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BIR/00CN/LSC/2012/0014

H.M. COURTS & TRIBUNALS SERVICE

MIDLAND LEASEHOLD VALUATION TRIBUNAL

DECISION

on an application under sections 27A and 19 of the Landlord and Tenant Act 1985 for a determination of liability to pay and reasonableness of service charges and further an application under section 20C of the Act that the landlord's costs incurred in connection with the application are not to be treated as relevant costs to be taken into account in determining any service charge payable by the tenant.

Applicant:	Ms Angela Ruth White
First Respondent:	Freehold Managers PLC
Second Respondent	Freehold Managers (Nominees) Limited
Subject Property:	70 Centenary Place, Holliday Street, Birmingham, B1 1TB
Relevant Lease:	Dated 29 October 2004 made between Kingsoak Homes Limited of the one part and Shanaz Aftab of the other part
Members of the Tribunal:	Mr R Healey LLB (Chairman) Mr S Berg FRICS
Paper Determination:	3 September 2012
Release date:	24 SEP 2012

Summary of the Determination

The insurance excess is not payable by the Applicant. Neither the First Respondent nor the Second Respondents' costs incurred in connection with the application are to be treated as relevant costs to be taken into account in determining any service charge payable by the Applicant.

Reasons for the determination

Introduction

1. This is a decision on an application made by the Applicant who seeks a determination of the service charges payable in respect of the service charge year 2011/ 2012.

2. The Applicant holds the leasehold estate in the Subject Property.

3. The issue for determination is the liability of the Applicant to pay the sum of £500 demanded by the Respondents as part of the service charge in respect of an insurance excess following a water leak from the Subject Property.

The Law

4. Section 27A of the Landlord and Tenant Act 1985 ("the Act") sets out the jurisdiction of the tribunal and the relevant clause (1) provides:

> ***S27A Liability to pay service charges: jurisdiction***
> *(1) An application may be made to a leasehold valuation tribunal 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.*

5. Section 19 of the Act limits the amount of service charge payable and provides ;

> ***S19 Limitation of service charges: reasonableness.***
> *(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period—*
> *(a) only to the extent that they are reasonably incurred, and*
> *(b) 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; and the amount payable shall be limited accordingly.*

6. Section 20C relates to payability of Landlord's costs and provides ;

> ***S.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 persons specified in the application.*

(1) ....
(2) The...tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Hearing

7. In accordance with Regulation 13 of the Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003 the parties were given due notice of its intention to proceed without an oral hearing and no party having made a request to be heard the Tribunal proceeded to determine the application by way of paper determination on 3 September 2012.

The Applicant's submissions

8. The Applicant submits that she is not liable to pay the insurance excess of £500.00 (or any part thereof) charged to her as part of her service charge and further that the excess should be a cost to the freeholder to be recovered through the general service charge and payable by all leaseholders.

9. The Applicant submits that the cost of insurance is a cost to the freeholder which is passed on to the leaseholders as a whole by way of service charge. The excess under the insurance policy permits a reduced premium which is to the advantage of all leaseholders. It is therefore appropriate that any additional costs which arise out of the excess should be the responsibility of the leaseholders as a whole.

10. The Applicant refers to the Sixth Schedule Part B Clause 6.4 of the Relevant Lease which provides-

"If notwithstanding the extent of the risk and value . . . . . the money receivable under such insurance shall be insufficient to meet the cost of the necessary works. . . then the deficiency shall be treated as a further item of expense . . . . . recoverable from the lessees accordingly insofar as any such deficiency may relate to any excess . . . . . under the terms of the Lessor's insurance policy from time to time."

The Respondents' submissions

11. Ms. Gillian Stanley, Area Property Manager for Mainstay Residential Limited made submissions on behalf of both the First and the Second Respondents.

12. The Respondents submit that non-communal insurance claims should be the responsibility of the appropriate individual leaseholder as it is the responsibility of each individual leaseholder to ensure that their apartment is water tight. The Respondents submit that the Lessor is able to recharge for such items under the Eighth Schedule, Part 1 Clause 8 which reads –

"To keep the Lessor indemnified in respect of charges for other services payable in respect of the charges for other services payable in respect of the Demised Premises which the Lessor shall from time to time during the term be called on to pay such sums to be repaid to the Lessor on demand."

13. The Respondents produce a copy of a letter from Cunningham Lindsey, Loss Adjusters, to the Applicant confirming that she is liable for the £500 excess as the leak originated from the en suite shower feed in the Subject Property.

14. The Respondents submit that it is inequitable for insurance excesses to be payable by all leaseholders as part of their service charge as many faults can be attributed to the individual leaseholders not maintaining their service installations.

15. The Respondents submit that if the insurance excess in each case was charged to the general service charge then this would inevitably increase the service charge budget. Further if the excess was deleted from the insurance policy the premium would be considerably higher.

16. The Respondents produce a copy of the ARMA Guidance Notes on Insurance and refers the Tribunal to the section entitled "Excesses and Exclusions". The relevant section reads as follows –

"Because excesses are so common in all policies it is arguable therefore that the excess is a properly recoverable item from the service charge and is a cost of the insurance.

The treatment of excesses varies and there are no hard and fast rules. Some argue that as all share the benefit of lower premiums because of the excess, all should share the excess irrespective of the circumstance. Others distinguish according to the incident, i.e. if the cause is communal then the excess is paid through the service charge, whereas if the cause is within a flat's area of responsibility (leaking pipe, overflowing sink etc.) then the flat owner should pay. Managers should bear in mind that the payment of an excess may not necessarily be a lawful use of the service charge and open to challenge. Some leases contain a clause making the lessee liable for all costs in the event of leaks from their flats, in which case there is a route to recovery through enforcement of the lease clause. However this is by no means universal. If the lease permits enforceable house rules the policy on excesses could be set out therein".

Findings of the Tribunal

17. The charging of an insurance excess to either the general service charge or to the individual leaseholder depends upon the terms of the Lease.

18. The relevant provision is within the Eighth Schedule Part One of the Relevant Lease – Covenants enforceable by the Lessor.

19. Clause 9 reads as follows –

"*To repair and keep the Demised Premises and all service installations exclusively serving the same (but excluding such parts of the Demised Premises as are included in the Maintained Property) and every part thereof and all landlord's fixtures and fittings therein and all additions thereto in good and substantial repair order and condition at all times during the Term including the renewal and replacement forthwith of all worn and damaged parts but so that the Lessee shall not be liable for any damage which may be caused by any of the risks covered by the insurance referred to in the Sixth and Ninth Schedules (unless such insurance shall be wholly or partly vitiated by any act or default of the Lessee or of any member of the family*

employee or visitor of the Lessee or other such occupier) or for any work for which the Lessor may be expressly liable under the covenants on the part of the Lessor hereinafter contained".

20. The Respondents submit that the water leak originated from the en suite shower in the Subject Property. This is not challenged by the Applicant and the Tribunal determine this to be the cause of the water leak.

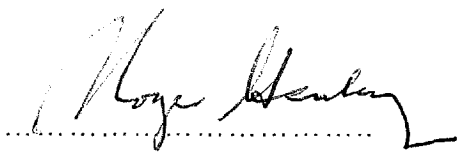
21. The Tribunal observes that the Eighth Schedule Part One Clause 9 of the Relevant Lease reads "The Lessee shall not be liable for any damage which may be caused by any of the risks covered by insurance ..... " If follows that notwithstanding the obligation of the Applicant to keep the Service Installations in the Subject Property in good and substantial repair order and condition she is not liable for damage caused by her failure to do so provided the risk is covered by the Respondents' insurance. The Tribunal determines that the water leak is covered by the insurance required to be implemented by the Respondents and that none of the exclusions set out in this clause 6 apply.

22. The Tribunal accepts the Applicant's submission that as the insurance premium is reduced by the inclusion of an excess and is to the benefit of leaseholders generally then any excesses are to be charged to the leaseholders generally subject to any exclusions as there may be in the Relevant Lease. The Tribunal does not find any applicable exclusions in the present application.

DETERMINATION

23. The Tribunal determines that the Respondents are not entitled to charge the Applicant the insurance excess of £500. The whole sum is payable by the Respondents and is chargeable to the leaseholders as a whole as part of the service charge.

24. The Tribunal also determines that any costs incurred by the Respondents or either of them in connection with the proceedings before the Tribunal shall not be treated as relevant costs to be taken into account in determining the amount of any service charge payable by the Applicant.



Roger Healey

Chairman