UPPER TRIBUNAL (LANDS CHAMBER)

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LT Case Number: LRX/4/2012

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – whether LVT decision on a point not raised with the parties unfair – landlord covenant to insure – whether implied term the insurance premium recoverable from the tenant as a service charge – appeal dismissed

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE EASTERN RENT ASSESSMENT PANEL

BETWEEN	**TREVOR SADD**	**Appellant**
	and	
	RUTH BROWN	**Respondent**

Re: 1a Norwich Street,
Hingham,
Norwich,
Norfolk NR9 4JJ

Determination on Written representations

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The following cases are referred to in this decision:

Thinc Group v Armstrong [2012] EWCA Civ 1227
Liverpool City Council and Irwin [1977] AC 239
Barnes v City of London Real Property Co [1918] 2 Ch 18
Rapid Results College v Angell [1986] 1 EGLR 53
Finchbourne v Rodrigues [1976] 3 All ER 581

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the Eastern Rent Assessment Panel ("the LVT") dated 17 October 2011 to limit the service charges recoverable in respect of a residential flat at 1a Norwich Street, Hingham, Norwich, Norfolk NR9 4JJ ("the Flat"). In that decision the LVT considered the liability to pay service charges pursuant to a lease dated 11 March 1988 and made between the Appellant and Michael John Sadd as Lessors and Paul Eamonn Adcock as Lessee whereby the Flat was demised for a term of 99 years from 1 June 1987 ("the Lease").

2. The application to the LVT was made by Rhona Wild who was at the time (August 2011) the lessee under the Lease and who challenged all of the service charges in respect of the years 2008/2009, 2009/2010, 2010/2011 and 2011/2012. In its decision the LVT allowed some service charges but disallowed others. In particular the LVT held that no insurance premiums could be recovered by the lessor from the lessee under the terms of the Lease and all premiums were disallowed. On 18 May 2012 the President granted permission to appeal limited to the issue relating to liability to pay the insurance premium and ordered the case be dealt with by way of review.

3. Subsequently Ms Wild sold her interest in the Lease to the Respondent who has indicated she does not wish to oppose or participate in the appeal. With the agreement of the Appellant the case is being dealt with by the written representation procedure.

The appeal

4. The application to the LVT raised two questions relating to insurance premiums: (1) whether the apportionment of the premium as between the Flat and other premises insured under the policy was reasonable and (2) whether it was reasonable for the lessor to recover any other sum as insurance, it being believed that the amount claimed included other charges.

5. In its decision the LVT found that the amount charged for insurance was reasonable, although it queried why the insurance covered loss of £31,000 rent as the Lease reserves only £40 per annum, rising to £80. However, the LVT also decided that, on the true construction of the Lease, no insurance premiums were payable by the lessee. In particular, paragraph 14 of the Fifth Schedule to the Lease which contains the obligation to pay service charges did not entitle the lessor to recover the costs of insuring in accordance with the obligation to do so in paragraph 2 of the Eighth Schedule.

6. It is clear from Ms Wild's applications to the LVT that she did not raise as an issue whether insurance premiums were recoverable as a matter of contract under the Lease. Her

concerns related to the reasonableness of the premium having regard to apportionment between properties and whether any other sums were included. It is true that a letter from her solicitors to the Appellant dated 3 May 2011 mentioned that the Lease did not contain a provision for recovery of the insurance premium, but no point was taken on that. In its application to the LVT for permission to appeal the Appellant complained that the LVT was "working outside its jurisdiction in making determinations on questions that have not been asked." That is not disputed in the LVT's reasons for refusing permission to appeal or indeed dealt with at all. The LVT appeal was dealt with on the basis of written representations and there is no evidence that the LVT raised with the parties the issue as to whether insurance premiums are recoverable under the Lease.

7. As the Court of Appeal recently confirmed in *Thinc Group v Armstrong* [2012] EWCA Civ 1227, for a court of tribunal to determine a dispute on the basis of a case not put forward by a party or not raised by the court or tribunal is unfair and not permissible, see paragraphs 50 & 51. It follows from the above that in my judgment the LVT was not entitled to hold that insurance premiums were not recoverable under the Lease without at least referring the issue back to the parties for their comments which it did not do. It should be observed that this is yet another example of the LVT taking a point not sought to be pursued by the party in whose favour the decision was taken and without giving either party an opportunity to deal with it resulting in an appeal that should not have been necessary.

8. However, in principle the LVT's jurisdiction does extend to determining whether sums are payable under a lease as service charges, see s.27A of the Landlord and Tenant Act 1985. Through its representations on the applications for permission to appeal the Appellant has had an opportunity to put forward its case as to why insurance premiums are recoverable under the Lease. When granting permission to appeal the President ordered the case be dealt with by way of review. By virtue of s.175(4) of the Commonhold and Leasehold Reform Act 2002 the Lands Chamber may exercise any power which was available to the LVT. Therefore it would be appropriate for the Lands Chamber to now determine whether the LVT was correct or not and whether insurance premiums are or are not recoverable under the Lease.

The issue

9. By clause 3 of the Lease, the lessee covenants with the lessors that he will observe and perform the covenants in the Fourth Schedule of the Lease. By clause 4 of the Lease, the lessee covenants with the lessors (and the lessees of other properties identified on a plan) that he will observe and perform the covenants in the Fifth Schedule. By clause 7 the lessors covenant with the lessee that they will observe and perform the covenants in the Eighth Schedule.

10. The Fourth Schedule contains covenants by the lessee to pay the rent reserved by the Lease, to yield up on expiry of the term, to pay any costs incurred in connection with service of a s.146 notice and to give notice of any assignment. It also includes the following covenant in paragraph 2:

> "To pay and discharge and indemnify the Lessors against all rates duties charges assessments impositions and outgoings whatsoever (whether Parliamentary Parochial Local or of any other description) which are now or may at any time hereafter be assessed charged or imposed upon or payable in respect of the demised premises by the owner or occupier thereof."

11. The Fifth Schedule contains various covenants by the lessee relating to the carrying out of works to the demised premises and restrictions as to the use of the demised premises including a prohibition on acts which may render void or voidable any insurance policy effected by the lessors or which "may cause an increase in the premium payable in respect thereof," paragraph 7. Paragraph 14 contains the substance of the service charge provisions:

> "14. (i) From time to time and at all times during the said term to pay to the Lessors a sum equivalent to the costs incurred by the Lessor in complying with his obligations under paragraph 1a) of the Eighth Schedule hereto
>
> (ii) From time to time and at all times during the said term to pay and contribute to the Lessors a sum equal to one half of the costs outgoings and expenses incurred by the Lessor in making the payments and providing the services set out in Clause 1(b) of the Eighth Schedule hereto
>
> (iii) From time to time and at all times during the said term to pay and contribute to the Lessors a sum equivalent to a reasonable proportion of the costs outgoings and expenses incurred by the Lessor in making the payments and providing the services set out in Clause 1(c) of the Eighth Schedule hereto"
>
> (iv) To pay to the lessor a collection fee of [£25] per annum (index linked…) and a further 10% of such sum (or whatever other percentage is determined by the Lessor) to cover the cost of estate Management (such total amount due hereunder being hereinafter called "the Service Charge") The Service Charge shall be paid in the following manner…"

There follows provision as to the method of payment of the service charge.

12. The Eighth Schedule contains a covenant by the lessor to pay a proportionate service charge in respect of other properties until they are let (paragraph 3) and to release the lessee from his covenants on any assignment (paragraph 7). The remaining paragraphs all require the lessor to carry out works or spend money in connection with the management of the demised premises which I summarise as follows:

> Paragraph 1(a): to keep the exterior in good repair and condition.
>
> Paragraph 1(b): to keep the main structure in good repair and condition.
>
> Paragraph 1(c): to keep the other properties and land shown on the plan in good repair and condition

Paragraph 2: to insure the demised premises and the building of which it forms part against loss or damage by specified risks for their full reinstatement value and in the event of loss or damage to reinstate, making up any shortfall in insurance money, to produce a copy of the policy on demand, to consent to the lessee's mortgagee being noted on the policy, to apportion the insurance so the demised premises is insured for its full reinstatement value and not to allow the insurance to lapse without the written consent of the lessee and lessee's mortgagee.

Paragraph 4: to paint the exterior in every 4th year.

Paragraph 5: to pay all reasonable costs relating to the management of the demised premises and other properties and of the employment of such person(s) as the lessor shall deem necessary in connection with the performance of the lessor's covenants in the Lease.

Paragraph 6: to provide such other services as the lessor considers reasonable and to be good management.

13. The LVT refers to the Lease and the provisions of paragraph 14 of the Fourth Schedule (an obvious error for the Fifth Schedule) which are summarised in paragraph 5 of the decision. After referring to paragraphs 1(a) to (c) of the Eighth Schedule which are specifically mentioned in paragraphs 14(i) to (iii) of the Fifth Schedule, the LVT go on to refer to the obligation to insure in paragraph 2 and to paint the exterior in paragraph 4 and then say this:

> "9. Crucially, there is no obligation placed upon the lessee to pay or contribute to any cost of insurance or external decoration in any of the clauses of the lease: only those costs incurred under paragraphs (or clauses) 1(a) to (c) in the Eighth Schedule. This error (at least concerning the insurance) was identified by the Applicant lessee's solicitor."

The last remark is a reference to the letter dated 3 May 2011 from Ms Wild's solicitors to the Appellant referred to in paragraph 6 above.

14. Later the LVT state

> "19. Insurance – As already mentioned above, the lease includes no provision requiring the lessee to reimburse any proportion of the insurance premium paid by the lessor: see the wording of Schedule 5 para 14 which does not refer anywhere to para 2 of Schedule 8. None is therefore recoverable, save by consent, unless the leases are varied either by agreement or application to the LVT under Part 2 [an error for Part 4] of the Landlord and Tenant Act 1987."

In paragraph 20 the LVT go on to find the amount charged for insurance and the apportionment reasonable. Paragraph 21 goes on to query why insurance covers loss of rent in the sum of £31,000 in respect of the Flat given the ground rent is only £40 rising to £80 and states that provision of alternative accommodation cover would seem more appropriate. The LVT does not go so far as to say that the sums sought to be recovered as service charge are not reasonable by virtue of the inclusion of cover for loss of rent and I note in passing that there is no cross appeal in respect of the LVT's finding of reasonableness.

15. The Appellant's case is that, although the language of the Lease is "not a little arcane," the costs of complying with paragraphs 2 to 7 of the Eighth Schedule are recoverable under the Fifth Schedule paragraph 14(i) to (iv) or the Fourth Schedule paragraph 2. It is said that payment for the matters contained in paragraphs 2 to 7 of the Eighth Schedule is an amplification of the leaseholders duties and therefore a requirement of paragraphs 1(a) to (c) of that Schedule. Therefore the costs are recoverable under paragraph 14 of the Fifth Schedule. The Statement of Case also refers to "schedule five section 4" which I take to me a reference to paragraph 14 of the Fifth Schedule as paragraph 4 contains a lessee's covenant to paint the interior of the demised premises. The argument is supported by a reference to the fact that the Lease has been scrutinised by 8 solicitors and 3 mortgage companies over the years none of whom have suggested that insurance premiums are not recoverable.

Decision

16. In my judgment the insurance premium is not recoverable under the express terms of the Lease. The Eighth Schedule contains 7 specific paragraphs containing very different obligations. It cannot possibly be said that an obligation to repair includes an obligation to insure when the obligation to insure, a quite distinct type of requirement, is contained in a separate paragraph which contains detailed provisions. Paragraphs 14(i) to (iii) of the Fifth Schedule are also quite specific, they cross refer to paragraphs 1(a) to (c) of the Eighth Schedule in terms and to no other provisions of the Eighth Schedule. Paragraph 14(iv) only entitles recovery of a collection fee, the amount or calculation of which is also specified, and 10% of "such sum" to cover the cost of estate management. Whether the phrase "such sum" refers to the immediately preceding collection fee or, as the LVT found, the whole of the sums due under sub-paragraphs (i) to (iv), it does not entitle the lessor to recover insurance premiums pursuant to the obligation to insure in paragraph 2 of the Eighth Schedule.

17. As to paragraph 2 of the Fourth Schedule, in my judgment the LVTs' approach to this provision was correct, see paragraph 3 of its reasons for refusing permission to appeal which states:

> "As this provision (which commonly appears in leases) concerns sums levied compulsorily upon land, whether as national or local taxation or statutory charges, the [Appellant's] argument that this also includes the payment of insurance premiums negotiated by the lessor is misconceived. This is especially so where there are specific provisions in the lease which deal with the lessor's contractual obligation to insure."

18. The cost of an insurance premium incurred by the lessor is not a 'rate, duty, charge, assessment or imposition' on the Flat. The highest it could be put is that it might be an obligation to 'indemnify' the lessor against an 'outgoing' which is 'assessed upon' or 'payable' in respect of the Flat by the owner. However, in my judgment such wording does not naturally extend to payment of a sum due under an insurance contract voluntarily entered into by the lessor. Paragraph 2 is dealing with charges imposed by others in respect of the Flat and requires the lessee to either pay them himself or reimburse the lessor for them. Nor is paragraph 2 a 'sweeping up clause' where a lessee covenants to pay for such other services as the lessee

considers necessary. Such a provision will not normally entitle a lessor to recover the cost of something for which specific provision is made elsewhere in the lease. In fact there is a provision requiring the lessor to provide such other services as the lessor considers reasonable and to be good management in paragraph 6 of the Eighth Schedule but again no corresponding obligation in paragraph 14 of the Fifth Schedule for the lessee to pay for them.

19. I have considered whether a term could be implied in the Lease requiring the lessee to reimburse the lessor for insurance premiums. It is certainly unusual for such a term not to be included and until this application to the LVT all parties appear to have been proceeding on the understanding that the Lease does contain such a provision. However, this is not the sort of case like *Liverpool City Council and Irwin* [1977] AC 239 where in a particular type of contract a term will be implied as a legal incident of the contract. This is a formal lease containing detailed provisions regulating the relationship between the parties and which on the face of it represents all the terms of the contract agreed between them.

20. A term may only be implied into the Lease if it is necessary to give business efficacy to the contract e.g. *Barnes v City of London Real Property Co* [1918] 2 Ch 18 where the tenant covenanted to pay a fixed amount for the services of a housekeeper and the court held that the landlord could not take the money unless he spent it on a housekeeper. However, it does not automatically follow that if one party agrees to provide a service or pay for something the other party is obliged reciprocate. In *Rapid Results College v Angell* [1986] 1 EGLR 53 the tenants of second floor offices held a 6 year lease under which the landlord expressly covenanted to repair the external walls, structure and roof but the service charge provisions only obliged the tenant to contribute to 50% of the costs of repairing the 'exterior.' Owing to disrepair the landlord was obliged to replace the roof parapet. Even though the offices were on the top floor the court held that the roof was not part of the exterior of the second floor offices and there was no obligation to contribute towards its repair. An important factor was that the lease was for only 6 years at a rack rent and one would not expect such a tenant to be liable for repairs to the main structure including the roof.

21. The position here is different in that the Lease is for 99 years at a ground rent and a lessee in these circumstances would normally be expected to reimburse the landlord an appropriate percentage of the cost of insuring the building. However, there is no provision in the Lease which gives any indication the parties contemplated the tenant would pay for the cost of insurance or indeed the other matters listed in paragraphs 4 to 6 of the Eighth Schedule to the Lease. This is not a case where the term being implied is an incident, as the court found a necessary incident, of an existing provision, such an the obligation to pay a service charge where a term was implied that it must be reasonable (*Finchbourne v Rodrigues* [1976] 3 All ER 581). To imply a term in the present case would be to effectively draft a completely new paragraph in the Fifth Schedule to the Lease, paragraph 14 of which already contains detailed and specific provisions as to what is recoverable by way of service charge. If a term should be implied to reimburse costs incurred pursuant to paragraph 2 of the Eighth Schedule then why not a similar term in relation to the obligations in paragraphs 4 to 6 of the Eighth Schedule? The implied term would involve re-writing the Lease. The fact that such a term would be reasonable or was probably omitted by mistake is not enough. The Lease is not unworkable without such a term. There are restrictions on the use of the Flat and a covenant not to do anything which may

increase the insurance premium in paragraph 7 of the Fifth Schedule which would protect the Lessor from unreasonable (as between lessor and lessee) increases in the premium. For all these reasons I do not consider that to imply a term that the lessee will reimburse the insurance premium is necessary to give business efficacy to the Lease.

22. The Appellant refers to an alleged inconsistency in the LVT's approach in that paragraph 9 of the decision only refers to insurance premiums not being recoverable and does not make a similar point about the cost of redecoration incurred pursuant to paragraph 4 of the Eighth Schedule. However, the LVT were alive to this point and deal with it specifically in paragraph 22. The LVT concludes that redecoration may also fall within paragraph 1(a) and (b) of the Eighth Schedule, being required to ensure the exterior and structure are kept in good repair and condition. There is no appeal against the decision in this respect.

23. The Appellant is not without a remedy. If appropriate a claim for rectification may be brought. Further, as the LVT pointed out the Appellant may apply for the Lease to be varied under Part IV of the Landlord and Tenant Act 1987.

24. For all these reasons this appeal is dismissed. No application for costs has been made.

Dated: 5 January 2013

Her Honour Judge Alice Robinson