



LRA/140/2007

LANDS TRIBUNAL ACT 1949

LANDLORD AND TENANT – service charges – liability – whether costs reasonably incurred – insurance premium – building consisting of ground floor commercial use with two flats above – landlord’s obligation to insure against fire and other normal residential risks – whether evidence that premium increased by insurance against additional risks – held no such evidence – appeal dismissed

**IN THE MATTER OF AN APPEAL AGAINST THE LEASEHOLD VALUATION
TRIBUNAL FOR THE LONDON RENT ASSESSMENT PANEL**

APPEAL by

Ian Shrimpton and Keith Jones

Re: 80A Bolton Crescent, London SE5 0SE

Before: The President

Appeal determined by written representations

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DECISION

1. This is an appeal against a decision of the Leasehold Valuation Tribunal for the London Rent Assessment Panel dated 16 July 2007 on an application under section 27A of the Landlord and Tenant Act 1985. The application relates to premises at 80A Bolton Crescent, London SE5 0SE, which consists of ground floor premises occupied as a motorcycle repair store and two flats, one on the first floor and one on the second floor. The applicants, the appellants in this appeal, are the tenants of the flats. The application, as the LVT put it in its decision, “essentially sought a determination for the year 1 October 2006 to 29 September 2007 as to the Applicants’ liability to make payments in respect of the buildings insurance premium paid by the Respondent.”

2. On 30 May 2007 a differently constituted tribunal had determined as a preliminary issue that, on a proper construction of the respective leases of the two flats, each of the applicants “is responsible for 33% of the landlord’s premium, subject to that premium being reasonable.” The preliminary determination also stated: “The Tribunal will require the Applicants’ case to be supported by evidence that the landlord’s premium is an unreasonable sum to be recharged to them at 33% each.”

3. In its decision the LVT recorded that the premium of the insurance policy effected by the landlord in respect of the building was £2,320.03 (including tax and terrorism) and the policy had evidently been arranged by Reich Insurance Brokers. In a covering letter Reich had said that the premium had been revised down from £3,201.06 “to reflect the occupancy of the property by Phoenix Motorcycles.” The letter also stated: “The insurance rating now reflects the tenancy of the property and is competitive for this type of property and occupation.”

4. In evidence before the LVT the applicants produced an alternative quotation that they had obtained off the internet. The premium quoted was £531.13 (including tax but not terrorism). The landlord produced an email from his brokers, which pointed out the differences in cover provided under the actual policy and that in the quotation, and he submitted that the applicants had failed to establish their case. The LVT said that with some hesitation it had decided to accept this submission. It went on:

“There can be no real doubt about the quotation obtained by the Applicants not being sufficiently on a ‘like-by-like’ basis to demonstrate that the premium paid by the Respondent was unreasonable. Nor is it really possible, given that the insurance was arranged via an insurance broker with a reputable insurance company, for the Tribunal to conclude that the Respondent acted unreasonably in incurring the cost of paying the premium (ie so that it would not be recoverable as a service charge under a.19(1) of the 1985 Act). It has to be appreciated that a landlord is not obliged to provide services, including obtaining insurance, at the cheapest possible rate. The cost only has to be ‘reasonable’ and there is always a range of reasonableness. The Applicants have not managed to show that the premium paid by the Respondent in respect 2006-2007 is outside the range of what can be regarded as reasonable.”

The LVT therefore decided that each tenant was liable to pay 33% of the premium of £2,320.03 (£765.61).

5. The decision then said:

“14. Finally, the Tribunal should clarify its reference to hesitation in reaching this decision. Apart from the particular difficulties of construing the two different leases involved, dealt with for present purposes as a preliminary issue but which will remain a potential source of difficulties until resolved by binding amendment or decision, the Tribunal feels considerable concern that the insurance policies considered and quoted include cover for commercial occupation of the ground floor.

15. The landlord’s obligation to insure the Building (ie 80A Bolton Crescent) under the lease of the first floor flat (clause 5.1) refers primarily to normal risks and perils under a householder’s comprehensive policy. Similarly, the lease of the second floor flat refers to “normal residential comprehensive risks” (clause 3(1)). The Applicants’ liability to contribute to the premium assumes that the insurance policy complies with the terms of their leases. However, no argument from the Applicants was raised at the Hearing that insuring the ground floor in the occupation of Phoenix Motorcycles (or successor businesses) is inconsistent with the Applicants’ leases. Nor was any evidence provided as to the amount, if any, by which the commercial occupancy of the ground floor has increased the premiums payable. So this factor could not be taken into account by the Tribunal.

16. Although it would be within the Tribunal’s jurisdiction to vary the leases so as to make satisfactory provisions for the recovery of such expenditure (ie on an application under Part IV of the Landlord and Tenant Act 1987), it would plainly be preferable for the parties to negotiate and agreement for appropriate amendments to be made to their leases so as to avoid future disputes requiring determination by a Tribunal.”

6. The tenants sought leave to appeal from the LVT. It granted leave, saying:

“The Determination dated 16 July 2007 involved acceptance of a preliminary decision that may not be correct.”

The landlord does not respond to this appeal, which falls to be determined, therefore, on the appellants’ written submissions. In these they say that had the preliminary determination not been made they would at the principal hearing have continued their original approach, which was that it was unreasonable for them to contribute equally to an insurance policy that includes cover for commercial risk as well as normal residential comprehensive risks. They produce copies of residential quotations for their respective flats, one from Norwich Union with a premium of £385.50 (in respect of the first floor flat) and one from Direct Line Insurance with a premium of £422.10 for “Flat 1St Floor and Abov”. They say that they would be happy if agreement could be reached with the landlord that the proportion of the existing premium payable should be reduced to 17.5% to reflect a cost based on the quotation of £400 or that the landlord should take out two separate policies, one to cover the two residential flats, to which they would each contribute 50%.

7. Two questions appear to me to arise in this appeal on the basis of the foregoing: firstly what it is that the leases provide for in terms of the tenants' contributions to the insurance premium; and secondly, in the light of this, whether the determination of the liability of each tenant at £765.61 has been shown to be wrong. I will consider these questions in turn.

8. Under the lease of the first floor flat the tenants covenants to:

“4.3 4.3.1 pay in addition to the rent first reserved at the times and in the manner hereinafter specified all sums as shall be determined under the provisions of this sub-clause to be the Maintenance Charge payable in respect of the demised premises

4.3.2 the Maintenance Charge in respect of each year of the Term shall be 33% or such other attributable to the demised premises (such proportion to be conclusively determined by the Lessor's surveyor) (“the due proportion”) of the costs and outgoings incurred by the Lessor during the relevant accounting year or any part thereof as follows:

4.3.2.1 in carrying out their obligations under Clause 5 hereof...”

Clause 5 contains the landlord's covenant to:

“5.1 Insure and keep insured... the Building against loss or damage by fire and other risks and special perils normally insured under a householder's comprehensive policy...”

“The Building” is identified in the demise as being the building known as 80A Bolton Crescent, of which the demised flat forms part.

9. Under the lease of the second floor flat the tenant is to pay a yearly rent and “by way of further or additional rent (and to be recoverable by distress as for rent in arrear) the same which shall become payable by the Lessee under clause 3(1) hereof.” The tenant covenants to pay the yearly and other rents in clause 2(1). Under clause 3(1) the tenant covenants:

“(1) At all times during the term hereby granted to insure and (unless the policy of insurance shall be vitiated by any act neglect or default of the Lessee) keep insured the Building and all buildings which may hereafter be erected in connection therewith against loss or damage by fire storm tempest aircraft and such other normal residential comprehensive risks as the Lessor may deem expedient and also two years' loss of rent and Architects' and Surveyors' fees...”

“The Building” is identified in the demise to mean the building known as 80A Bolton Crescent.

10. In its preliminary determination, the LVT said, in relation to the lease of the first floor flat, that it enabled the landlord to charge the 33% of the insurance premium of the building,

with the proviso that the landlord's surveyor could determine a different proportion. Since no other proportion had been determined, it said that it determined "that the tenant of the first floor flat is responsible for 33% of the landlord's premium, subject to that premium being reasonable."

11. In relation to the lease of the second floor flat the LVT said:

1. Clause 1 requires the tenant to pay the sums payable by the Lessee under Clause 3(1), whereas Clause 3(1) provides for expenditure by the Lessor. As it stands Clause 1 makes no sense and the **Tribunal finds that the word "Lessee" in Clause 1 is a drafting error. Clause 1 is construed as requiring the tenant to pay the sums payable by the Lessor under Clause 3(1).**
2. The obligation in Clause 1 is to pay "the sums" payable under Clause 3(1) – not a proportion of those sums. Clause 2(17) was pointed out by the landlord at the PTR to provide for the tenant to pay "a fair proportion". Although, this relates to other expenditure under Clause 3, but not 3(1), it is indicative of an intention that the tenant should pay only a sum that is attributable to the flat.
3. It is possible, but highly unlikely that, for reasons unknown, the tenant in 1982 agreed to repay the premium for the whole building. The landlord has not argued for this in its submission and has not attempted to charge more than 33%. **The Tribunal determines that the tenant of the second floor flat has to pay a proportion of the insurance premium of the building that is attributable to the flat.**
4. However, there is not clause in this lease which provides a method of calculating what that proportion should be. The thrust of the Applicant's argument however is not that 33% is an unfair proportion, but that the premium itself is higher than necessary to cover "normal residential comprehensive risks". The tenant of the second floor has not argued for a different percentage and **the Tribunal determines that the tenant of the second floor flat is responsible for 33% of the landlord's premium, subject to that premium being reasonable.**

12. In relation to each lease, therefore, the LVT expressed its preliminary determination of the tenant's obligation to be to pay "33% of the landlord's premium subject to that premium being reasonable." That was, in my judgment, a correct statement of the tenant's liability. In the case of the first floor flat the 33% was expressly provided for in clause 4.3.2. In the case of the second floor flat, although the lease contained no such percentage limitation, it appears to be clear that the LVT was invited by the parties to proceed on the basis that 33% was the proportion payable (see paragraphs 3 and 4 of the determination as set out above). In each case the cost of insurance, being a relevant cost under section 18 of the 1985 Act, was (under section 19) to be taken into account in determining the amount due only to the extent that it was reasonably incurred.

13. The statement of the tenant's liability in the preliminary determination did not spell out the risks that the landlord was obliged to insure against. In the lease of the first floor flat, the obligation is to insure "against loss or damage by fire and other risks and special perils normally insured under a householder's comprehensive policy." In the lease of the second

floor flat the obligation is to insure “against loss or damage by fire storm tempest aircraft and such other normal residential risks as the Lessor may deem expedient.” Though couched in slightly different terms these provisions are for present purposes, in my view, to the same effect. An insurance premium incurred in insuring the building against the risks specified would not be made unreasonable if, by reason of the ground floor being in commercial use, the premium was higher than it would have been if the ground floor had been in residential use. The obligation is to insure the building against risks of the specified categories, and this obligation is not qualified by the particular uses that may be made of other parts of the building. On the other hand if the landlord insured against risks additional to those normally insured against under a householder’s comprehensive policy the cost associated with these additional risks would not, in my judgment, be a cost reasonably incurred.

14. An alternative construction, which as I understand it is the one contended for by the appellants, is that the liability of each tenant is limited to his proportion of the cost that the landlord would incur in insuring the building on the assumption that the whole of the building was in residential use. This, however, is not what either lease provides, and I can see no reason for implying a term to this effect.

15. The fact that the preliminary determination did not express the tenant’s liability as being limited to normal residential risks (or, alternatively, to his proportion of the cost that the landlord would incur in insuring the building on the assumption that the whole of the building was in residential use) did not, however, inhibit the tenants from disputing, or the LVT from inquiring into, the reasonableness of the premium, taking such a limitation into account. Indeed the LVT appears to have recognised this in paragraph 15 of its decision. The only reason why it did not take into account the amount by which the commercial occupancy of the ground floor had or might have increased the premium payable was, apparently, the fact that no argument or evidence about this was advanced.

16. Leave to appeal was granted by the LVT, as I have said, on the basis that the preliminary decision construing the leases might not have been correct. In my judgment the preliminary decision was correct, and the LVT when dealing with the principal issue was not inhibited by the terms in which the preliminary decision was expressed from considering whether the premium was increased by the commercial occupancy of the ground floor. If the LVT thought that evidence ought to be provided on this matter, it could have adjourned the proceedings to enable this to be done. Instead, in my view correctly, it determined the application on the basis of the material before it. Since it had no evidence on the extent to which the commercial occupancy of the ground floor might have increased the premium, it accepted as reasonable the cost of insurance actually incurred by the landlord through the agency of competent brokers. That was, in my judgment, clearly correct, and I am at something of a loss to understand why leave to appeal was granted.

17. Nevertheless leave to appeal was granted, and it was not limited to review. The appeal is thus a rehearing. The landlord does not respond to the appeal. The appellants in their written submissions to this Tribunal have adduced insurance quotations relating to their flats and contend that these show that the amount properly attributable to each of them in respect of insurance of the building against domestic property risks is no more than £400. This, however, does not even begin to show that the risks insured against by the landlord included risks

additional to those (fire etc) normally insured against under a householder's comprehensive policy or that the premium paid by the landlord was thereby inflated. There is nothing that would suggest that the LVT was wrong to accept the landlord's case for the reasons that it gave in its decision. The appeal must accordingly be dismissed.

Dated 18 July 2008

George Bartlett QC, President