9061

Case Reference	:	**CAM/OOME/LSC/2012/0150** **CAM/OOME/LRM/2012/0012**
Property	:	**Flat 2 to 5, 39-40 Upper Thames Street, Windsor, Berkshire, SL4 1PR**
Applicant	:	**BH (Thames Street) Limited** **Represented by Laytons Solicitors LLP**
Respondents	:	**Victoria Charalambous ("the Respondent")** **39 and 40 Thames Street RTM Co Limited ("the Company")** **Both represented by MayfieldLaw Solicitors**
Date of Transfer of CAM/OOME/LSC/2012/0150	:	**31st October 2012**
Date of Application CAM/OOME/LRM/2012/0012	:	**5th December 2012**
Type of Applications	:	**Determination of the reasonableness and liability to pay service charges pursuant to section 27A of the Landlord and Tenant Act 1985 ("the 1985 Act")** **AND for an Order that the Company was, on the relevant date, entitled to acquire the right to manage the property pursuant to section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act")**
Tribunal	:	**Judge J. Oxlade** **N. Martindale FRICS** **P. Tunley**
Date and venue of Hearing	:	**12th July 2013** **Holiday Inn, 1 Church Street, Chalvey, Slough**

DECISION

For the following reasons the Tribunal finds that:

(i) **claim CAM/OOME/LSC/2012/0150 shall be transferred back to the County Court;**

(ii) **the sums demanded as service charges from the Respondent for insurance of £2675.97 and £3558.35 for the periods 25th March 2011 to 31st December 2011 and 1st January to 31st December 2012 are reasonable and payable;**

(iii) **the sums demanded as service charges from the Respondent for administration expenses for arranging insurance as 15% of the sums referred to in (ii) above are reasonable and payable;**

(iv) **the Tribunal refuses to make an Order pursuant to section 20C of the 1985 Act;**

(v) **claim CAM/OOME/LRM/2012/0012 is withdrawn**

(vi) **the Company shall pay to the Applicant assessed costs of £8400 including vat in respect of claim CAM/OOME/LRM/2012/0012.**

REASONS FOR DECISION

Background

The Claim for unpaid service charges

1. On 27th July 2013 BH (Thames street) Limit ("the Applicant") issued a claim in Kingston County Court against Victoria Charalambous ("the Respondent").

2. The basis of the claim was that the Applicant was the registered owner, and from 25th March 2011 was liable to insure the building. The Respondent, as lessee was liable to pay service charges in respect of the four flats, as to 19% in respect of flat 2, and 22% in respect of each of the flats 3, 4, and 5, so a total of 85% of costs. Further, the lease allowed for a management charge of 15%. Accordingly, the sum claimed was £7301.53, in addition to which there was statutory interest.

The Defence

3. The Respondent filed a defence in the County Court, denying liability to pay any sum to the Applicant, and she set out detailed reasons. For

reasons that will become apparent, it is apposite to set out here the detailed reasons given by the Respondent for saying that she did not consider herself to be liable for the sums demanded:

"(1) the leaseholders (including myself) were notified of the claimant's purchase of the freehold by letter dated 27th April 2011. The next contact the freeholder made was in February 2012 to demand service charges. During the period April 2011 and February 2012, the freeholder did not maintain or manage the building services at all. No correspondence details were supplied for emergency situations. The Claimant further refused to acknowledge my request to make contact during an emergency situation at the building which required his attention. With no contact from the freeholder and no acknowledgement of my requests for communication, I have continued to manage the building services and issues arising to the best of my abilities. I have also continued to insure the building at my own expense on behalf of the other leaseholders. Since July 2011 there has been ongoing flooding of sewerage in the building basement which causes a foul horrific smell to permeate the communal corridors and some of the properties. Windsor & Maidenhead Environmental Health have been notified of the problem. Thames Water have admitted liability due to a collapsed drain. The ongoing problem and the lack of involvement of the Claimant in dealing with the issue has caused me to claim off my insurance policy to rectify the damage incurred by the flooding and also to manage the situation personally. The issue is ongoing therefore my insurance claim is ongoing. Therefore, it is unreasonable for the Claimant to expect me to cancel my policy whilst it is covering repair of the building ("Issue 1")
(2) The claimant claims service charges of building insurance for a period of two and a half years prior to notice given on 17th February 2012, in contravention of section 20B of the Landlord and Tenant Act 1985 ("Issue 2").
(3) The insurance document provided by the Claimant for the period 2011-12 could not be validated as paid up by an independent insurance agent ("Issue 3")
(4) The Claimant's building insurance for 2012-13 is grossly overpriced compared with my own policy for the same coverage. The rebuild cost insured by the Freeholder is unreasonable ("Issue 4").
(5) As a consequence of the foul smell in the building, the leaseholders including myself have lost tenants and at present I am finding it difficult to re-rent vacant property. The freeholder has failed to address the impact of the building disrepair on the leases ("Issue 5").
(6) The Claimant is in breach of section 11 of the Landlord and Tenant Act 1985. A broken window of the commercial unit remains boarded up since the Claimant became freeholder of the building in April 2011. ("Issue 6")
(7)The Claimant has excluded the commercial unit in his calculation of the insurance premium between the leaseholders of the building. The commercial unit accounts for 23% of the total square footage of the building and the insurance premium benefits it equally with the

leaseholders. Therefore, it is unreasonable it should not contribute to the insurance premiums covering the whole building (Issue 7").
(8) The Claimant claims 15% management fee in addition to the insurance premium in contravention of the lease which states 12.5% share of professional fees ("Issue 8").

I do not have any confidence in the Claimant's ability to manage the building. His behaviour in pursuing these service charges has been unreasonable".

4. On 24th September 2012 District Judge Gold made an Order that the parties do file representations why the matter should not be transferred to the LVT.

Reply

5. In a reply dated 19th October 2012 the Applicant requested that the County Court deal with the matter, on the basis that it was a simple dispute concerning recovery of service charges incurred for insurance, and for which the Respondent was liable under the terms of the lease. The Applicant provided the following detailed response to the issues raised by the Respondent:

(1) On 27th April 2011 Lester Aldridge LLP Solicitors acting for the seller (Santander UK Plc) notified the Respondent of the Applicant's purchase of the freehold and reversion of the lease, and gave an address for the Applicant of Burley 237 Guildford Road, Normandy, Guildford; it asked that all future payments of service charge and rent should be paid to that address. The Respondent did not seek to make contact with the Applicant prior to the issue of the bills for insurance. The Applicant had a Windsor-based keyholder, Kempton Carr Croft, with whom the Respondent made contact when there was a sewerage problem; Thames Water said that it was an external foul sewer drainage issue, and that they were dealing with it, and so it was not an issue with the internal plumbing or sewerage. The Applicant had worked exhaustively with Thames Water to seek resolution. The building was insured by the Applicant, in accordance with the lease, and the Applicant had provided to the Respondent of the insurance. The Respondent may not be able to make a claim on the insurance as she has no insurable interest, and in any event the buildings were under-insured.
(2) The claim did not breach section 20B as none of the sums claimed were in respect of a period more than 18 months before the demands were issued.
(3) Insurance is paid monthly, by direct debit, by the Applicant's broker would not speak to the Respondent in the absence of prior authorisation, which had not been sought; the Respondent had not asked for evidence of payment of the premium.
(4) The Applicant would address rebuild and policy cost at a hearing.
(5) The Applicant had worked exhaustively with Thames Water, who had been on site for 2 weeks. The building is not in disrepair, though

the basement has been flooded and has been professionally cleaned by Thames Water. The foul smell had affected the whole building.
(6) The Respondent had been advised that the window of the commercial unit would be replaced once a tenancy for the retail unit had been agreed; in light of the continuing problems resulting in the premises not having been let, the landlord has proceeded to replace the windows.
(7) The proportions of service charge are clearly set out in the lease and the charges have been applied in accordance with the lease; as the Respondent's own Solicitors appear to have drafted the leases it was not clear why the Respondent bought the leases if she disagreed with the proportions.
(8) The 15% management fee was applied in accordance with clause 10 of page 24 of the leases.

Transfer

6. On 31st October 2012, on the Court's own initiative, the claim was transferred to the LVT by Order of District Judge Gold for the LVT to "determine the claim having regard to the issues raised in the defence".

Proceedings before the LVT

7. On 27th November 2012 the President of the Eastern panel of the LVT made Directions, noting that (a) the Tribunal has no jurisdiction to determine if the landlord or management company have broken the terms of a lease by failing to comply with the covenants as to repair. Accordingly, the only issues raised in the defence over which the Tribunal has jurisdiction are:

"(1) whether the insurance premium is reasonable, and (2) whether the management fee is reasonable and payable".

The First Hearing

8. The application was listed for hearing on 19th March 2013, at which hearing both parties were represented: Ms. Creer of Counsel represented the Applicant and Ms. Mossop, Solicitor, represented the Respondent.

Preliminary Issue – jurisdiction

9. There had been correspondence between the parties prior to the hearing concerning the ambit of the Tribunal's jurisdiction, in light of the case of John Lennon v Ground Rents (Regisport) Limited [2011]UKUT 330.

10. The Respondent's primary position was that the Tribunal had jurisdiction to consider all points which the Respondent wished to raise, including:

(a) the Applicant's failure to adduce evidence that insurance costs had been incurred i.e. paid by the Applicant,
(b) the Applicant's failure to provide services to a reasonable standard,

(c) the Applicant's failure to comply with a condition precedent in the lease of service of a statement of management expenses in accordance with clause 1.27, meant that the Respondent's liability to pay service charges was not triggered,
(d) the Applicant's failure to show that administration costs had been incurred,
(e) the Applicant's documents showed that Campsie Commercial was engaged as managing agents from 6th September 2012, which precluded the Applicant from recovering a 15% administration charge thereafter,
(f) the Respondent had to mitigate her losses by maintaining the insurance policy herself, because of the Applicant's failure for the first 10 months to communicate that it was insuring the building; the costs expended by the Respondent in insuring the building should be set off against the Applicant's demand for service charges,
(g) the Applicant failed to show that it was entitled to management charges of 15% as it had failed to show that its management was to a reasonable standard, and that Campsie were only employed from 6th September 2012 onwards,
(h) the Respondent would assert that the Tribunal had jurisdiction to determine if a service charge is payable, and this encompassed the Respondent's assertion that the terms of the lease were unfair, when considering regulation 5(1) of the Unfair Terms in Consumer Contracts Regulations 1999, as the lessees were all liable to pay insurance including the commercial unit, without any contribution from the Applicant,
(i) the Respondent would seek a transfer back to the County Court of the dispute, for the County Court to determine whether the lease should be rectified as to unreasonable insurance terms.

11. In light of the Applicant's position in correspondence and in anticipation of the Tribunal's view of John Lennon the Respondent sought to file with the Tribunal on the morning of the hearing a section 27A application, and wished to proceed with the application in its totality that day.

12. The Tribunal heard submissions from both parties and concluded that the Tribunal's jurisdiction derived from the order for transfer, and so the issues with which the Tribunal was concerned, were those identified in the defence filed in that action. Further, whilst the Respondent now sought to expand the extent of the dispute before the Tribunal, the Applicant did not consent to a widening of the Tribunal's jurisdiction, and who had inadequate forewarning of the application, and so was unable to deal properly with it.

13. Accordingly, the Respondent applied to adjourn on the basis that she wished to proceed with the section 27A application, and that it would

be in the interests of justice for the Tribunal to be seized of all matters, rather than determining issues on a piecemeal basis.

14. The Tribunal acceded to the Respondent's submission that it should be adjourned; it was not in the interest of either party or the Tribunal to cover the same ground on two separate occasions. The Tribunal indicated that it would issue directions in due course and in light of the late filing of the section 27A application would not accept unnecessary delay.

Post-first hearing Matters

Right to manage

15. On 16th April 2013 directions were made. The Tribunal noted that there was also an application made by the Company, to acquire the right to manage, pursuant to section 84(3) of the Commonhold and Leasehold Reform Act 2002 ("the right to manage application"). The Respondent was a Director and shareholder of the Company, and the driving force behind the application. It appeared just and convenient for all applications to be heard at the same time by the same Tribunal. A date of 12th July 2013 was set for all three applications.

Dismissal of section 27A

16. In June 2013 the Applicants notified the Tribunal that the Respondent had failed to comply with Directions made to progress the section 27A application, and so the Tribunal invited submissions from both parties on the Applicant's application to dismiss the section 27A application for want of failure to comply with directions. On 2nd July 2013 the Tribunal made a determination on the papers to dismiss the Respondent's section 27A application, for want of compliance with the Directions Order dated 16th April 2013, which had caused prejudice to the Applicant. The Tribunal noted at paragraph 16 of the decision that the Respondent had, in the documents filed, sought to raise a further issue – namely damages due for breach of covenant to be set-off against any liability of the Respondent to pay service charges.

17. The effect of the decision to dismiss the section 27A application is that at the hearing listed to proceed on 12th July 2013 the Tribunal would deal only with the dispute as transferred to the LVT as a result of the County Court Order

Right to Manage – withdrawal

18. On 9th July 2013 the Company applied to withdraw the right to manage application. This was because it had been left in a difficult position by a delayed surveyor's report, which was crucial to the question of the calculation of the commercial premises as a proportion of the building; this went to the heart of the dispute over the right to manage.

19. On 10th July 2013 the Tribunal consented to the withdrawal of the application of the right to manage, save in respect of costs which would be determined at the hearing set for 12th July 2013, in accordance with the Tribunal's power pursuant to section 88(4) of the 2002 Act.

The Second Hearing

20. Accordingly, the matter was listed for hearing on 12th July for determination of:

(i) the reasonableness and payability of service charges, with the issues as framed by the issues raised in the pleadings before the County Court, (ii) consequential costs orders arising from (i), and (iii) the Applicant's costs incurred in responding to the right to manage application against the Company.

21. At the commencement of the Second hearing in light of the Respondent's skeleton argument which sought to address all of the points set out in paragraphs 10 and raise additional arguments, the Tribunal heard as a preliminary issue the ambit of the jurisdiction of the Tribunal at the hearing. The Applicant's position was as before: that the case of Lennon made clear the Tribunal's limited remit on a transfer from the County Court; that the Applicant did not consent to an extended jurisdiction; that the Respondent had the section 27A application dismissed, and the Respondent's attempt was now to undermine that dismissal.

22. Ms. Mossop conceded that the case of Lennon bound the Tribunal, but that in order to determine that the Applicant was entitled to service charges the Applicant must prove that they had spent money on insurance and it would be wrong in law to proceed without requiring that; as the Respondent had not admitted liability or quantum, the Tribunal must determine those matters. She said that her position was entirely consistent with CPR on the content of a defence, particularly 16.5(3) which provides that a defendant who fails to deal with an allegation, but sets out in his defence what the nature of his case is in relation to the allegation, will be taken to require the allegation to be proved. By 16.5(4), where it is a money claim he shall be taken to require that any allegation relating to the money claim be proved unless he expressly admitted the allegation. The Respondent's position was that it should not be the approach of the Tribunal to consider only the framing of the dispute by reference to what the Respondent said in her defence.

23. In reply Ms. Creer relied on paragraph 24 of Lennon and said it would go behind this decision to require the Applicant to prove anything which was not raised by the defence. She conceded that the Applicant needed to prove that there is a contractual right to the money – by

virtue of the lease – but need not go further and anticipate every argument that the Respondent thought to raise.

24. The Tribunal found that its jurisdiction was limited to those issues raised in the defence. It would not, upon transfer back to the County Court, prevent the County Court from examining other issues which the proceedings disclosed. This was conceded by the Respondent at the last hearing, which resulted in the issue of the section 27A application. Accordingly, the Tribunal would decide only those limited issues set out in the defence.

25. The Tribunal heard oral evidence from Mr. Lee and Mr. Casement on behalf of the Applicant, and the Respondent.

26. At the end of the hearing the Tribunal directed that the Applicant file a copy of bank statements showing that the insurance premiums had been paid for 2011/12 and 2012/13, as claimed, redacted save as to the amounts paid, dates of payment and the identity of the account holder.

27. In the events that occurred there was no time to hear the right to manage costs application, and so that aspect of the case was adjourned for the parties to settle, in default of which the Tribunal would consider the matters on the papers alone.

28. The Tribunal re-convened in the absence of the parties on 6th August 2013 to consider the applications.

Relevant Law

29. The relevant statutory provisions are set out in Appendix A.

Findings

30. The Tribunal has carefully considered all of the evidence filed, both oral and documentary, and the submissions made both orally and in the skeleton arguments filed by both parties.

Issue 1 - The Respondent's case

31. The Respondent relied on oral evidence and three witness statements made by her. Her essential point was that the previous freeholder went into receivership, and the mortgagor (Santander) took over, although they neglected the building. She became concerned because (i) the building would receive overdue demands for utilities, and she was worried that essential services would be cut off (ii) she made sure that fire extinguishers were serviced, (iii) she paid insurance for the whole building and did not receive demands from Santander, and (iv) the cleanliness of the building had deteriorated. In short, she was left to manage the building. Then the Respondent received notice that the Applicant had purchased the freehold interest, but she received nothing from the Applicant direct. She carried on as before and managed the

building and continued to insure it. She just let the insurance run. She anticipated that the Applicant would contact her to say what they planned to do with the building, but received nothing from them. In July 2011 there was an emergency; there was a massive flood and she realised that she did not even have a telephone number for the Applicant; she needed access to the commercial unit and so sought contact with the Applicant through the advertising board for Kempton Carr Croft outside the premises. She was supplied with a wrong number, and so complained, and then had a letter saying that she had been "aggressive".

32. The Respondent had insured the premises, having disclosed the true situation to the insurance company; it included a loss of rental income, which arose because of the flooding; fortunately she was able to make a claim for 6-months loss of rent. The loss adjustor kept open the claim, in case of the need for redecoration caused by Thames Water having to run the sewerage pipes through the communal hallway – with an impact on the decorations. Eventually, Campsie took over management in September 2012.

33. The first correspondence from the Applicant arrived on 17th February 2012, to which she responded, and though there was correspondence, it was not resolved. She had first told the Applicant that she had organised insurance in a letter dated 28th February 2012, and she had asked for evidence to demonstrate that the Applicant had paid for insurance, as claimed, which had not been supplied. Against this backdrop she felt unsafe to cancel her policy, because of the lack of proof and indeed there was no maintenance organised by the freeholder until September 2012.

34. In cross-examination the Respondent accepted that she had an address for the Applicant by letter dated 27th April 2011, but did not write to the Applicant as she had expected the Applicant to contact her. There was flooding in the summer of 2011 and she had tried to contact the Applicant, but was given a false number. She was outraged, and took the view that the Applicant was negligent and did not care about the building. She accepted that perhaps Kempton had given the wrong number, but they were acting on the Applicant's instructions. She was clear that the Applicant was demanding insurance, but had never adduced evidence. In fact at the outset the Applicant claimed insurance for the building, prior to its purchase, and so she distrusted the demand. The relationship got off to a bad start. The 2009 and 2010 claim for service charges arising from insurance has fallen away, because of section 20(B). The Respondent accepted that by 1st March 2012 she was aware that insurance was in place.

Issue 1 - The Applicant's case

35. The Applicant relied on the oral evidence of Mr. Christopher Lee and his witness statements; he works as a business consultant for the

Applicant. He added that the Applicant exchanged contracts on 25th March 2011, buying from Santander (as mortgagee in possession) and so the liability to insure arose on that date. The Applicant insured from that date.

36. In cross-examination he said that the reason for taking out the insurance from 25th March 2011 was that it was required by Santander, and they were advised accordingly that it was standard practice.

37. The Applicant did not make direct contact with the Respondent until the following year as Kempton were marketing the commercial unit, had the keys, and were liaising with the Respondent directly. He had spoken to Thames Water, as the Respondent was alleging that the drains in the basement had flooded, but Thames Water said that the survey by the engineers showed that it was Thames Water's drains, not the freeholder's drains. He was unsure when Kempton were in touch with the Respondent, though he thought that the survey took place on 20th April 2012. The freeholder had voluminous correspondence with Thames Water and he strongly refuted the suggestion that the Applicant had neglected the building. He had not produced the documents, as he had not thought that the Applicant's entitlement to recovery depended on this point. He agreed that there were no repairs to the window in the commercial premises until 2012, but this was because of the ongoing situation with Thames Water. He said that the lessees may have formed the view that the Applicant was not managing the building, but this was because they were not party to the discussions.

38. The Applicant had not undertaken the cleaning, as they had been told that the lessees did their own cleaning, and so did not instruct anyone to undertake this. He agreed that the Applicant had not paid utilities and other items direct until Campsie took over in September 2012, but said that the Respondent had been reimbursed for invoices that she had paid. Mr. Lee personally inspected the premises at least weekly, though he had not produced documents to support this.

39. In answer to the Tribunal's questions the witness said that Mr. Lee's company had been engaged to undertake the administration around the finances, the book keeping, to collect ground rent and to liaise with the letting agents. Their brief was to keep an "eye" on the building, but not to manage it. He accepted that they had not, from day 1, communicated to the tenants that they were taking over insuring and managing the building; they had waited a year to do so.

40. In accordance with the directions made on 12th July 2013 the Applicant filed bank statements, showing that the insurance premiums had been paid from a bank account operated by Ultimate Lifestyles Limited and that in due course these were refunded by BH (Thames Street) Limited, who thereafter took over the payments for 2011 and 2012. The sums originally claimed were incorrect, and so the annual insurance costs to the Respondent for the four flats were £2675.97 from 25th March 2011

to 31st December 2011 exclusive of management fees and £3558.35 for 1st January 2012 to 31st December 2012 exclusive of management fees.

Issue 1 – findings

41. There is no issue but that the lease requires the Applicant as freeholder to insure the premises, which definition includes the commercial unit. Further, that the Respondent as lessee is required to contribute to the costs of insurance in percentages specified in the lease, as set out in paragraph 2 of the decision.

42. The lease imposes no positive obligation on the Applicant to notify the Respondent of insurance being taken out on the premises prior to it being taken out, until such time as the lessor is met with a request under clause 4.4.3 to produce to the lessee without any reasonable delay, full details of the landlord's insurance and evidence of payment of the most recent premium.

43. Although the Respondent relies on the absence of contact by the Applicant from 2011 to 2012, coupled with the neglect of the building and the failure to meet bills and responsibilities, as a reason to continue to insure the building, the facts do not give rise to a basis on which the Tribunal could say that the sum demanded was not reasonable or payable under the lease. It is not open to the Tribunal to exercise discretion or to import notions of fairness into the question of operation of the lease, which is what the Respondent really seeks.

44. Whilst each party criticised the other's actions, the Respondent had no legitimate basis for assuming that insurance was not in place as required under the lease, and if in any doubt could have made an enquiry for information under the terms of the lease (clause 4.4.3). The Applicant had no basis for assuming that the Respondent would insure the premises, because the lease did not require her to do so. There is no adequate evidence in respect of the insurance arrangements made by Santander; there is no evidence to conclude that there was any agreement between the Respondent and Santander for her to undertake insurance and management responsibilities; there is no basis on which the Tribunal could find that the Applicant was in anyway "fixed" with knowledge that the Respondent had in the past insured the building; in short there is no evidential basis on which an estoppel could be found to operate.

45. In light of the limited nature of our remit, the Tribunal has not considered whether of not the landlord has operated the service charge account correctly in accordance with the requirement to issue a "statement of account", and to perform a balancing exercise. Nor has the Tribunal considered any argument for a claim for damages against the Applicant for breach of quiet enjoyment, or a failure to produce insurance documents within a reasonable time as demanded under 4.4.3.

46. On the evidence now adduced the Tribunal finds that there is adequate evidence to show that the building was insured at the material time, and what were the costs of insurance.

Issue 2 – findings

47. The Applicant conceded in correspondence prior to the issue of the County Court proceedings that the sums claimed for insurance by Santander were stale, and so did not seek to argue that they were recoverable, in light of the section 20B argument raised by the Respondent. This was a non-issue before the Tribunal.

Issue 3 – findings

48. The Respondent's case was that when told about the insurance in place in February/March 2012 she sought to make enquiries of the Applicant's brokers to "validate it". The brokers declined to release information, for data protection reasons. The Applicant accepts that the Respondent made these attempts, and said that had she indicated that is what she was doing, then the Applicant would have provided the information.

49. In fact the Applicant has now provided the full information, only as a result of the Tribunal's insistence at the end of the hearing in July. The Tribunal finds that the Applicant has not been particularly co-operative in respect of adducing evidence of payment, and had not complied with the terms of clause 4.4.3 of the lease until the Direction was made in July 2012. Whilst this does not affect the recovery of the premium payable by the Respondent to the Applicant, and cannot go to the issue of recoverability, it will no doubt go to the issue of costs as between the parties, when assessment is made by the County Court.

Issue 4 – The Respondent's Case

50. The Respondent's case is that the insurance arranged by the Applicant for the year 2012/13 is unreasonably high; the Respondent uses her own policy as a comparison. The dispute turns on the proper rebuild value of the premises for insurance purposes.

51. In oral evidence the Respondent said that she wanted to understand how there was a difference of approximately £2000 between the costs of the two competing insurance policies, and so asked her insurance broker PJ Insurance Brokers Limited. This gave rise to his letter dated 20th July 2012 in which he referred to there being a wide difference in the sum insured: the Applicant's policy shows a sum insured of £2,583,566 whereas the Respondent's policy shows a sum insured of £1,254,000. He said that his policy was in line with the RICS guide for the size, age of the building and ease of repair. They included an 1 day uplift of 15%, whereas the freeholder's was written on an index-linked basis. The terms offered by the Applicant's insurer (Aviva) were subject

to a site survey to be completed by 25th April 2012, and he asked if this had been carried out.

52. The Respondent pointed out that Mr. Symonds of Campsie notified the Applicant on 6th September 2012, at page 394 of the bundle, that the building should be insured on a full reinstatement basis for £1,761,00; this was closer to the figure that she had provided. Her broker was of the opinion that the policy did not follow RICS guidelines. She considered that the Applicant plucked a figure from the air, and that not enough care was taken on the point. The consequence was that it was more expensive.

53. In cross-examination the Respondent said that she had asked her broker to obtain alternative quotes, but that the flooding affected his ability to do so, as did the fact that the commercial unit was vacant. It was put to her that he policy did not include terrorism, which she said she did not know; her policy included loss of rental income on the non-commercial part. The Respondent had provided the measurements of the premises to the broker – she thought on the basis that it was 5 flats and commercial premises, and gave him the square footage - and he calculated a re-instatement value of £1,254,000, based on his knowledge and experience. In re-examination she pointed out that the letter dated 20th July 2012 provides a quote on the basis of an uplift; he says that he based his quote on RICS guidelines.

Issue 4 – The Applicant's Case

54. The Applicant principally relied on the evidence of Phillip Casement, insurance broker, who had filed a witness statement. In evidence-in-chief he said that there were differences in the basis of the quotes provided by both parties: a 30 day and 15 day cover, which protects against re-building price inflation, though this would not produce a significant variation in premiums. He said that he would not consider himself to be an expert, and so would not go down the route of estimating re-build values; he would recommend a professional valuation, and always advised his client accordingly. The rebuild value did not overly influence the premium payable. When he asked for a quote on the basis of unoccupancy – as disclosed by the Respondent to her insurers – his insurers declined to provide a quote, and so he was unable to provide a like for like quote.

55. Aviva agreed to cover the building, subject to survey, which was done subsequently. No questions were asked in cross-examination nor re-examination. In answer to the Tribunal's questions the witness said that he arranged insurance on the basis of what his client – Mr. Lee – said was in the report. The position is that post-survey the insurers can alter terms offered. In this case there were some fire safety issues raised.

56. Mr Lee said that he had initially arrived at a re-build value in discussion with Kempton Carr, to see what they felt, as they had to obtain cover immediately. Campise produced letters after inspection at pages 394 ad 395 showing the reinstatement value of £1,761,000 but that did not include loss of rent from the retail unit. This was supplemented by an explanation that the vat element of the costs of £454,000 had not been added for the commercial unit. Other items were added, including the 30% day 1 cover and full replacement of the fixture and fittings in the residential units on the basis that they have decent kitchens. The breakdown of insurance costs at page 396 was written by Mr. Lee. In cross-examination he said that re-build costs in Windsor are inflated by matters such as not (for security reasons, being next to the Castle) being able to leave skips on the road, that permissions have to be granted and can take up to 2 years longer.

Issue 4 – findings

57. The Tribunal is to look only at the reasonableness of insurance costs in the year 2012-13, as the earlier year was not challenged. The root of the dispute is the reinstatement value.

58. Both parties produced competing evidence, none of which was presented as a whole by professionals, so each required much explanation and supplementation by the parties. It is usual to expect an expert valuer to provide valuations in RICS format with floor areas, using BICS guidelines, and an adjustment for age of construction and geographical factors. Neither had done so. The Applicant has done marginally better than the Respondent, as the Applicant's valuer had provided a loss of rent calculation; the Applicant did at least have a professional valuer prepared to commit his rebuild value to paper.

59. In the absence of better evidence, the Tribunal is left with preferring one cost over another; it is not realistic for the Tribunal to attempt to calculate for itself the applicable reinstatement value or premiums. The Applicant's evidence is preferable to the Respondent's; the latter having no clearly stated basis on which the reinstatement value was calculated; the Tribunal considers that it is somewhat usual to encounter a broker who would or could accurately assess reinstatement costs in what is a difficult and unusual site, with some of the complications referred to by Mr. Lee.

60. In the circumstances the Tribunal is satisfied that the insurance costs for the year 2012/13 are reasonable and payable.

Issue 5

61. The Respondent's point in respect of this was to seek a set off for damages for disrepair, and it was conceded that this was better determined as a whole with the outstanding issues referred to under issue 1. Accordingly, the Tribunal makes no finding in this respect.

Issue 6

62. It was conceded that section 11 of the 1985 Act relates to the duty to maintain structures and exterior of residential accommodation; this was not an apposite provision to consider in light of the broken window being in commercial premises. Accordingly, the Tribunal makes no finding in this respect.

Issue 7

63. The Respondent's position is that the leases are unfair as they make provision for the residential lessees to contribute to the insurance over the commercial premises; the commercial premises do not contribute to this.

64. At the first hearing it was agreed that this dispute was better determined in the County Court. Accordingly, the Tribunal makes no finding in respect of this issue.

Issue 8 – The Respondent's position

65. In respect of this item the Respondent's skeleton argument indicated that this point was abandoned. However, in closing submissions Ms. Mossop indicated that the Respondent's position was that as the Applicant had not adduced evidence of incurring insurance or management charges, neither were recoverable.

Issue 8 – The Applicant's position

66. The Applicant's position was that as managing agents were appointed after 6th September 2012, the flat rate of 15% was not recoverable from that date.

Issue 8 – Findings

67. The lease provides, by paragraph 10 of the Sixth Schedule, that for as long as the landlord does not employ managing agents in respect of the estate, he shall be "entitled to add a sum not exceeding 15% p.a. to any of the items in Part 1 of this Schedule for administration expenses". The addition of the words "any of the items in Part 1" include the costs of any expenses incurred by the landlord in carrying out the obligations under the lease. It follows that in respect of the additional 15%, the landlord need not prove that he has incurred out of pocket expenses on administration; it is a percentage to add irrespective of any cost to the landlord in addition to the substantive items. Accordingly, the landlord can add 15% on insurance costs from 25th February 2011 to the date when Campsie were appointed as agents, and the Tribunal finds that the service charge in this respect is reasonable and payable.

Costs arising from transfer

67. The Respondent made an application pursuant to section 20C of the 1985 Act to preclude the Applicant from recovering legal costs arising in the proceedings. The Tribunal declines to make an Order for the following reasons: the Applicant has been substantially successful; the County Court has the power to make costs orders, and upon transfer back and final disposal will take into account all matters including those before the Tribunal; there are a number of outstanding issues for the County Court to determine. Accordingly, the Tribunal transfers back to the County Court the case, and leaves open the question of costs and a section 20c application.

Costs from failed RTM application

Background

68. Pursuant to section 86 of the 2002 Act, on 9th July 2013 the Company gave notice to withdraw the application for the Right to Manage. This was because the dispute was as the proportion of the premises which were commercial, which affected the entitlement by the Company to manage the premises. The matter depended on expert evidence and the Respondent was unable to produce an expert report in accordance with Directions.

69. The Company concedes liability to pay costs to the Applicant, in accordance with Section 88(1)(a); the issue between the parties is quantum. The Applicant says that it spent £14,005.10 incl. vat and should recover this sum, and seeks an Order to that effect. Both parties rely on the statutory provisions set out in section 88(2).

The Applicant's submissions

70. The Applicant relies on (i) the bundle of documents filed in anticipation of the hearing on 12th July 2013, to show the background of the dispute and (ii) costs submissions dated 31st July 2013, with attachments.

71. The costs were broken down as follows: from service of claim notice to issue of LVT application (10th September to 5th December), £2984 plus vat; from issue of the LVT application to determination of proceedings (6th December 2012 and 15th July 2013) £7505.60; from 16th July 2013 onwards in preparing the costs schedule and submissions and liaising with the Tribunal, £1182.15 plus vat. The Applicant's Solicitor produced the schedules of costs incurred, showing the fee earner's hourly rate of £185.00, and a spreadsheet of time spent. The disbursements paid to Campsie property consultants were supported by invoices.

72. A chronology contained within the Applicant's submissions sets out the progress of the matter: it was served with a notice of the right to manage on 10th September 2012, and served a counter-notice setting out its position (which has remained unchanged) that the commercial

premises exceeded 25% of the area, and so the claim could not succeed. The Applicant made an suggestion of obtaining a joint survey to resolve the matter, which was rejected. The Applicant offered dialogue to attempt to resolve the matter, to save costs, but this did not progress matters. The Applicant considers that the Company dragged its heels in complying with the Tribunal's directions and so costs were incurred in liaising and chasing. Further, in April 2013 the parties arranged a joint survey, and this showed that the size of the commercial premises meant that the statutory test could not be met. The Company declined to withdraw, and persisted.

73. In short, the Applicant's case is that the Company has known all along the point in issue, dragged its heels, not taken up sensible offers to resolve the matter, incurred unnecessary costs because of failing to respond, and failed to face reality. Meanwhile the Applicant has racked up costs in trying to make progress. The Applicant's position is that it has incurred unnecessarily high costs, arising from the Respondent's unreasonable conduct.

74. The Applicant relies on CPR 38.6(1) as to costs incurred on discontinuance, in which the Court has discretion, subject to a presumption that the costs will be Ordered to be paid on a standard basis pursuant to Rules 44.12(1), save that in this case the Company should pay costs on an indemnity basis. The Applicant made the point that the presumption of the statutory provision is that the Landlord will not suffer financial loss, because the landlord is confronted by a notice to which it must respond. Further, the Company was on notice at the outset that there was this impediment to the Company acquiring the right to manage – it was a hopeless application and bound to fail. Finally, the Company's conduct has been totally unreasonable for the reasons set out above. The Applicant relied on the case of Mireskandari v Law Society [2009] EWHC 2224 concerning discontinuance, as an analogous situation, as support for the relevance of the Company's conduct to the costs recoverable.

The Company's Submissions

75. The Company made submissions on costs under cover of letter dated 1st July 2013.

76. The Company's position was that Applicant's costs can only be recovered where the costs were reasonably incurred and were reasonable in amount; intrinsic to this assessment is proportionality and contractual liability. Further, costs should only be payable in respect of expenditure actually incurred; that it cannot recover more than it is liable to pay.

77. The Company made the point that there was only one issue in the case, it was a straightforward factual dispute; the costs were disproportionate and unreasonable; the Applicant would not have incurred these costs if it had to bear these costs itself. The Company

admitted that the Applicant was entitled to recover legal costs, but that it should be reduced by £5500.

78. Further, there was no evidence that the Applicant had agreed to bear professional costs in addition to those agreed to be incurred on 18th September 2012, as to advice on the validity of the claim; accordingly, only £555 plus vat should be recovered. As it was agreed that the Solicitor would only undertake advisor work and that the Applicant would manage the aspect of ascertaining the percentage of residential v commercial parts, there was no proper basis for the Solicitor charging anything in respect of this. The professional agreement excluded certain types of work from the Solicitor's remit, which now appeared to have crept into the costs sought i.e. costs of £212.75 for liaising with the surveyor which fell outside the contract.

79. It appeared that the Applicant's were billed for secretarial costs of £85 per hour, for 2 ½ hours, which was an excessive hourly rate, as the hourly rate of the principal fee earner should cover support staff costs.

80. The Company took issue with the surveyor's fees: the surveyor did not appear to have measured the whole building, as when the report was considered by the Solicitor on 18th November 2012, the residential units were not measured. The fee therefore was unnecessary, as it did not give rise to the report needed. The Applicant's Solicitors fees should be reduced from £2935 to £850 plus vat.

81. The Company then turned at paragraph 19 to specific items, labelled by the Company from 1-87: specific points were made about the length of time billed in respect of each item of work, against what the Company considered reasonable: for example

(i) the Solicitor saw the claim form shortly after service on 10th September, and a reasonable time to review it would be 12-24 minutes, not the time claimed which was just short of 3 ½ hours
(j) the Solicitors claim for correspondence at items 5,7,9,10,11,18,21 and 23 does not specify to what this related, and was excessive in light of the issues raised
(k) the Solicitor prepared the counter notice, and items 12,13, and 15 relate to this, showing approximately 2 hours, was excessive; as was advice post counter-notice at items 16,20 and 22 which was just under 2 ½ hours.

82. The Company did not provide a clear breakdown of how it arrived at a figure of £5500 to be deducted from legal fees.

Findings on costs

83. The Tribunal applies the statutory provisions, namely that the Tribunal shall allow only such professional costs as are reasonably incurred judged by establishing what services the Applicant would reasonably have paid for itself had it been meeting the costs. The Tribunal is well-

used to applying the test, being almost identical to that found at section 60 of the Leasehold Reform Housing and Urban Development Act 1993, when the landlord's costs are assessed on a lease extension. There is a considerable body of case law on the point, which does not lead the Tribunal to accept that the Tribunal should apply an indemnity principle, or that it should work on the basis that the underlying purpose of the provision is to ensure that he landlord is not out of pocket. Rather, the landlord shall recover only those costs which he would reasonable incur if he was meeting the costs.

84. The Company's submissions have merit, in that the Applicant's position at the outset was that the claim could not succeed as the commercial unit occupied too higher a percentage of the building, and this was stated in the counter-notice. It is the thread that runs through the correspondence that the Tribunal has seen. As this was a limited issue, which required only an expert's report to resolve the matter, the sheer extent of the correspondence, industry, and time spent by the Applicant's Solicitors is wholly disproportionate to the matter in hand. Whilst the Tribunal accepts as a matter of fact that the time spent by the Applicant's Solicitor was spent, the time is excessive. In the few items seized on by the Company and detailed in paragraph 81, there is considerable force in the arguments made.

85. The Applicant's underlying submission is that the Company was so difficult to deal with that there was a large amount of wasted correspondence simply trying to get the Company to see sense, and to justify its position. However, if the Applicant had been paying the costs itself, the more likely and sensible approach would have been to obtain its own experts report, and sat back and waited for the Company to make its case, or not as the case may be. It appears that unnecessary time and industry was spent attempting to get the Company to see that it could not succeed.

86. The Applicant has referred to the Company's conduct as justifying an assessment on an indemnity basis. Whilst the Company would have been well-advised to have a proper report prior to issuing the application, it does appear that the Company had access to an old surveyor's report, and used this as a basis for assessing the measurements. This did not have an eye to the RICS guidelines on measuring space, which vary dependant on the reason for the measurements. The Company now counts the cost of not having done so, but the Tribunal does not consider that this conduct was so unreasonable that to justify the conversion to an indemnity basis.

87. The Tribunal cannot assess each piece of correspondence or each item on the Solicitor's bill to establish what was reasonably or unreasonably, not least because the Tribunal does not have the Solicitor's file before it, and has only a trial bundle which does not disclose the entirety of the correspondence. The Tribunal can only take a view on a broad basis.

88. As for disbursements to Campsie, it is not entirely clear when the building was measured for the purpose of this dispute: the letter at page 51 of the bundle refers to inspection on 8th November 2012, and an invoice is sent for £600 for inspecting the property and calculating the floor areas; then there is a second invoice for inspection with Simon Levy for 12.75 hours in April 2013. The invoices appear to suggest that there were measurements taken over 3 days; whilst the building is not a regular box shape, and considerable care needed to be taken in view of the importance of the measurements to the preliminary issue, the time is nevertheless excessive. It did not appear to include the provision of a report, which would have been necessary and prudent. In short, the Applicant appears to have expended £2589 on simply measuring the building. Campsie then charged £585 for a witness statement, when it would have been preferable to have submitted an experts report, which would naturally have been provided arising from the measurements. The witness statement recites the law, and gives a description of the accommodation, but does not provide a piece of work which justifies the time claimed to have been spent on it.

89. The Tribunal has formed the view that the totality of the costs are unreasonably high, in light of the narrowness of the issue and limited evidence needed, such that if the Applicant was itself discharging them, it would not have incurred them. Doing the best that we can on the available evidence, the Tribunal finds that the costs claimed should be reduced by 40%, so that the Company will pay assessed costs to the Applicant of £8400 including VAT.

.....

J. Oxlade

Judge of the First-tier Property Chamber (Residential Property)

22nd October 2013

Appendix A

The 1985 Act as amended by the Housing Act 1996 and the Commonhold and Leasehold Reform Act 2002 provides as follows:

Section 18

"(1) In the following provisions of this Act "service charge" means an amount payable by a tenant of a dwelling house as part of or in addition to the rent –

(a) which is payable directly or indirectly for services, repairs, maintenance, improvement or insurance or in the landlord's cost of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.

(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the landlord or a superior landlord in connection with the matters of which the service charge is payable.

(3) For this purpose

(a) costs include overheads, and
(b) costs are relevant costs in relation to a service charge whether they are incurred or to be incurred in the period for which the service charge is payable or in an earlier period.

Section 19

(1) "Relevant costs shall be taken into account in determining the amount of a service charge payable for a period –
    (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; and the amount payable shall be limited accordingly.

(2) Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) " An application may be made to a leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

(2) Subsection (1) applies whether or not any payment has been made.
(3) An application may also be made to a leasehold valuation tribunal for a determination whether it costs were incurred for service, repairs, maintenance, improvements, insurance, or management of any specified description, a service charges would be payable for the costs and if it would as to –

(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.

Section 88 CHLR Act 2002

"(1) A RTM Company is liable for reasonable costs incurred by a person who is –
(a) a landlord under a lease of the whole or any part of any premises,

.....

(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs."