UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2012] UKUT 245 (LC)
UTLC Case Number: LRX/17/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charge – lessor covenanting to insure in joint names of lessor and lessee – lessor placing insurance with lessee's name omitted – whether lessor entitled to recover a proportion of the premium

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF A LEASEHOLD VALUATION TRIBUNAL

BETWEEN **DENISE GREEN** **Appellant**

and

180 ARCHWAY ROAD MANAGEMENT CO LTD **Respondent**

Re: 180B Archway Road
Highgate
London
N6 5BB

Before: His Honour Judge Nicholas Huskinson

Sitting at 43-45 Bedford Square, London, WC1B 3AS
on 17 July 2012

The Appellant appeared in person
The Respondent was represented by its company secretary Mr Anthony Ellis, of Prickett & Ellis Management Ltd

No cases are referred to in this decision

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel ("the LVT") dated 9 December 2010 whereby the LVT decided that the appellant (as lessee) was liable to pay to the respondent (as lessor) certain sums in respect of her share of the insurance premium for insuring 180 Archway Road, Highgate, London N6 5BB ("the building") for the period from 2006 until the date of the LVT's decision.

2. The appellant holds the first floor flat in the building from the respondent upon the terms of a lease dated 12 July 1988 whereby the respondent's predecessors in title demised the flat (which is called 180B) to the appellant's predecessors in title for a term of 99 years from 25 March 1988 at a ground rent payable by annual payment in advance on 25 March in each year. Clause 2 (vii) contained a covenant by the lessee in the following terms:

> "To pay to the Lessor throughout the said term a yearly sum being one quarter of the sum expended from time to time for insuring the Building in accordance with Clause 4(ii) hereof such sum to be paid on the rent day next following the payment of the relevant premium and to be recoverable as rent in arrear….."

Clause 4 (ii) contained a covenant by the lessor in the following terms:

> "To insure and keep insured with a reputable insurance company in the joint names of the Lessor and the Lessee each and every part of the Building including Architects' and other professionals fees from loss or damage by fire and all such risks as are normally included in a householders' comprehensive insurance policy and such other risks as the Lessor may from time to time determine to the full reinstatement value thereof and will supply a copy and produce the original policy and evidence of renewal thereof to the Lessee whenever reasonably required so to do and will thereafter forthwith on each occasion when any such loss or damage shall arise apply all moneys received in respect of such insurance or insurances in rebuilding repairing and otherwise reinstating the Building to the same condition as previously and will allow a note of the interest of any mortgagee of this demise to be endorsed upon the policy."

3. In 2005 a dispute arose between the appellant and the respondent regarding the payment of service charges and, in particular, the payment of the appellant's contribution towards the insurance premium upon the building. I understand the dispute was in respect of a period prior to the respondent becoming the freeholder and prior to Mr Ellis and his firm becoming the managing agents. This dispute came before the LVT. So far as concerns the insurance the LVT decided that there had been a failure properly to insure the building and that the appellant was not responsible for certain insurance premiums for the years ending 25 March 2004 and 2005. As a result of her anxieties

regarding insurance, in 2004 the appellant took out her own insurance at her own expense upon her flat and it appears she has continued to keep such insurance in place.

4. The question in the present appeal is whether the respondent is entitled under the terms of the lease to require the appellant to pay a proportion of the insurance premiums paid by the respondent for insuring the building for the periods 1 July 2005 to 1 July 2006, 1 July 2006 to 1 July 2007, 1 July 2007 to 1 July 2008, 1 July 2008 to 1 July 2009 and 1 July 2009 to 1 July 2010. The mere fact that the appellant may have had in place her own separate insurance taken out at her own expense does not of course mean that she is not liable to contribute to this insurance placed by the respondent, if the terms of the lease are such as to make her liable.

5. Before the LVT the appellant raised various points each of which she contended meant that she was not responsible for paying the insurance premiums sought. These points included her arguing that, for various separate reasons, the insurance taken out by the respondent was invalid or in some other way defective, see subparagraphs (a) to (g) of paragraph 16 of the LVT's decision. The LVT in its decision rejected all of the appellant's arguments. Only one of the appellant's arguments is relevant upon the present appeal, because the appellant has been refused permission to challenge the LVT's decision rejecting her other arguments. The relevant argument is the following, namely the appellant says she is not liable under the lease to contribute towards the cost of the insurance placed by the respondent because the respondent failed to comply with the terms of clause 4(ii) in that it failed to take out insurance in the joint names of the lessor and lessee. The respondent argues that the appellant's interest in the building was protected by the "general interest" clause in the insurance policy and that this was sufficient.

6. Upon this point the LVT's analysis is set out in paragraphs 23 to 25 of its decision:

> "The noting of the general interest on the Certificate of Insurance rather than Ms Green's specific interest.
>
> 23. Ms Green considered that she was entitled to have a specific interest in the insurance policy noted on the Certificate of Insurance as this was a clause in her lease (see 4.2 of the lease) and she believed a necessity in order for the insurance to be valid. She noted that the interest of two other lessees is mentioned specifically.
>
> 24. Mr Ellis's response was that the general interest noted on the Certificate of Insurance was sufficient, that it would be impractical to note all specific interests, and that the only explanation for some specific noting of interests was historical.
>
> 25. The Tribunal accepted Mr Ellis's argument that the noting of the general interest was sufficient and therefore determined that the failure to note Ms Green's specific interest was not such as to invalidate the insurance. It therefore does not provide sufficient reason for Ms Green to refuse to pay her contribution to the building insurance."

7. In granting permission to appeal the President observed:

> "Much of the content of the grounds of appeal consists of a catalogue of complaints that have nothing to do with the matter before the LVT. The LVT was concerned solely with whether the service charges for the insurance premiums were reasonable and payable; and in respect of all but one of the grounds that is advanced in relation to its decision on those matters there is no reasonably arguable case that the LVT was in error. The exception is the contention that the failure to insure in the joint names of the lessor and lessee as required by clause 4 (ii) means that there is no liability in respect of the insurance premium. On that there is a realistic prospect of success. Permission to appeal is confined to that issue. The appeal will be dealt with by way of review."

8. At the hearing before me the appellant Ms Green appeared in person. The respondent was represented by Mr Ellis of Prickett & Ellis Management Ltd who act as managing agents for the respondent. Mr Ellis is also the company secretary of the respondent.

9. The documentary material before me was substantially the same as that before the LVT, but with some more recent additions. The following points may be noted so far as concerns the basis on which the respondent placed the insurance of the building. It appears that for each of the years with which I am concerned the insurance was placed with AXA Insurance UK PLC. There are before me copies of the certificate of insurance for the following periods which (so far as relevant) are in the following terms:

(1) A certificate for the period 1 July 2005 to 1 July 2006 showing the respondent as the insured, showing that the property insured is 180 Archway Road (which is described as retail/office with flats above), showing entries for the type of insurance cover and the excess payable and the sums insured and the property owners liability cover and then stating as follows:

"The policy includes a general interest clause

Specific Interest	Shop – 180 – Mr C Charalambous Flat – 180a – Mr R Sinclair – Royal Bank of Scotland – 180b – Ms D Green – Cheltenham & Gloucester Flat – 180c –Mr G Andrews - Birmingham Midshire of Trinity Court, 21-27 Newport Road, Commercial First Mortgages Ltd"

(2) A certificate for the period 1 July 2006 until 1 July 2007 in similar terms save that the relevant entry now read:

"The policy includes a general interest clause

Specific Interest	Shop – 180 – Mr C Charalambous - Lancashire Mortgage. Flat 180A - Paul Munroe"

(3) There is no certificate before me for the period 1 July 2007 to 1 July 2008.

(4) A certificate for the period 1 July 2008 to 1 July 2009 in effectively the same terms as those of the certificate for 1 July 2006 to 1 July 2007.

(5) There is no certificate before me for the period 1 July 2009 to 1 July 2010.

(6) I am not concerned in the present appeal with the insurance year 1 July 2010 to 1 July 2011 because any liability in the appellant to pay a contribution towards the insurance premium for that period would not have arisen until 25 March 2011, which is outside the period with which the present case is concerned. I do however note that by this year the insurance had changed so that it was now placed with Zurich. There is before me a certificate for that year which is in similar terms to the certificate for 1 July 2006 to 1 July 2007 – i.e. the name and interest of two lessees is shown but the appellant's name and interest is not shown.

10. Thus it can be seen that for the year 1 July 2005 to 1 July 2006 Ms Green's name was specifically mentioned on the face of the certificate as having a specific interest in the building. However for the next year her name was omitted, although the name of the person interested in the shop and the name of the person interested in flat 180A was specifically noted. This was also the case for the year 1 July 2008 to 1 July 2009 and for the year 1 July 2010 to 1 July 2011. I assume (and Mr Ellis did not seek to persuade me otherwise) that the certificates for the missing years, namely 1 July 2007 to 1 July 2008 and 1 July 2009 to 1 July 2010 are in the same terms and that once again there is no mention of Ms Green's name on the certificate.

Parties' Submissions

11. Both Ms Green and Mr Ellis had prepared written skeleton arguments with reference over to their respective bundles. They developed their points briefly in argument and in answer to questions from me.

12. In respect of the year 1 July 2005 to 1 July 2006, the respondent would have paid the insurance premium for this year of cover at around 1 July 2005. Accordingly the appellant's obligation to pay the respondent one quarter of the sum expended arose (if it arose at all) on 25 March 2006. The certificate for this year shows Ms Green's name expressly upon the face of the document together with her flat being identified and her mortgagee being identified. Ms Green accepted in argument that insurance in these terms was sufficient compliance by the respondent with its obligation to place insurance in the joint names of the lessor and lessee. I agree. It follows that Ms Green is liable to pay to the respondent one quarter of the sum expended by the respondent in obtaining this insurance for this period 1 July 2005 to 1 July 2006.

13. In respect of the subsequent years Mr Ellis accepted that the insurance documents did not make any reference to Ms Green. However he submitted that this did not matter and he advanced the following arguments:

(1) He referred to a letter at page D2 of the bundle from Axa to the appellant dated 20 April 2005 confirming that her flat was insured under the policy and that her interest had been noted and that Axa were satisfied the insurance had been handled appropriately.

(2) He submitted that there was no doubt that the appellant's flat had been properly insured since 2004 under the policy which the respondent had placed. There was no doubt that if she had made a claim such claim would have been met.

(3) He submitted that it was only the location of the names on the certificate that could give cause for unwarranted concern.

(4) He said that in subsequent years the insurers ceased listing the individual lessees in the annual certificate because the insurers maintained that the "general interest" clause in the policy sufficiently covered them. He submitted that this was the general practice in the insurance industry. He referred to the general interest clause in the Axa policy (at pages C9 and C10 of the bundle). This clause provided, under the heading Mortgagees and Other Interests as follows:

> "The interest of the Leaseholder(s) Mortgagee(s) and Tenant(s) in the individual portions of the Property Insured to which the interest applies is noted such interests to be advised to the Company in the event of a claim……"

(5) He referred to a letter is dated 29 June 2011 from John Lowe of Invicta Insurance Services Limited stating:

> "With regard to your enquiry, I would advise that insurance policies are very rarely issued in the name of the lessee's as in many cases these are too numerous to be accommodated and are constantly changing, which makes this unworkable. Therefore, it is standard practice to issue the policy in the name of the management company and incorporate the "general interest clause" which protects the interest of the lessee's. I would confirm that the policy was issued on this basis at its inception on 9th August 2004, and I would further confirm that the policy has and continues to provide full cover in respect of the four leasehold flats and shop (hairdressers)."

(6) In summary Mr Ellis submitted that the insurance placed was entirely effective so as properly to insure the appellant's interest in the building and that the absence of the appellant's name from the insurance documents was not relevant bearing in mind the general interest clause.

Conclusions

14. With respect to the LVT, I consider that the LVT concentrated upon the wrong question. The LVT in paragraph 25 of its decision concluded that the noting of the general interest was sufficient and that the insurance was not invalidated and (in effect) that therefore the appellant's interest in the building was properly insured. However the question was not whether insurance had been placed which, on the balance of probabilities, would have been sufficient for the appellant if she had made a claim. The question instead is whether the respondent complied with its obligation under clause 4(ii) of the lease. The appellant's covenant is a covenant to pay one quarter of the sum expended for insuring the building "in accordance with Clause 4(ii) hereof". Accordingly in order to be entitled to seek payment from the appellant under her covenant the respondent must show that it has placed insurance in accordance with clause 4(ii). This clause requires the respondent to insure the building "in the joint names of the Lessor and Lessee".

15. As a matter of general impression (and leaving aside for the moment any authority) I consider that to place insurance in the name of the lessor, with no mention of the name of the lessee and with the lessee's interest being dealt with merely by the general interest clause, is not the same thing as placing insurance in the joint names of the lessor and lessee. I am confirmed in this view, ie that the intention of the parties under clause 4(ii) was that something more was required than merely the appellant's interest being dealt with under a general interest clause, by the closing words of clause 4(ii) which contemplate that the lessor will allow a note of the interest of any mortgagee to be endorsed upon the policy.

16. Mr Ellis suggested, on the basis of his understanding of the insurance industry and on the basis of the letter from John Lowe referred to at paragraph 13(5) above, that it was impractical and perhaps even impossible nowadays to obtain insurance in the name of both lessor and lessee. However no adequate evidence of this has been placed before either the LVT or this Tribunal. Also I notice that *MacGillivray on Insurance Law* 11th edition at paragraph 20-046 states:

> "A joint insurance in the names of both lessor and lessee is very commonly arranged."

In these circumstances I do not accept that it would have been impossible or impractical for the respondent to have placed insurance in terms where the appellant's name and property were expressly shown so as to make clear that the appellant's interest was a specific interest which was expressly covered by the insurance. Indeed it is clear that it was neither impossible nor impractical to do so bearing in mind that the respondent did in fact place such insurance which did expressly show the name and interest of two of the lessees in the building for the relevant years, but which omitted the appellant's name and interest. Also it may be seen that the appellant's name and flat were expressly recorded as a specific interest in the insurance for 1 July 2005 to 1 July 2006.

17. I also note that *Woodfall Landlord and Tenant* states at paragraph 11.093:

> "A covenant by the tenant to insure in the names of the landlords is broken if the insurance is made in their names jointly with that of the tenant. Similarly a covenant to insure in the joint names of the landlord and tenant is broken if the tenant insures in his name alone, but not if the tenant insures in the name of the landlord alone, for the addition of the tenant's name is purely for his benefit. A covenant to insure in the names of A and B is broken by insuring in the names of A, B and C."

18. It should be noted that in the present case the Tribunal has received no expert evidence in relation to the practice of the insurance market in relation to property insurance such as this, nor has either party been legally represented. It may very well be that under the insurance which the respondent placed the appellant was as fully covered in all normal situations as if her name and interest had been expressly stated on the face of the insurance documents. However I am not persuaded that the appellant's position under the insurance as placed (with her interest merely being covered by the general interest clause) was in all ways and in all circumstances exactly as good as if the insurance had been placed strictly in accordance with the respondent's covenant in clause 4(ii) of the lease. It may be her position was effectively as good as this so long as the freeholder was a respectable and responsible body. I have no reason to consider the respondent or Mr Ellis or his firm as anything other than entirely respectable and responsible and in this connection it is right I should record a passage in their favour which appears in paragraph 36 of the LVT's decision:

> "However the current freeholder appears to be very reputable. Mr Ellis is an experienced and considerate property manager, and the freehold company has a substantial interest in the premises being properly insured."

For so long as the freeholder remains a respectable and responsible body with a respectable and responsible managing agent 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. There are some theoretically possible circumstances, for instance if the freehold came into the hands of a body which was not respectable and responsible and which did not choose to act so as to ensure after a relevant event (e.g. a fire) that the appellant's interest was properly notified to the insurers under the general interest clause, where I can see that the appellant could be in a significantly less good position under the insurance as placed as compared with an insurance which was in accordance with clause 4(ii).

19. In the result I allow the appellant's appeal and I reach the following conclusions:

(1) In respect of the insurance for the year 1 July 2005 to 1 July 2006 (a quarter part of the premium for which would have become by the appellant on 25 March 2006) I conclude that this insurance was in compliance with clause 4(ii) and the appellant is liable to pay to the respondent one quarter part of this premium.

(2) In respect of the insurance for the years 1 July 2006 to 1 July 2007, 1 July 2007 to 1 July 2008, 1 July 2008 1 July 2009, and 1 July 2009 to 1 July 2010 I conclude that the insurance placed by the respondent was not in accordance with clause 4(ii) and the appellant is not liable to pay any part of the premiums incurred by the respondent for these years.

20. Mr Ellis indicated that it was not his intention to charge any fees for representing the respondent before the Upper Tribunal. He also accepted that there was no reason why I should not make an order under section 20C of the Landlord and Tenant Act 1985. I consider it would be just and equitable to make such an order. Accordingly I order that all of the costs incurred by the respondent in connection with these proceedings before the Upper 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 appellant.

Dated 23 July 2012

His Honour Judge Nicholas Huskinson