joint loss will be absent."

36. Mr Denehan's argument is that the RSA policy is a composite policy and that the requirement to insure "in the joint names of the lessor and the Lessee" is broad enough to encompass a composite policy in the form put in place in this case.

37. The crucial words of the policy are ""In so far as required under the terms of the Leases the Lessees of the units are noted as the Joint Insured in respect of their units"; if those do not give the insured an independent right to claim on the policy, Mr Denehan asks, what is their effect?

38. It is difficult to answer that question. The words themselves are ambiguous; the Lessees "are noted" as the joint insured, and it is not clear how far that is intended to differ from the situation where the Lessees' interests are noted on the policy. In the absence of any authority, or of any evidence from the insurance company or of industry practice, I am not able to say what the effect of those words is. It may be that they give the respondent an independent right to claim on the policy. Or it may be that the words are intended to provide comfort to the lessees, confirming that the appellant can make a claim that covers their interests as well as its own. It is not obvious that the words create a composite policy, nor that the respondent's claims would be unaffected either by a breach of the insurance contract by the appellant or by the appellant's insolvency. The appellant produced no evidence about any of those points before the FTT, and has (properly) not sought to adduce fresh evidence on appeal.

39. Nor is it clear to me that even if those words do create a composite policy of insurance, that in itself is legally the same as an insurance policy "In the joint names" of the appellant and the respondent, in circumstances where the respondent's name is not mentioned and is not known to the insurance company.

40. It is by no means clear that the FTT was wrong on this point. But I do not have to decide it, since the appeal succeeds on ground 1, and there is much to be said for not doing so when only one of the parties is represented and the interests of other lessees of the appellant are potentially engaged. In the circumstances I decline to make a decision on the second ground of appeal.

Conclusion

41. The appellant has succeeded on ground 1, which is sufficient for it to succeed in the appeal despite the failure of ground 2. The decision of the FTT is set aside. The Tribunal substitutes its own decision that the insurance payments demanded of the respondent for the two years in question – one actual, one estimated – were not only reasonable but also payable in accordance with the contractual terms of the lease.

42. That being the case I also set aside the FTT's decision that the appellant was to reimburse the respondent for the FTT's fee, and the FTT's decision under section 20C of the

Landlord and Tenant Act 1985 (although Mr Denehan notes that it does not appear that the appellant is entitled to recover the costs of these proceedings though the service charge).

Judge Elizabeth Cooke

22 April 2020