9395

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**CAM/42UD/LSC/2013/0079** **CAM/42UD/LSC/2013/0080** **CAM/42UD/LSC/2013/0081** **CAM/42UD/LSC/2013/0082** **CAM/42UD/LSC/2013/0083** **CAM/42UD/LSC/2013/0084**
Properties	**0079**	74 Compair Crescent, Ipswich IP2 0EH
	0080	7 Holman Court, Ipswich IP2 0ES
	0081	44 Holman Court, Ipswich IP2 0ES
	0082	13 Gaskell Place, Ipswich IP2 0EL
	0083	72 Gaskell Place, Ipswich IP2 0EL
	0084	1001, 10 Reavell Place, Ipswich IP2 0ET
Applicants	**0079**	Mr John Whitehead
	0080	Mr Stuart Parkinson
	0081	Mrs Rachel Inman
	0082	Mr David Butler
	0083	Mr Robert Appleton
	0084	Mr Nicholas Hockley
Representative	:	Glenn Stevenson, of Stevensons Solicitors
Respondents	**1**	Sinclair Gardens Investments (Kensington) Limited
Representative	:	Alexander Halban (col) instructed by W H Mathews & Co
	2	Ranelagh Road (Ipswich) Management Co Ltd
Type of Application	:	For determination of payability of service charges for the years 2011–12 & 2012–13 [LTA 1985, s. 27A]
Tribunal Members	:	G K Sinclair, G F Smith MRICS FAAV REV & R Thomas MRICS
Date and venue of Hearing	:	Wednesday 16th October 2013 at The Novotel, Ipswich
Date of Decision	:	1st November 2013

DECISION

Summary

1. The applicants are a selection of leaseholders of flats on the Ranelagh Road estate in Ipswich. The first Respondent is their landlord and the second Respondent is the management company named in their respective leases, which is essentially leaseholder controlled but whose practical responsibilities have been contracted out to a professional management company, Norwich Residential Management Ltd.

2. The single issue in this dispute is the cost of the annual buildings insurance, this being largely dependant upon the choice of insurer nominated by the landlord. The leaseholders object to the landlord's nomination of Liberty Mutual, through its nominated agent, Princess Insurance Agencies. This is because Liberty has been shown to be almost 50% more expensive for comparable cover obtainable from other leading insurers, and the landlord declines to justify its choice.

3. The landlord's stance in these proceedings has been a bold one. It argued that the proceedings should not have been brought under section 27A but instead under section 30A and paragraph 8 of the Schedule to the 1985 Act, as amended. This was raised with the applicants' solicitors and with the tribunal office at an early stage, yet an invitation to apply for a strike-out was not taken up. Instead, the landlord has filed no formal statement of case in response, nor any evidence, and has given no disclosure whatever. At the hearing counsel appeared, armed with a small bundle comprising excerpts from the statute and relevant case law. He could test the applicants' evidence and make submissions, but could advance no positive case.

4. Having considered the lease and other documentary material placed before it, and listened to the parties' respective submissions and the evidence before it, the tribunal determines that the premium required by the insurer nominated by the landlord is not likely to be one negotiated at market rates but instead one where a generous commission is payable to an agent associated with the landlord, namely Princess Insurance Agencies.

5. For the reasons which follow the tribunal determines that the nomination is unjustified and the service charge, to the extent that it has been inflated by this amount, has been unreasonably incurred in each of the two years in question. What the applicant tenants and/or the management company should do if the landlord were to continue to nominate this insurer is a matter on which they must take their own professional advice. The landlord shall also reimburse to the applicant tenants the tribunal fees they have incurred in the sum of £500.

Material lease provisions

6. The sample lease considered at the hearing was that for 74 Compair Crescent and is dated 30th March 2010. It is a tri-partite lease, with a lessor, management

company, and lessee. The function of the management company is to provide services for the estate, to the costs of which each lessee must by clause 3(5) contribute his proportionate share. Each lessee, and every assignee, is required to become a member of the management company. Should the company fail or neglect to carry out its duties or become insolvent then, by clause 4(7), the lessor shall undertake the same obligations and be entitled to recover the cost of the same from the lessee.

7. By clause 7 the company covenants to carry out the obligations set out in Part IV of the Schedule to the lease. Material to this determination is that set out in paragraph 7 :

> **The company will at all times** during the said term (unless such insurance shall be vitiated by any act or default of the lessee) **insure** and keep insured the block (including lifts if any) and the contents of the common part in the names of the lessor and lessee his mortgagees (according to their respective estates and interests) and the company against comprehensive risks **with some insurance company of repute nominated by the lessor and through the agency of the lessor...** *[emphasis added]*

Relevant statutory provisions and case law

8. Section 18 of the Landlord and Tenant Act 1985 defines the expression "service charge", for the tribunal's purposes, as :

> an amount payable by a tenant of a dwelling 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...

9. The overall amount payable as a service charge continues to be governed by section 19, which limits relevant costs :

a. only to the extent that they are reasonably incurred, and
b. where they are incurred on the provision of services or the carrying out of works, only if the services or works are of a reasonable standard.

10. The tribunal's powers to determine whether an amount by way of service charges is payable and, if so, by whom, to whom, how much, when and the manner of payment are set out in section 27A of the Landlord and Tenant Act 1985. The first step in finding answers to these questions is for the tribunal to consider the exact wording of the relevant provisions in the lease. If the lease does not say that the cost of an item may be recovered then usually the tribunal need go no further. The statutory provisions in the 1985 Act, there to ameliorate the full rigour of the lease, need not then come into play.

11. Section 30A gives effect to the Schedule to the Act, which confers on tenants certain rights with respect to the insurance of their dwellings. The landlord in this case relies upon paragraph 8 of the Schedule, but paragraph 1 is important as (repeating section 30, but going into more detail) it contains an important definition :

> In this Schedule –
> "landlord", in relation to a tenant by whom a service charge is payable

which includes an amount payable directly or indirectly for insurance, includes any person who has a right to enforce payment of that service charge;...

12. Paragraph 8 reads as follows :

(1) **This paragraph applies where a tenancy of a dwelling requires the tenant to insure the dwelling with an insurer nominated or approved by the landlord.** *[emphasis added]*

(2) The tenant or landlord may apply to a county court or leasehold valuation tribunal for a determination whether –

(a) the insurance which is available from the nominated or approved insurer for insuring the tenant's dwelling is unsatisfactory in any respect, or

(b) the premiums payable in respect of any such insurance are excessive.

(3) No such application may be made in respect of a matter which –

(a) has been agreed or admitted by the tenant,

(b) under an arbitration agreement to which the tenant is a party is to be referred to arbitration, or

(c) has been the subject of determination by a court or arbitral tribunal.

(4) On an application under this paragraph the court or tribunal may make –

(a) an order requiring the landlord to nominate or approve such other insurer as is specified in the order, or

(b) an order requiring him to nominate or approve another insurer who satisfies such requirements in relation to the insurance of the dwelling as are specified in the order.

(5) ...

(6) An agreement by the tenant of a dwelling (other than an arbitration agreement) is void in so far as it purports to provide for a determination in a particular manner, or on particular evidence, of any question which may be the subject of an application under this paragraph.

13. From the cases of *Havenridge v Boston Dyers Ltd*[1], *Berrycroft Management Co Ltd v Sinclair Gardens Investments Ltd*[2] and *Forcelux Ltd v Sweetman*[3], the following propositions of law may be distilled :

a. A landlord insuring his property may avoid challenge provided he does so with an insurance office of repute, in the normal course of business (*Berrycroft*)

b. He must do so competitively, at normal market rates (*Forcelux*)

c. However, he is not obliged to shop around the market for the lowest premium available, and can deal with just one underwriter (*Havenridge*)

d. If the rate appears to be high in comparison with other rates that are available in the market then the landlord can be called upon to prove that there was no special feature of the transaction which took it outside the normal course of business (*Havenridge*)

e. Otherwise, the right of a landlord to nominate the insurer is unqualified,

[1] [1994] 2 EGLR 73

[2] [1997] 1 EGLR 47

[3] [2001] 2 EGLR 173 (LT)

and he is not obliged to give reasons (*Berrycroft*)

f. The question to be answered is not, was the insurance the cheapest available, but was the cost reasonably incurred (*Forcelux*).

Inspection and hearing

14. Accompanied by Mr Clayton Hudson of Norwich Residential Management Ltd the tribunal inspected the development at 10:00 on the morning of the hearing. The purpose was to understand the physical nature of the development – with many low-rise blocks with no lifts and one 11-storey tower with double lift shafts – and the likely insurance risks. The development, which comprises 261 privately owned and self-contained flats occupied by a mix of professional persons, students or housing association tenants, lies between the main railway line and the river, but the latter is well guarded by concrete flood defences. The blocks are built of concrete block with pre-cast concrete stairwells and part-brick walls with a combination of wood, modern LPCB approved cladding and rendering to various sections of the external fascias. The pitched roofs are single membrane throughout. The low-rise blocks have passive smoke detection systems while the tower has its own fire riser.

15. The ground floor of most blocks is given over to (or available for) retail or office use, and one entire block comprises a hotel. One other block and discrete parts of some others are held by a registered social landlord and are maintained separately. The estate roads have not been adopted by the highway authority so remain maintainable by the management company. Adjoining these private roads are parking spaces, some of which are for the commercial or social landlord tenants. There is also a small children's playground with play equipment that requires annual safety checks.

16. The hearing commenced at 11:30. Neither Mr Stevenson for the applicant nor Mr Halban for the landlord had participated in the inspection. On the morning of the hearing each party sought to introduce a new small bundle. In the case of the landlord the bundle comprised the material parts (ss.18–30A) of the 1985 Act, s.29 of the Tribunals, Courts and Enforcement Act 2007, and copies of decisions by the LVT :

a. *Re 143–153 Stonecross Road, Hatfield* [CAM/26UL/LSC/2010/0120], and

b. *Re Blocks C, E & G, Cherry Blossom Close, Chequers Way, London N13* [LVT/INS/027/003/00].

17. The applicants' additional bundle comprised a mixture of statute, case law, a site plan, insurance premiums, Companies House documents, and correspondence. The excerpts from legislation were ss.18, 19, 27A and paragraph 8 of the Schedule to the 1985 Act and s.24 of the Landlord and Tenant Act 1987. The cases cited were :

a. *Commissioners for Her Majesty's Revenue and Customs v DV3 RS Limited Partnership* [2013] EWCA Civ 907

b. *Dickens Court Management Company Ltd v Sinclair Gardens Investment (Kensington) Ltd* [CAM/26UL/LSC/2010/0120][4] and

c. *Various Leaseholders v Sinclair Gardens Investment (Kensington) Ltd* [LON/00AM/LIS/2005/0070].

[4] The same case as referred to in paragraph 16 a. above

18. The tribunal was directed to the correspondence to show the attempts made by the management company or its managing agent to engage in a constructive discussion with the landlord about the cost and suitability of the insurance cover. The schedule at page 64 showing a comparison of insurance premiums from three companies over three years had been compiled by Mr Stevenson, partly from information provided by the applicant's insurance expert, Mr Scott Jarvis. The tribunal did not find the Companies House documents of assistance, as it had already been established by Mr Jarvis' enquiries (mentioned in his report) and is recorded in reported decisions of the court that Princess Insurance Agencies is operated by an associated company of the landlord, Cullenglow Ltd.[5]

19. Mr Stevenson began by explaining the reasons why the tenants had applied under section 27A rather than paragraph 8 of the Schedule :
    a. This was not a case where the tenant was obliged to insure, and – under section 30 – the management company was not defined as a "tenant" either
    b. The definition of "service charge" in section 18 includes the cost of insurance
    c. Even if it applied, paragraph 8 cannot deal with retrospective service charges incurred during the last two years
    d. Under section 24 of the 1987 Act the court or tribunal has jurisdiction to appoint a manager if satisfied that unreasonable service charges have been made.

20. Mr Stevenson relied upon the evidence that the applicants had been able to obtain from their expert, Mr Jarvis. His report was in the main bundle and he attended for oral examination and cross-examination by Mr Halban, counsel for the landlord. Mr Jarvis' evidence was as complete as he could make it, as the landlord had declined to reveal the claims history of this recently completed development. When seeking alternative quotations he had therefore worked on the assumption that, as a worst case scenario, the estate had suffered an escape of water/water damage claim no worse than £50 000 in value. At the hearing Mr Hudson was able to assist by confirming that his company has managed the site since August 2012 and in that time there had been only about 3 claims, none of which would have had any effect because each was for less than the £350 excess.

21. Mr Jarvis stated that he currently works for KTIB in Norwich, where he is an account executive and - for the last 7 days – had been an Associate Director. He had worked there for 14 years, holds the qualification Cert CII and is close to obtaining his Diploma in Insurance. He had prepared the report at page 64, but one correction was needed concerning the actual premium total for the blocks. In the Liberty Mutual paperwork he had misread the terrorism premium for block B. On page 66 the reference to the collective total premium should read £52 340 and not £52 067.04. In his final paragraph the figures he quotes have an in-built commission of 5%.

22. As to the corporate relationship between the landlord and Princess Insurance Agencies, the information in his report on page 65 of the bundle (that both were subsidiaries of another company, Forbes Corroon (Holdings) Ltd) was obtained

[5] See *Berrycroft Management Co Ltd and others v Sinclair Gardens Investments (Kensington) Ltd* [1997] 1 EGLR 47

by his own investigations via a website known as Duedil which he uses regularly to check who he is dealing with.

23. By reference to the master policy number seen in bundle 2, page 101, this shows that there is a common policy number between this development and other developments, where all are part of a scheme in which they are each added together and not separately evaluated

24. Questioned about his comment on page 66 that "this premium seems excessive..." Mr Jarvis offered three key explanations :
    a. That this appears to be a binder arrangement with one insurer and there is a poor claims experience over the entire portfolio, and Ranelagh Road are suffering because of the claims history of others, or
    b. There is a significant insurance commission, or
    c. The rates of Liberty Mutual are not in accordance with the market. Commercial property insurance is the most sought after because it is very profitable. This is because it is unlikely to have significant risks year on year, and administratively it is very easy to manage for an insurer. Once policy is set up there is very little for the insurer to do other than handle claims.

25. Asked about claims handling, he said that a lot of brokers have moved away from in-house claims handling, instead encouraging the insured to go direct to the insurance company. Those that do retain an in-house claims team seem to retain customers, while others outsource to keep their costs down.

26. Questioned about the advantages of having all one's insurance placed with one company, he said this should be that the collective premium should encourage lower rates being obtained by the broker, and potentially higher commission earnings. The downside is that where a collective binder has a poor loss ratio that will be reflected across the entire portfolio. Judging by the premium payable in this case, either the insurance is not competitive or the insurance risk is being reflected across the entire portfolio.

27. Asked if there was any particular reason why the Ranelagh Road development should be regarded as high risk he said No. As part of his presentation to various insurance companies he had presented photos, maps, flood risk plans, etc. and there was nothing to suggest a high risk. AXA (one of the insurers approached) is based only 300 metres away, so has detailed knowledge of the risk at hand.

28. Asked about the landlord's choice of insurer, he said that Liberty Mutual was a company with American roots (the Statute of Liberty on its logo was pointed out as a clue), that there was nothing particularly unusual about its insurance terms, and that he had had some dealings with it. He said that when he had come across Liberty before he found them to be reasonably competitive, so he was stunned to see the rebuilding cost quoted in this case.

29. On the subject of commission, he said that he had come across risks where it could be as high as 30–35%, but premium levels that high would be less than 5% of the market. Commission of up to 20% exists and is not unusual – perhaps around 50% of the market – but should reflect the level of actual work involved

as broker, and he found that 5% commission would be very common.

30. Asked whether Liberty Mutual was an insurer "of repute", Mr Jarvis referred to the Standard & Poors rating at the top of his table on page 68. Liberty Mutual was rated as A, while AXA and Allianz each were AA. He said that his company would not use anyone with less than a BBB rating, although he was struggling to think who currently has a AAA rating. This can change from month to month, but it would normally take a long time for an insurer to drop from AAA to BB. AXA, with its AA rating, would be more reliable than Liberty Mutual, which tends to be used for more specialist work, or "to dip in and out", but this type of insurance was regarded as "core business"by most insurers.

31. Finally, Mr Jarvis was asked about an aspect affecting the level of risk, namely occupancy. He confirmed that as part of his presentation he had suggested any type of tenant (as envisaged by the lease), gave the proportions of different types of occupiers, and obtained written confirmation from both AXA and Allianz that they were happy with that.

32. So far as the comparable rates shown for AXA and Allianz are concerned, he was keen to draw the tribunal's attention to the fact that in the previous year NRM, the managing agents, had undertaken a similar exercise involving AXA, Allianz and Fusion Insurance. Again, these mainstream rates were considerably lower than the premium quoted by Liberty Mutual through Princess, but the landlord insisted – after some initial requests for clarification of cover provided, but then without any explanation – upon nominating Liberty Mutual. (Correspondence, to which Mr Stevenson referred in closing, appears at the back of the additional bundle.)

33. In his closing submissions on behalf of the landlord Mr Halban said that :
    a. The landlord's only role is to nominate the insurer
    b. The landlord cannot be a party to a service charge application where it does not receive payment of any service charges. Any claim should be against the management company
    c. The means of bringing a claim concerning nomination of an insurer is to use the specific section put in the Act for that purpose : section 30A and paragraph 8 of the Schedule
    d. If the insurance premium is unreasonable that could not affect the nomination, but merely the management company's power to recoup the cost; so there would be a shortfall
    e. One cannot impose a liability on the landlord where there was none before
    f. If one could challenge the reasonableness of the premium then Mr Jarvis accepts that there was a considerable range of rates and commissions, and he did not identify anything out of the ordinary in this case
    g. It was for the applicants to prove that the policy was obtained other than in the ordinary course of business
    h. On consideration of the evidence the landlord had no case to answer.

34. Mr Stevenson referred to the question of section 19 "reasonableness", to the case of *Havenridge v Boston Dyers Ltd*[6], and to the LVT decision in *117 Cazenove*

[6] [1994] 2 EGLR 73

Road, Hackney[7] (where the same landlord was involved as respondent, and the insurance was held to be excessive and unreasonable). On the subject of paragraph 8 of the Schedule he referred in support to paragraph 5–013 of *Service Charges and Management* : Tanfield Chambers (2nd edition, Sweet & Maxwell). On the evidence Mr Jarvis was asked whether 35% was normal in his industry. He said he thought few charged that commission. Neither Mr Stevenson nor Mr Jarvis could say that that was the commission in this case, but there is an unexplained difference of 45%. He noted the possibilities of a higher insurance rate, high commission, and a poor claims history. He argued that the tribunal was entitled to assume that a 45% excess was grossly excessive and outside the normal market. Liberty Mutual is not a household name, and those alternative insurers put forward have higher S&P ratings than it.

35. Mr Stevenson concluded by seeking to persuade the tribunal that under the terms of section 27A(1) it could determine by whom a service charge contribution was payable, and if the nominations were ruled unreasonable then the tribunal should order the landlord to reimburse the management company (and hence the tenants) the unjustified excess.

36. He sought a ruling that the nomination was unreasonable so that the applicants would have grounds for applying for the appointment of a manager under section 24 of the 1987 Act as, he suggested, assumption of control by an RTM company would not prevent the landlord from exercising its power of nomination.

37. Mr Halban challenged Mr Stevenson's argument on section 27A. The purpose of that part of the legislation is to relieve tenants of liability; not to impose a liability where none previously existed. There was no mechanism for imposing such a liability.

Findings

38. The first point to consider is whether this application should have been brought under section 27A or under paragraph 8 of the Schedule. Paragraph 8 is quite clear. It applies where a "tenant" is obliged to insure with a company nominated by the landlord. Although the management company is tenant-controlled in this case section 30 and paragraph 1 of the Schedule are equally clear that any party entitled to levy service charges is for the purposes of the Act a "landlord", but not to the exclusion of the real landlord. The management company is required to insure, not the tenants. The purpose of inserting paragraph 8 was to deal with the extension of statutory protection to tenants of leasehold houses as well as those of flats. It would be extraordinary if a landlord were to expect individual tenants to insure the whole building, including common parts, of which their flat formed only a small part. With an entire house the position is entirely different.

39. Although in *Berrycroft Management Co Ltd and others v Sinclair Gardens Investments (Kensington) Ltd*[8], to which the tribunal chairman referred in oral argument, the Court of Appeal declined to form a view on the point the judge at first instance, Judge Paul Baker QC, did. He said this :

7 Otherwise cited as *Various Leaseholders v Sinclair Gardens Investment (Kensington) Ltd* [LON/00AM/LIS/2005/0070]

8 [1997] 1 EGLR 47, at

> None of the leases of the flats with which I am concerned require the tenant to insure at all much less to insure with a nominated insurer. On the contrary it is the management company which covenants with each tenant to insure his flat as part of the block and that company is or may be required to insure with an insurer nominated by the landlord. It is true that the management company is owned by all the tenants in a block but that, in my judgment, is insufficient to bring the leases either individually or collectively within the scope of para 8. In the first place the management company in relation to the tenant for the purposes of the schedule is a landlord not a tenant. Second, what is necessary to bring this paragraph into operation is a requirement of the tenant to insure the dwelling ie the flat of which he is the tenant. The insurances in these cases are of entire blocks for obvious reasons. The Act of 1987 extended the scope of the service charge provisions of the Act of 1985 to leases of individual dwellings whereas they had previously been confined to leases of flats forming part of a building. The paragraph was introduced to give a remedy where dwellings which unlike flats might frequently be insured separately.

40. Judge Paul Baker QC was an experienced judge in the field of property law and this tribunal respectfully agrees with him. Paragraph 8 can therefore be ignored.

41. The tribunal has already set out at paragraph 13 above a succinct summary of the principles governing a landlord's rights and obligations concerning the choice of insurer. In *Commercial and Residential Service Charges* : Rosenthal & ors (Bloomsbury, 2013), to which the tribunal chairman also drew the parties' attention, the authors remind the reader at paragraph 10–08 that :

> In general terms, the courts have been astute to avoid construing a lease in a way which enables the tenants to scour the market to find a cheaper policy than the one to which they are being asked to contribute and to refuse to pay for the more expensive policy obtained by the landlord.

42. At paragraph 10–10 the authors go on to refer to the case of *Gleniffer Finance Corporation Ltd v Bamar Wood Ltd*[9], where the tenants posed, but the court declined to answer, the questions whether a landlord's duty was to act in a way that is "fair and reasonable", alternatively to exercise his power to insure in good faith. In *Havenridge*, however, the issue did arise. The lease required that the tenants pay such sum as the landlord should "properly expend" on insurance, and at paragraph 10–11 the court's findings are summarised as follows :

> The court, however, accepted the landlord's submission that "properly" means that **the landlord must show** that the insurance was placed with an insurer "of repute" in respect of the defined risks and otherwise in accordance with the contract, that the insurance was negotiated at arm's length and that the premium was no greater than "the going rate". That is not the same as requiring the landlord to pay a "reasonable rate" (which would cap the amount that the landlord could recover). Rather, this reinforces the requirement that the landlord's negotiation with the chosen insurer should be an arm's length one and that the rate should be that chosen insurer's going rate for the policy in question.
>
> *[emphasis added]*

[9] (1978) 37 P&CR 208

43. As Evans LJ said, at page 75 :

> The safeguard for the tenant is that, if the rate appears to be high in comparison with other rates that are available in the insurance markets at the time, then **the landlord can be called upon to prove that there was no special feature of the transaction which took it outside the normal course of business.**
>
> *[emphasis added]*

44. This is the approach which this tribunal adopts, but the difficulty for the landlord in this case is that the tactic it has chosen to adopt is to disclose no documents and adduce no evidence whatsoever. The applicants called an expert who has gone into rather more extensive detail than one usually sees in cases of this sort, and he has expressed surprise at the rate charged by what in his experience is a reasonably competitive insurer. He has put forward three possible reasons why the rate here might be so much higher than competitive quotes obtained not only by him in 2013 but by the managing agent (through some other broker) in 2012.

45. Those reasons, as set out at paragraph 24 above, were :

a. That this appears to be a binder arrangement with one insurer and there is a poor claims experience over the entire portfolio, and Ranelagh Road are suffering because of the claims history of others, or
b. There is a significant insurance commission, or
c. The rates of Liberty Mutual are not in accordance with the market. Commercial property insurance is the most sought after because it is very profitable. This is because it is unlikely to have significant risks year on year, and administratively it is very easy to manage for an insurer. Once policy is set up there is very little for the insurer to do other than handle claims.

46. Mr Jarvis has satisfied the tribunal that there is nothing which would make this development a particularly high risk. It is an almost brand new development in good structural condition, well-managed, and with a reasonable mix of occupiers. It would be quite wrong for the tenants of this development to be tarred with the poor risk reputation of other parts of the landlord's portfolio, as each should be judged on its merits and the discount for a substantial block or master policy applied equally to the separately assessed premiums. Deprived of any information about the Ranelagh Road estate's claims history (beyond what the current managing agents know, which dates only from August 2012), Mr Jarvis erred on the side of caution by assuming for the purpose of obtaining competitive quotes that there had been one substantial water damage claim for £50 000.

47. That leaves only the options of payment (not to the landlord, but to its connected insurance brokerage) of substantial commission and Liberty Mutual's rates not being in accordance with the market.

48. Mr Jarvis' evidence that he usually found Liberty Mutual reasonably competitive tends to suggest that the latter is incorrect, leaving the issue of commission, but – a prima facie case having been established by the tenants – no evidence has been adduced by the landlord to demonstrate that it has acted at arm's length, or in good faith, or in the normal course of business.

49. The landlord has chosen to adopt a policy of silence; of keeping its cards close to its chest. We do not know what commission is received by Princess, nor whether it plays a significant part in claims handling such as to justify an argument that such commission was properly earned. That being the case, this tribunal is satisfied on the basis of the detailed evidence produced by the applicants that the insurance premiums are not at market rates and that the nomination of Liberty Mutual, despite the provision of detailed evidence to it in September and October 2012 of three broadly similar but much lower quotes, was unreasonable and not conducted at arm's length. The true market rate is approximately 45% cheaper than the premiums demanded in the years in question by Liberty Mutual. See the helpful schedule prepared by Mr Stevenson at page 64 of the additional bundle.

50. Where does that leave the applicant tenants and the management company?

51. Were the landlord the party demanding payment of service charges, including a due share of the insurance premium, then the outcome would be simple. The landlord would be deprived of the ability to recover the unjustified excess. The loss would fall upon it. In this case, however, it is the management company which collects the service charge and pays the insurance premium sought by the nominated insurer. It is not its fault if the landlord nominates an excessively expensive insurer.

52. Mr Stevenson emphasised the importance of a positive finding against the landlord so that this might found an application for the appointment of a manager under section 24 of the 1987 Act. What the applicants care to do next, and indeed the management company, is a matter for them. If the management company declines to act in accordance with any future nomination of Liberty Mutual (or any other company nominated by the landlord) then it is arguably in breach of its covenant under the lease and the right to insure becomes that of the landlord directly. If the landlord's decision is not one at arm's length or in the ordinary course of business then any adverse finding by a future tribunal will come with a direct financial sting.

53. The applicants must act after taking sound professional advice, but the decision is theirs. On two points raised by Mr Stevenson the tribunal must, however, disagree. First, section 27A enables a tribunal to go further than its jurisdiction previously allowed, namely to declare the reasonableness or otherwise of any actual or proposed service charge. Following amendment of the law the tribunal could now determine payability, etc., but only in accordance with the terms of the lease. Thus, the tribunal cannot direct a party to pay where it is under no such obligation in the lease. It cannot alter a tenant's liability to pay, for example by directing that arrears be paid at different intervals than those specified in the lease.[10] The tribunal therefore rejects Mr Stevenson's bold submission that it can order the landlord to pay back the excessive (45%) proportions of the insurance premiums.

54. Secondly, the tribunal is puzzled by Mr Stevenson's argument that an RTM company would still be bound by the landlord' s ability to nominate an insurer. The material parts of section 96 of the Commonhold and Leasehold Reform Act 2002 provide as follows :

[10] See *Southend-on-Sea Borough Council v Skiggs* [2006] 2 EGLR 87

(2) Management functions which a person who is landlord under a lease of the whole or any part of the premises has under the lease are instead functions of the RTM company.

(3) And where a person is party to a lease of the whole or any part of the premises otherwise than as landlord or tenant, management functions of his under the lease are also instead functions of the RTM company.

(4) Accordingly, any provisions of the lease making provision about the relationship of –

(a) a person who is landlord under the lease, and

(b) a person who is party to the lease otherwise than as landlord or tenant,

in relation to such functions do not have effect.

(5) "Management functions" are functions with respect to services, repairs, maintenance, improvements, insurance and management.

55. The landlord's right to nominate is therefore overridden, and vests in the RTM company.

Costs and fees

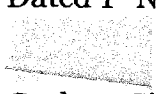
56. Although financially the applicant tenants may appear to have secured a Pyrrhic victory, insofar as the premiums for the years in question are concerned, they have nevertheless succeeded in establishing what they sought. The landlord's participation in these proceedings was minimal – failing to comply with any directions and arguing only, and wrongly, that the application was a nullity as it should have been brought under paragraph 8 of the Schedule – until instructing counsel to attend the hearing.

57. The applicants in their individual application forms indicated that they sought an order under section 20C preventing the landlord from including any of the costs of these proceedings in the service charge for this or any future year. The problem with that is, as said at the outset, that it is the management company which is charged with carrying out and invoicing the tenants for the services in Part IV of the Schedule to the lease. Only were it to default in doing so would the landlord assume such a role.

58. The management company has been joined formally as second respondent to these proceedings but stands with the tenants on the issues in dispute. In these circumstances the tribunal sees neither the need nor any scope for making such an order.

59. However, the applicants have been obliged to pay application fees of £350 and a hearing fee of a further £150, £500 in all. Pursuant to rule 13(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 the tribunal directs that the respondent landlord reimburse the applicants for the fees that they have incurred. The landlord shall therefore pay the applicants the sum of £500.

Dated 1st November 2013



Graham Sinclair – Tribunal Judge