10691

FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case Reference	:	**LON/00BH/LSC/2015/0020**
Property	:	**49 Morieux Road, Leyton, London E10 7LL**
Applicant	:	**Northumberland and Durham Property Trust Limited**
Representative	:	**Bond Dickinson LLP**
Respondent	:	**Mr Peter Anthony Rochford**
Representative	:	**Mr P A Rochford In Person**
Type of Application	:	**Section 27A Landlord and Tenant Act 1985 – determination in connection with service charges payable**
Tribunal Members	:	**Judge John Hewitt** **Mr Luis Jarero BSc FRICS**
Date and venue of Determination	:	**10 March 2015** **10 Alfred Place, London WC1E 7LR**
Date of Decision	:	**16 March 2015**

DECISION

Decisions of the Tribunal

1. The Tribunal determines that:

   1.1 It be reported to the County Court at Hastings that clause (xi) of the lease dated 11 September 1964 is a valid clause and although the tribunal does not have jurisdiction to determine whether the clause is a reasonable clause we find that the obligation to insure or contribute to the cost of insurance effected pursuant to the clause is not unreasonable in context and the reasonable costs incurred by the landlord in effecting insurance in accordance with the clause amounts to a service charge payable by the tenant to the landlord within the meaning of section 27A Landlord and Tenant Act 1985; and

   1.2 The file be returned to the said County Court, the tribunal having determined issue number 3 of the order dated 15 December 2014.

2. The reasons for our decisions are set out below.

Procedural background

3. Evidently the applicant is the freeholder of premises and a building at and known as 49 and 51 Morieux Road, Leyton. The building comprises two self-contained flats or maisonettes both of which appear to have been sold off on long leases. 49 Morieux appears to be the upper maisonette and 51 Morieux Road appears to be the lower maisonette.

4. On 18 November 2012 the applicant as landlord commenced court proceedings against the respondent as tenant and claimed a total of £1,505.99 being alleged arrears of ground rent and costs of insurance payable pursuant to a lease of the premises 49 Morieux Road. The allocated claim number is 2NY20021.

5. The proceedings appear to have taken a rather tortuous path. On 15 December 2014 District Judge Harper sitting at the County Court at Hastings made an order which contained five paragraphs; that which is material to this tribunal is number 3 which reads:

   "The issue as to the validity or reasonableness of clause (xi) of the lease is to be referred to the First-tier Property Tribunal in accordance with DJ Wrights order of the 22nd September 2014."

6. The tribunal gave directions on 20 January 2015. The parties were notified that the tribunal proposed to determine the reference on the papers and without an oral hearing and that any request for an oral hearing was to be made by 6 February 2015. Directions were given for the filing and service by each party of a statements of case and supporting documents.

   In compliance with those directions the tribunal has received the applicant's statement of case submitted by its solicitors, Bond

Dickinson. It is dated 25 February 2015 and the respondent's statement of case under cover of a letter dated 20 February 2015. In both cases the parties have attached supporting documents to their respective statements of case.

The tribunal has not received any request for an oral hearing. We have therefore determined the question referred to us by the court without an oral hearing pursuant to rule 31. We have done so on the submissions and papers filed by the parties pursuant to the directions.

The subject lease

7. Both parties agree that the subject lease is that dated 11 September 1964 and granted by Woodken Property Co. Limited to Benjamin Mosley and Florence Rosina Mosley. The lease granted a term of 60 years from 11 September 1964 at a ground rent of £175 per year and on other terms and conditions therein set out.

8. The applicant submits that the respondent is registered at Land Registry as the proprietor of the lease and thus the term granted by the lease is now vested in the respondent and he is bound by the covenants on the part of the tenant set out in the lease. Up to date office copies of the register have not been provided. The respondent does not appear to contend that the lease is not vested in him. We thus infer that the lease is vested in the respondent and that he is obliged to observe and perform the obligations on the part of the tenant set out in the lease. We do not know when the lease was vested in the respondent.

9. The premises demised by the lease are:

"FIRST ALL THOSE pieces of land situate in and having a frontage to Morieux Road Leyton in the County of Essex and which as to their position and boundaries are shown on the plan annexed hereto and thereon on coloured Pink and Green

SECONDLY ALL THAT maisonette known as Number 49 Morieux Road aforesaid being the first floor and the staircase leading thereto of the building now standing upon the piece of land shown on the said plan and thereon coloured Purple"

We observe that the lease appears to be a printed standard form onto which the names of the parties and the specific demised premises have been entered in typescript and with irrelevant provisions crossed through with lines. We infer that the general scheme envisioned by the stationer or printer of the form of lease was a common form scheme of the time and that the landlord adopted and adapted it for its use.

10. The lease adopts the expressions 'Lessor' and 'Lessee'. For present purposes these expressions have the same meanings as the expressions 'Landlord' and 'Tenant'.

11. The lease sets out a number of covenants on the part of the Lessee with the Lessor.

Material for present purposes is clause (xi) the marginal note to which states: *"Insurance"*. Again so far as material the clause reads as follows:

"(xi) Forthwith to insure and at all times during the said term to keep insured the demised premises and all buildings erections and fixtures of an insurable nature which are now or at any time during the term erected ... or placed upon ... the demised premises against fire and special perils normally incorporated in a Householders Comprehensive Policy in such Insurance Company and through such agency as may be nominated by the Lessor from time to time in a sum equal to the full value thereof in the joint names of the Lessor and the Lessee ... and to pay all premiums ... within seven days after the same shall become due and whenever required to produce to the Lessor or its agent the policy for every such insurance and the receipt for the last premium thereof... And in case default shall be made in effecting or keeping on foot such insurance or producing such receipts it shall be lawful for the Lessor but without prejudice to the power of re-entry ... to insure the said buildings against loss or damage by fire and the Lessee will forthwith repay all sums expended in effecting or keeping on foot such insurance ..."

12. We find that in context the proper construction or interpretation of that provision is:

12.1 There is a primary obligation on the part of the tenant to insure the demised premises (that is to say 49 Morieux Road);

12.2 That insurance must be against the perils of fire and *special perils normally incorporated in a Householders Comprehensive Policy;*

12.3 The landlord may, but is not obliged to, nominate the insurance company with which the business is to be placed and/or the broker through whom the business is placed;

12.4 In the absence of any nomination by the landlord the tenant is free to select the insurer and/or broker with or through whom the business is placed;

12.5 The insurance effected by the tenant is to be in the joint names of the landlord and the tenant and is to be in the full value of the demised premises;

12.6 Upon demand the tenant is to produce to the landlord the policy effected and the receipt for the premium;

12.7 In default of the tenant effecting insurance the landlord is entitled (but not obliged) to effect insurance against loss or damage to the *said buildings* by fire, but evidently not against other perils or "*special perils normally incorporated in a Householders Comprehensive Policy*".
In context we find that the expression *said buildings* means the demised premises rather than all the buildings that may be on the plot because the focus of the clause is the obligation on the

tenant to insure the demised premises and the arrangements to be put in place in the event that the tenant is in default of his obligation. Obviously if the draftsman of the lease had used the expression 'demised premises' the position would have been beyond doubt;

12.8 In the event the landlord effects insurance against loss or damage by fire the tenant is obliged to reimburse on demand the costs incurred by the landlord in doing so.

13. Before moving on it may be helpful if we observe that a provision requiring the tenant to insure a maisonette in the first instance, with a power for the landlord to do so in default is not an unusual provision in our experience. Many residential leases provide for the landlord to insure and to recoup the costs incurred from the tenant perhaps as a means for ensuring that the premises are always insured to full value with a reputable insurer but that is by no means a universal practice. We also observe that in our experience many tenants would prefer to be entitled to arrange their own insurance rather than have to contribute to the cost of insurance effected by their landlord.

14. We further observe that where a landlord effects insurance and seeks to recoup the cost from a tenant that amounts to a service charge within the meaning of section 18 Landlord and Tenant Act 1985 (LTA 1985). The consequence of that is that the amount recoverable by the landlord is capped by section 19 LTA 1985 and is limited to such sum as may be reasonable in amount.

The positions of the parties

The respondent's position

15. It is convenient to take the respondent's position first. His submissions are set out in a document dated 31 January 2015 which is headed: "Revised submission". Further submissions have been made in four letters to the tribunal all dated 17 February 2015. It is not obvious that the respondent copied those four letters to the applicant's solicitors. If he did not do so he must copy them to the solicitors straightaway. The parties are reminded that all correspondence sent to the tribunal must be copied to the opposite party at the same time and the fact that this has been done must be stated plainly on the face of the correspondence.

Revised submissions 31 January 2015

16. The respondent first submits that the building comprising 49 and 51 Morieux Road is one to which section 72 of the Commonhold and Leasehold Reform Act 2002 (CLRA 2002) applies. He may well be right about that but Chapter 1 of Part 2 of CLRA 2002 is concerned with the no fault right to manage scheme. That is a self-contained scheme which enables long lessees of certain buildings to exercise the right to manage the building providing that they comply with the requirements of the scheme. We cannot see that the right to manage scheme has any relevance to the question which the court has referred to us which concerns the validity of the insurance provision only.

17. Next the respondent submits, correctly in our view, that the provisions of the LTA 1985 apply to the subject tenancy. For present purposes sections 18, 19 and 27A LTA 1985 are applicable and govern the service charges payable by the respondent to the applicant.

18. The respondent also correctly submits that the Schedule to LTA 1985 sets out rights of tenants with respect to insurance. The schedule defines the expression 'tenant' to include a statutory tenant. Section 37 LTA 1985 defines the expression 'statutory tenant' to mean a statutory tenant within the meaning of the Rent Act 1977. Section 2 Rent Act 1977 provides that after the termination of a protected tenancy of a dwelling-house the person who, immediately before that termination, was the protected tenant of the dwelling-house shall, if and so long as he occupies the dwelling-house as his residence, be the statutory tenant of it.

19. In a number of his submissions the respondent asserts that he is a statutory tenant and that he is entitled the protections of the LTA 1985. We reject the submission that the respondent is a statutory tenant. First the respondent is the tenant under the lease dated 11 September 1964. That tenancy has not yet come to an end, the respondent is not a protected tenant within the meaning of the Rent Act 1977 and, as we understand it, does not occupy the subject premises as his residence. All of this is to some extent immaterial because the respondent is a tenant within the meaning of LTA 1985, he has the benefit of the protection conferred by the LTA 1985 and such protection is the exactly the same for tenants and statutory tenants as regards service charges and insurance. Thus it is of no disadvantage to the respondent that he is not a statutory tenant of 49 Morieux Road.

20. We reject the submission that it is totally unreasonable for a lease to require a tenant to effect insurance on the demised premises. In our experience many tenants can and do effect their own insurance. As we have observed above many tenants would relish the right and obligation to effect their own insurance rather than have to contribute to the cost of insurance effected by their landlord.

21. There is nothing we can see in the materials before us to support the assertion made by the respondent that the current state of the building insurance for the premises is a shambles.

22. We have not seen the lease of 51 Morieux Road and we cannot comment on what it may contain as regards insurance. We have seen the lease of 49 Morieux Road and we cannot see any provision that requires the insurance of both properties to be effected with the same insurer nominated by the landlord. We thus reject the respondent's submission to that effect.

23. It appears that the respondent may have misunderstood the effect of clause (xi) of the lease. As we have found above, that provision imposes

the obligation on the tenant to insure the demised premises (and not any other premises) on a certain basis and in default of him doing so the landlord is entitled to effect some basic insurance and to recover the cost thereof from the tenant.

24. The respondent submits that the lease must be amended to bring it in line with the LTA 1985. He does not identify the amendments he contends for. There is nothing we can see in the materials before us that suggests that clause (xi) of the subject lease is in any way contrary to the provisions of LTA 1985.

25. In any event the issue referred by the court for the tribunal to determine is limited to the question of the validity of clause (xi). We have determined that it is a valid and enforceable clause. On the terms of this reference this tribunal does not have any jurisdiction to alter or vary the terms of the lease. In case it may assist the parties we shall mentions shortly the tribunal's power to vary or alter leases in certain limited circumstances.

The applicant's position

26. The applicant has provided substantial evidence to show that both an individual and/or a company or property investor can obtain buildings insurance on a property such as 49 Morieux Road. We accept that evidence because it strikes a chord with the experience of the members of the tribunal and it reinforces our view that there is a ready market for such insurance.

27. Further submissions regarding the statutory provisions relied on by the respondent and the question whether clause (xi) is defective mirror the conclusions we have arrived at above and we need not repeat them here. Suffice it to say that taken overall we prefer the submissions on the effect of clause (xi) made on behalf of the applicant.

The four letters dated 17 February 2015

28. In these letters the respondent makes some observations about the materials relied upon by the applicant and he also makes some additional points. We shall them in short form.

29. We reject the criticisms made about some of the insurance quotations relied upon by the applicant. In some respects the respondent has descended to pedantic points. Taken overall the evidence supplied demonstrates to us that there is a ready market for buildings insurance on a property such as 49 Morieux Road.

30. In the letter headed 'Court costs paid by me. Claim Number 2YN200221/ 22nd September 2014' the respondent suggests that at a court hearing the applicant's solicitor informed him that the claim to insurance premiums was withdrawn. He also states in the letter that the claim for ground rent was to be referred to this tribunal.

31. We cannot make any comment on the alleged withdrawal of the claim to insurance premiums but as regards transfer to this tribunal we have identified clearly the issue which the court referred to this tribunal which is set out in paragraph 3 of the order dated 15 December 2014. In any event this tribunal has never had jurisdiction in respect of ground rents thus a referral in respect of the claim to ground rent would not have been appropriate.

32. The letter headed 'Unpaid Ground Rent Claim Number 2YN20021 The History', the respondent sets out the circumstances which he says caused him to withhold ground rent. We are not concerned with the ground rent issue, that is a matter for the court. Accordingly it is not appropriate for us to make any observations on that letter.

The insurance provisions and variation of leases

33. Part IV and sections 35 – 39 Landlord and Tenant Act 1987 (LTA 1987) sets out the limited circumstances in which a tribunal has jurisdiction to vary a long lease of a flat. The subject maisonette would come within the definition of a 'flat' in this Act.

34. One of the circumstances (section 35(2)(b) LTA 1987) in which it might be appropriate to vary a lease is if the lease fails to make satisfactory provision with respect to the insurance of the building containing the flat. Properly construed this provision extends to the insurance of the flat itself.

35. Section 35 LTA 1987 and the rules of the First-tier Tribunal (Property Chamber) set out a clear regime to be followed if a party to a long lease wishes to make an application to vary a lease. There is no such application before this tribunal. This tribunal only has jurisdiction to determine the issue referred to it by the court.

36. We have set out above our construction of clause (xi) of the subject lease.

37. Where the policy of insurance is effected by the tenant the perils to be insured against are clearly stated to be: *"fire and special perils normally incorporated in a Householders Comprehensive Policy in such Insurance Company"*

38. However in the default provision where the landlord steps in and insures, the peril to be insured against is limited to *'fire'* and the tenant is obliged to repay the cost of insurance against that peril and that peril only. That leaves open other perils such a storm, tempest, flood and subsidence. The landlord may wish to insure against such perils and is free to do so but on our construction of the clause is not entitled to recoup the cost the insuring other such perils from the tenant. It may be that the cost of insurance against the peril of fire is no different to the cost of insurance against the peril of fire plus other perils but that would a matter for evidence.

39. It occurs to us that it may be in the best interests of both parties to ensure that the subject property is adequately insured against a range of modern perils and it may be that the parties will wish to agree a mutual variation of the lease to achieve such an objective.

The next steps

40. The next step is for this tribunal to report back to the court with its findings so that the court can give directions for the disposal of any outstanding issues in the court proceedings. Accordingly this decision and the court file will be sent to the County Court at Hastings.

John Hewitt
16 March 2015