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Case No: LC-2023-372

IN THE UPPER TRIBUNAL (LANDS CHAMBER)

APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

FTT REF: LON/00BG/LSC/2019/0277

26 March 2024

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – INSURANCE – commissions and fees received by landlords – whether leaseholders liable to pay gross insurance premiums without receiving credit for commissions and fees – s.19, Landlord and Tenant Act 1985 – appeal allowed and commission reduced from £1,517,372 to £536,182

BETWEEN:

OCTAGON OVERSEAS LIMITED (1)

CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED (2)

Appellants

-and-

SANDRA CANTLAY and others
(members of the Residents' Association of Canary Riverside)

Respondents

Canary Riverside,
Westferry Circus,
London E14

Martin Rodger KC,
Deputy Chamber President

7 March 2024

David Halpern KC and *Justin Bates*, instructed by Freeths LLP, for the appellants
Jonathan Upton and *Mattie Green,* instructed under the Bar Public Access Scheme, for the respondents

The following cases are referred to in this decision:

Brown v Innovator One plc [2012] EWHC 1321

Trustees Executors and Agency Co Ltd v Reilly [1941] VLR 110

Williams v London Borough of Southwark (2001) 33 HLR 22

Introduction

1. This appeal is about insurance commissions and fees received by the appellants (or their agents) in their capacity as landlords of the Canary Riverside Estate.

2. By a decision handed down on 21 December 2022, the First-tier Tribunal (Property Chamber) (the FTT) determined that the respondents, the residential leaseholders of the Estate, were not liable to pay service charges totalling £1,517,372 in respect of insurance and associated insurance premium tax of £121,338. It found that those sums had been received by agents of the appellants as a commission from the insurers of Canary Riverside and that under the terms of their leases the leaseholders had no liability to contribute towards them. In the alternative the FTT found that if the respondents were liable to contribute towards the cost of the insurance services in respect of which the commission was paid, the appellants had not demonstrated that the charges for those services (or any charges) were reasonable.

3. The FTT granted permission to appeal its decision on two grounds. It refused permission on other grounds, and I subsequently dismissed a renewed application to this Tribunal for permission on those additional grounds. The issues in the appeal are therefore concerned solely with the extent of the leaseholders' contractual liability to contribute to the cost of insurance where the landlord has received a commission from the insurer out of the gross premium it has paid, and with the reasonableness of the charges in this case.

4. At the hearing of the appeal the appellants were represented by David Halpern KC and Justin Bates, and the respondents by Jonathan Upton and Mattie Green. I am grateful to them all for their assistance.

Background

5. Canary Riverside (the Estate) is a large residential and commercial estate in the Docklands area of East London. It comprises five residential towers containing 325 flats and apartments let on long leases, and a hotel and other commercial units including cafes, restaurants and a gym, and both public and private car parking areas.

6. The first appellant, Octagon Overseas Ltd (Octagon), owns the freehold of the Estate. All five of the tower blocks were originally leased to the second respondent, Canary Riverside Estate Management Ltd (CREM), under a headlease granted in 1997 (the Headlease), and it still holds the same Headlease over four of the blocks. I will refer to the appellants, jointly, as the Landlords. The respondents are the leaseholders of 98 apartments in the four CREM blocks and are members of the Residents' Association of Canary Riverside (RACR). The leaseholders of 46 flats had originally joined in the making of the application and others joined later; a list of the respondents is appended to this decision.

7. The management of the Estate has generated a great deal of litigation in the FTT and in this Tribunal between the Landlords and the residential leaseholders and others. In 2016, on the application of the residential leaseholders, the FTT appointed a manager under section 24, Landlord and Tenant Act 1987. The manager is not involved in this appeal

because he is not responsible for the insurance of the Estate or the management of its commercial elements. Those remain in the hands of the Landlords.

8. The Headlease places the primary insurance obligations on the Landlord (now Octagon), with a right to recover the cost of doing so from the Tenant (now CREM). The relevant provisions are as follows.

9. By clause 6.1, the Landlord covenanted to:

> "[…] insure and keep insured, or procure the insurance of, with some insurance company (or companies) of repute or with Lloyd's Underwriters and through such agency as the Landlord may from time to time determine (subject to such exclusions excesses and limitation as may from time be imposed by the insurers in the name of the Landlord (whether or not with others):
>
> (i) The shell and core of all buildings and structures comprised within [the Estate] […];
>
> (ii) loss of the rents reserved […];
>
> (iii) any engineering and electrical plan and machinery […];
>
> (iv) property owner's liability and such other insurances as the Landlord may from time to time deem necessary to effect."

10. Clause 6.3. of the Headlease is headed "Commission and restriction on Tenant insuring" and provides:

> "6.3.1 The Landlord shall be entitled to retain and utilise as it sees fit any commission attributable to the placing of the insurance required by Clause 6.1 and the payment of any insurance sums
>
> 6.3.2 The Tenant shall not take out any insurance in respect of the matters which the Landlord is to insure or procure the insurance of under Clause 6.1 provided that this Clause 6.3 shall not prevent the Tenant from insuring in accordance with Clause 6.1 to the extent that and for as long as the Landlord fails to insure or procure the insurance in accordance with Clause 6.1 and the Landlord shall pay to the Tenant on demand the proper cost of any such insurance effected by the Tenant in such circumstances."

11. By clause 4.1(b) of the Headlease, the Tenant covenants to pay "the Rents", one of which is the "Insurance Rent" defined by clause 1 as:

> "a due proportion to be fairly and properly determined by the Landlord of all sums (including insurance tax, the cost of periodic valuations for insurance purposes and any VAT or other tax which may become payable in connection with the supply to the Landlord of goods or services relating to insurance (so far as not recoverable by the Landlord or any management company (as the case may be) as an input credit) which the Landlord shall from time to time pay in respect of the insurances required by Clause 6.1(i), (iii) and (iv) (due allowance being made for such part thereof as may properly be included as part

of the costs and expenses referred to in the Fourth Schedule) and the whole of the sums which the Landlord shall from time to time pay for insuring against loss of rents pursuant to Clause 6.1(ii)."

12. The occupational leaseholders are obliged to reimburse certain costs of services and insurance incurred by CREM. By clause 23.2 of the standard form of underlease for each of the apartments (the Underlease), the Tenant covenants to pay on account a specified proportion of the "Estimated Building Expenditure" which by clause 24.3.8, includes: "The Insurance Rent (as defined in the Headlease) but excluding a due proportion thereof to be fairly and properly determined by the Landlord thereof which is referable to the insurance of the Car Park".

The proceedings

13. These proceedings began in the FTT on 29 July 2019 as an application by the leaseholders for a determination under section 27A, Landlord and Tenant Act 1985, of the reasonableness and payability of service charges paid in respect of insurance for the years 2010 to 2020.

14. Most unusually it took more than three years before the FTT was able to determine the application, finally issuing its decision in December 2022, after a hearing in September 2022. Part of that time was taken up in an unsuccessful attempt by the Landlords to argue that charges for certain years had been agreed and that the FTT no longer had jurisdiction, but much of the delay was caused by the refusal of the Landlords to disclose information about their insurance arrangements. Information which the Landlords did supply in 2020 in purported compliance with the FTT's directions was later shown to be false (the FTT charitably described it as "woefully inaccurate").

15. Until 2022 (i.e. for the whole of the period with which the proceedings are concerned) the Estate was insured under a block policy covering 40 properties belonging to the Yianis Group. Since then, it has been insured under a standalone policy. The Landlords had relied on an associated company, Westminster Management Services Ltd (WMS), to liaise with its insurance broker, Reich, which then placed the insurance for the Estate.

16. The Landlords themselves employ no staff and arrange their affairs through agents, and their evidence to the FTT dealt with the tasks which WMS performed on their behalf. Mr Paul Curtis, an employee of WMS and the Financial Controller of CREM, explained that the Landlords instructed WMS to obtain insurance. Mr Curtis personally performed many of the tasks which were required or delegated them to other members of WMS staff. These included liaising with the broker, negotiating premiums, reviewing policies, arranging valuations and administering claims. He explained that insurance arrangements for the Estate were complex and that only a small number of insurers were willing to participate. He provided an estimate of the time spent by WMS staff in connection with the insurance of the whole Yianis Group portfolio.

17. Mr Curtis's evidence also referred to an application made by the Manager, then Mr Coates, in February 2018 to amend the management order to leave him in charge of insurance arrangements. Mr Coates had proposed that he be entitled to a fee of up to 30% of the

premium for placing the insurance. This would be split equally between the manager and the broker used by his firm. Mr Curtis said that he assumed this split reflected an agreement between Mr Coates and the broker concerning the insurance related tasks which they would each carry out.

18. The leaseholders' case before the FTT was that fees and commissions were paid to the Landlords by the insurer as a discount in return for insuring the whole of the Yianis Group portfolio with them. Such a discount reduced the cost of the insurance and should, in principle, be passed on to the leaseholders, as had happened in the case of *Williams v London Borough of Southwark* (2001) 33 HLR 22. As for the tasks said to have been performed by WMS, these were no different from tasks which would usually be undertaken by a managing agent in return for a fee which was less than WMS and the broker were believed to retain from the commissions.

19. At the hearing before the FTT the Landlords advanced no positive case about the quantum of the fees and commissions which they and their agents had received. They also declined to agree the apportionments and estimates which the leaseholders' representative, Angela Jezard, had "reverse engineered" from the minimal material eventually provided by CREM and their insurance brokers, Reich. From that material Ms Jezard estimated that during the ten years under consideration more than £2million had been paid by insurers to Reich and to WMS (in addition to brokers' fees paid to Reich). This represented more than 37% of the total premiums apportioned to the Estate. During the same period the average annual cost of management paid to agents for managing the Estate was £180,000. The leaseholders had therefore been charged more for the placing and administering of the insurance policies than they had for the management of the entire Estate.

The FTT's decision

20. The FTT said that there was considerable uncertainty about the exact arrangements regarding the commission structure because no documents evidencing the arrangements between the Landlords and either WMS or Reich had been disclosed. The Landlords' complete lack of transparency regarding the commission payments since 2010 had been "lamentable".

21. Nevertheless, on the basis of the evidence given by Mr Curtis, the FTT found that the Landlords instructed WMS to secure insurance, and that it instructed Reich to act as broker. Reich then identified a suitable insurer and agreed a commission structure with it. The insurer paid a sum to Reich (part of which was then paid to WMS). Mr Curtis had not seen any contractual documents, and he did not think WMS invoiced Reich; its share of the commission would just be sent to it. The FTT found that the whole sum was paid in respect of the work undertaken by WMS and Reich in connection with the insurance i.e. the payments were a commission in return for service; it concluded that "these were arrangements for the payment, and sharing, of a commission, rather than a rebate or discount as suggested by Ms Jezard."

22. The FTT then asked itself three questions. First, whether the costs of the work carried out by WMS and Reich were costs that the leaseholders were obliged to contribute to under the terms of their leases; if so, whether they were relevant costs within the meaning of

section 18(2), Landlord and Tenant Act 1985 so as to be subject to the statutory limit in section 19(1); and if so, whether the costs had been reasonably incurred.

23. As to the first question, the FTT accepted that the starting point was the definition of Insurance Rent in the Headlease, which was payable by CREM to Octagon and which the residential leaseholders were then obliged to contribute to through the service charge. If Octagon had received any commission attributable to the placing of insurance, the FTT considered that it would have been entitled to retain it because clause 6.3.1 of the Headlease said it could. But the commission had been paid to WMS and Reich, not to Octagon or CREM, so clause 6.3.1 was not engaged.

24. The FTT was satisfied that the work carried out by Reich, the broker, was the supply of a service relating to the insurance of the Estate and so fell within the definition of Insurance Rent in the Headlease. The leaseholders were therefore required to contribute to that part of the total cost of insurance, provided the amounts paid to Reich were reasonable. There was no evidence that insurance could be obtained without incurring a broker's commission, nor any alternative quotes from brokers. The FTT therefore determined that Reich's commissions of £483,182 over ten years (of which £38,696 was insurance premium tax) were reasonable in amount, had been reasonably incurred, and were payable by the leaseholders.

25. The FTT took a different view of the payments made to WMS. It explained its conclusions at paragraph 83, focussing on the definition of Insurance Rent in clause 1 of the Headlease, as follows:

> "In our determination, any payment for the work that WMS is said to have carried out, … did not amount to "sums… [paid] in respect of the insurances required by Clause 6.1(i) (ii) and (iv)…" of the Headlease and which can be recovered from the Applicants. In the tribunal's view this is a narrow definition which extends to costs of and related to the insurance itself, and not to the landlord's own activities connected with taking out or claiming on insurance. As such, sums paid for WMS's activities do not fall within the definition of Insurance Rent, and there is no contractual liability on the Applicants to contribute towards these costs. We conclude that all the work said to have been carried out by WMS is more accurately described as the provision of services concerning management of the Estate, including obtaining insurance."

26. The FTT said that "clear provision in the residential leases" would be required to entitle the Landlords to pass the cost of employing WMS on to the leaseholders. In the FTT's view, those costs could not be recovered as part of the costs of insurance, because they did not fall within what it took to be the narrow definition of Insurance Rent in the Headlease. It acknowledged that some of the costs might have been recoverable under clause 24.3.7 of the residential leases, which allows for the recovery of the cost of the management, administration and supervision of the residential buildings on the Estate. But that would require that the costs be properly demanded through the service charge as costs of management and not concealed within the costs of insurance. The FTT added, at paragraph 86:

> "In our determination, not only are the leaseholders not contractually obliged to pay these sums, the [Landlords] have also failed to satisfy the burden on them to prove that such costs were reasonably incurred in insuring the Estate, and therefore recoverable as either insurance rent or service charge."

27. The FTT therefore determined that the leaseholders were not liable to contribute towards so much of the sum claimed in respect of insurance as represented the payments to WMS; it found, on the basis of the calculations of Ms Jezard, that since 2010 these payments had been £1,517,372 plus insurance premium tax of £121,338.

The issues

28. The Landlords were granted permission to appeal by the FTT on two issues. The first was whether the FTT's interpretation of the leases, and its conclusion that so much of the insurance premium as was returned to WMS as commission was not recoverable from the leaseholders, were correct. The second was whether the FTT's conclusion that the Landlords had "also failed to satisfy the burden on them to prove that such costs were reasonably incurred", had been sufficiently explained in the decision.

29. When the FTT was asked to grant permission to appeal on the second of these grounds, it explained that it had meant only that, because there was no contractual liability on the leaseholders to pay the disputed charges, the costs had not been reasonably incurred. It acknowledged that this did not necessarily follow and it was for that reason it granted permission to appeal. It emphasised that, in view of the conclusion it had reached on the contractual recoverability of the charges, "there was no need for us to go on to determine whether the disputed amounts were reasonably incurred because that question was rendered academic".

Issue 1: Are the disputed sums payable under the Underlease?

30. In *Williams v Southwark* leaseholders were liable to contribute towards "the costs and expenses of … insurance". In 1995 their local authority landlord negotiated terms of insurance for its estate by which the gross premium payable under the policy was discounted by 25%. 5% of the discount was a loyalty bonus for maintaining the policy with the same insurer for five years. The rest of the discount was allowed in consideration of the landlord agreeing to handle claims and administer the policy. The landlord charged its leaseholders based on the gross premium and the question for the Court was how much of that gross sum represented the costs and expenses of insurance. The landlord agreed that the 5% loyalty bonus had reduced the costs of insurance so that only 95% of the gross sum could be charged to the leaseholders. As for the remaining 95%, Lightman J explained, at [5], that:

> "It is clear that under the 1995 agreement the full premium (less the 5% loyalty bonus) continued to be payable by the Council for the insurance cover provided, but Zurich agreed to assign to the Council responsibility for local claims handling and to pay to the Council 20% of the premium in return for those services. The insurance premium was not reduced by this arrangement; the full

> 95% remained payable, but the Council became entitled to pay itself 20% out of the premium as remuneration for the services which it agreed to provide."

31. In the leaseholders' statement of case in the FTT, which was prepared by Ms Jezard, they suggested that leasehold property insurance is unique in the insurance market in that the person taking out the policy (usually the landlord) is not the person who will ultimately pay the premium. Not only did this remove the incentive to negotiate a lower premium but, additionally, "the leasehold property insurance market has developed financial mechanisms that, perversely, increase premiums by benefitting landlords (and their agents) at the expense of leaseholders".

32. Whether this market is unique, and whether it operates in a way which is perverse, are not issues which can be addressed on the limited evidence in this case, but the general complaint that leaseholders are in a vulnerable position which may lead to them being required to pay more for insurance than is reasonable, features in almost every insurance case the FTT has to determine. The suspicions of leaseholders that they are being exploited are often magnified by a lack of transparency in the arrangements which have been made, and by the structure, practices and terminology of the insurance market of which few of them will have much experience. The potential for abuse is obvious where the party seeking to obtain a policy of insurance is simultaneously offering to provide services (such as claims handling) in return for a fee which the insurer will return to the insured out of the gross premium it charges for the policy.

33. The liability of the leaseholders in this appeal to contribute to the cost of insurance depends on the terms of their own Underleases. These are clear enough. By clause 23.2 each leaseholder has agreed to contribute towards the "Estimated Building Expenditure", which is defined as including the Insurance Rent (as defined in the Headlease) but excluding so much of it as is referable to the insurance of the carpark (which I assume is payable separately by those who make use of the carpark).

34. The FTT asked itself the correct question when it considered how much of the gross premium paid to the insurer was properly included in the Insurance Rent paid by CREM to Octagon. Stripped of irrelevant parts, the Insurance Rent means:

> "a due proportion … of all sums (including insurance tax, the cost of periodic valuations for insurance purposes and any VAT or other tax which may become payable in connection with the supply to the Landlord of goods or services relating to insurance … which the Landlord shall from time to time pay in respect of the insurances required by Clause 6.1(i), (iii) and (iv)

35. For the Landlords, Mr Halpern KC submitted that the FTT's narrow interpretation of this definition was simply wrong. The phrase "all sums … payable" meant the gross cost of insurance premium and the FTT's suggestion that the sums it received for the work which it appears to have accepted had been done was not a payment "in respect of the insurance" was insupportable. The words "in respect of" did not narrow the scope of the charge recoverable; on the contrary, they "have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which

the words refer" (*per* Mann CJ, in *Trustees Executors and Agency Co Ltd v Reilly* [1941] VLR 110,111).

36. For the leaseholders, Mr Upton did not give the FTT's approach his whole-hearted support. He suggested a different analysis.

37. On the evidence supplied by the Landlords, and in its statement of case, it was CREM, and not Octagon, which had instructed WMS to arrange insurance (as it was entitled to do under clause 6.3.2 of the Headlease if Octagon did not arrange the required insurance). It followed, Mr Upton submitted, that Octagon had not incurred any cost and that only CREM had done. There was therefore no Insurance Rent for CREM to pay to Octagon and the question whether the sums paid to WMS came within the meaning of Insurance Rent was irrelevant. That did not mean that the leaseholders were relieved of the obligation to contribute towards the cost of insurance, but that obligation was the result of a term which Mr Upton argued must be implied into their Underleases. The obvious term to be implied was one which mirrored clause 6.3.2 of the Headlease which provides that, to the extent that Octagon fails to insure or procure insurance in accordance with Clause 6.1 "[Octagon"] shall pay to the Tenant on demand the proper cost of any such insurance effected by the Tenant in such circumstances." Mr Upton therefore suggested that clause 24.3.8.1 of the Underlease should be read as if there was included in the Estimated Building Expenditure "the Insurance Rent (as defined in the Headlease *or, if no such Insurance Rent is payable by CREM, the proper cost of CREM insuring or procuring the insurance in accordance with clause 6.1* but excluding … the insurance of the car park."

38. As a second string to his argument, Mr Upton submitted that the FTT was right to find that the Insurance Rent did not include the sum paid to WMS. The reference to "sum [paid] in respect of insurance" meant the net sum paid after deducting any repayment by way of commission or discount. "In respect of" were words of connection, but the degree of connection which they signified depended on their context; in this context fees paid to WMS for management services were not paid "in respect of" insurance.

39. I have no doubt that the FTT was wrong to exclude the sum paid to WMS from the Insurance Rent as a matter of interpretation of the leases.

40. The insurance arrangements described by the FTT required the following payment steps: first, payment of the gross premium by the Landlords to the insurer; second, payment of a commission by the insurer to the broker; third, payment of a commission by the insurer to WMS. The evidence did not show how much was paid by whom, to whom (other than that WMS received its payment from Reich). It is possible that each step involved a separate payment with the gross premium being paid to the insurer first, before it made its own payments to the broker and to the agent; alternatively, the gross premium may have been paid by the Landlords to the broker, which may have deducted its own and WMS's commissions before remitting the balance to the insurer.

41. Mr Halpern KC referred to *Brown v Innovator One plc* [2012] EWHC 1321 in which allegations of breach of trust had been made following an unsuccessful tax avoidance scheme. The disputed payments included some to people unconnected with the scheme. Hamblen J was unimpressed by those allegations and pointed out at [996]-[997] that the

paying party had been entitled to 11% of the purchase price to cover expenses and its own profit, and how it chose to distribute that money was a matter for it. Additionally:

> "… short circuiting payments may be permissible both legally and from an accounting perspective. As stated by Buckley LJ in *Re Collard's Will Trusts* [1961] Ch 293 in the context of short circuiting by a trustee and section 32 of the Trustee Act 1925:
>
> > 'The principle is that the court will not insist on circuity of action if the same result can be achieved by direct action which legitimately could be achieved by more circuitous action.'"

42. It therefore does not matter in what order, or by how many payments the insurance arrangements were implemented. What matters is what the payments were for. The FTT was satisfied that the payments received by Reich and WMS were a commission, and not a rebate or discount to bring in the business. It found that Reich had negotiated the premium with the insurer and that as a result of what had been agreed Reich and WMS had been entitled to payments for the services which they each agreed to provide. It found that the sums receivable by Reich were paid in respect of insurance services and therefore within the meaning of Insurance Rent. Its sole reason for refusing to make the same finding about the sums receivable by WMS was that "sums… [paid] in respect of the insurances required by Clause 6.1(i) (ii) and (iv)…" meant only the costs "of and related to the insurance itself" and did not include costs of "the landlord's own activities connected with taking out or claiming on insurance".

43. In my judgment, on the evidence the only possible conclusion is that the cost of the insurances required by clause 6.1(i) (ii) and (iv) was the gross premium agreed between the broker and the insurer. Out of that gross premium, the insurer agreed that Reich should receive a commission for services; Reich and WMS are assumed then to have agreed that WMS was to carry out some of those services and receive part of the commission. But that arrangement did not reduce the cost of the insurance to the net sum retained by the insurer. If those services had not been provided by WMS, someone else would have needed to provide them. If the insurer had assumed responsibility or paid a third party, it would not have discounted the gross premium because it would have had an additional expense to meet. If the Landlords had paid for the services themselves, the gross premium might have reduced, but the cost of the services would be recoverable through the service charge, as the FTT acknowledged. But that was not what happened. The fact that services were to be provided by WMS, which is the insured's agent, and not by some third party selected by the insurer, does not mean that for the purpose of the contract the cost of the insurance was less than the gross premium. It does mean that the transaction appears not to have been conducted at arm's length and cannot be assumed to represent the best value available, or even a market value, but the consequence of those uncertainties is addressed by the reasonableness ceiling imposed by section 19, Landlord and Tenant Act 1985 and not by redefining the transaction.

44. I also agree with Mr Halpern that there is no justification for adopting a narrow interpretation of the definition of Insurance Rent. The sum is plainly not limited to the cost of insurance itself, as it includes "all sums (including insurance tax, the cost of periodic valuations for insurance purposes and any VAT or other tax which may become payable

in connection with the supply to the Landlord of goods or services relating to insurance". The parties' intention was to cast the net wide, not to confine it narrowly.

45. Mr Upton's preferred explanation of why the Insurance Rent did not include the commission element (because the premium was paid by CREM rather than by Octagon) is not open to him on the appeal as it was not a point raised or considered below, nor was it the subject of a respondent's notice. In its decision the FTT did not distinguish between Octagon and CREM in any of its findings, referring instead to "the Landlords", which confirms that the suggested significance of the distinction was not in its mind. In any event, even if the payments were all made by CREM, and not by Octagon, that would not make a difference to the sum to be included in the Insurance Rent. Clause 6.1 requires Octagon to "insure … or procure the insurance of" the Estate, and Mr Upton agreed that the Insurance Rent includes costs of insurance which has been procured by someone else at Octagon's request. Given the closeness between Octagon and CREM (with Mr Curtis as the financial controller of both) the only possible inference is that Octagon procured CREM to obtain the insurance in their joint names, rather than CREM acting unilaterally after Octagon had failed to insure.

46. I am therefore satisfied that the FTT was wrong to interpret the Headlease in such a way that the gross insurance premium was not recoverable from the leaseholders, and I allow the appeal on that basis.

Issue 2 – Was the cost of insurance reasonably incurred?

47. The second issue for which the FTT gave permission to appeal was whether it had given adequate reasons for finding that the Landlords had not discharged the burden of showing that the disputed part of the costs of insurance were reasonably incurred. But in giving permission it effectively neutered that ground of appeal by glossing its own conclusion at paragraph [86] of the decision (see paragraph [26] above), disavowing any determination that the cost of insurance was not reasonably incurred, and explaining instead that its finding was simply a consequence of the conclusion that the disputed commission was not recoverable under the terms of the Underlease.

48. The FTT also suggested that if this Tribunal took a different view on the issue of interpretation of the Underlease, the application ought to be remitted to it to make a determination on reasonableness. That suggestion was not one which either party welcomed.

49. Mr Upton sought to persuade me that what the FTT said in its refusal of permission to appeal was simply wrong and should be ignored. It had made a finding in unambiguous terms that the Landlords, to whom the burden had shifted, had failed to demonstrate that the disputed costs were reasonably incurred.

50. There are two difficulties with Mr Upton's submission. The first is that, when giving permission to appeal, the FTT said that it had not considered the issue which Mr Upton says it decided in the leaseholders' favour. The second, which gains considerable support from the first, is that the FTT did not give any explanation for the finding which Mr Upton says it made, but which it disavows. If I were to accept Mr Upton's submission it would

not assist the leaseholders because I would also accept the Landlords' complaint that the decision was inadequately explained and any adverse factual finding should be set aside.

51. Mr Halpern KC invited me to make a determination of my own of the reasonableness of the disputed insurance charges based on the evidence before the FTT. After an adjournment to enable Mr Upton to take instructions on that proposal, he confirmed that the leaseholders would prefer a determination by this Tribunal on the available material rather than face the delay, expense and further inconvenience of a second hearing by the FTT.

52. The material available to me includes relevant parts of the FTT hearing bundle and a transcript of the hearing. From these there is very little evidence to establish what a reasonable charge for the services provided by WMS and paid for by the commission element of the premium would be. But there are also the findings of the FTT and the positions which the parties adopted in presenting and responding to the application.

53. The FTT did not reject the evidence of Mr Curtis about what was done by WMS (much of it by him personally), nor how long it took, or the hourly rates of WMS employees. It did not say in terms what it made of this evidence, and Mr Upton invited me to proceed on the assumption that it had made no finding about what had been done. But the FTT referred at paragraph [44] to "work carried out by WMS" and found at paragraph [85] that the Landlords had appointed WMS to liaise with the broker, arrange valuations, seek quotes for insurance repairs "and all the other work described by Mr Curtis". In its grant of permission to appeal it referred to the work "carried out by WMS". It is also true that the FTT twice described the disputed charges as for "fees said to have been incurred", but the general effect of its decision is that it accepted Mr Curtis' evidence. Additionally, the leaseholders' case was not that the work claimed by WMS had not been done, but that the commission was a rebate or discount and did not form part of the true cost of insurance or insurance services. In cross examination Ms Jezard put it to Mr Curtis that the work of WMS might have duplicated the responsibilities of the managing agent, Marathon, but it was not suggested that Mr Curtis was not telling the truth about what he and other WMS employees did.

54. I will therefore proceed on the basis that the FTT found that WMS carried out the work described by Mr Curtis. Mr Upton's case was that no additional fee should have been charged for that work over and above the fees charged by Marathon, the managing agent acting for the Landlords before the appointment of the Manager in 2016. That does not seem to me to be a realistic submission where the work was done by two different entities and the FTT did not find that there had been duplication of work between them.

55. The difficulty is that the evidence was of work done by WMS for the whole of the Landlords' portfolio of 40 properties and was not limited to the Estate. Mr Curtis was unable or chose not to provide any breakdown of the work done in connection with insurance services connected with the Estate alone. As a result, it is not possible to know what proportion of the commission paid to WMS should be attributed to the insurance services provided to the Estate. Ms Jezard assumed in her own calculations that the commission should be apportioned by reference to the proportion of the total premium attributed to the Estate by the broker and the Landlords did not either confirm or dispute that assumption. Given the way the Landlords have conducted these proceedings it can

be inferred that they perceived it to be in their interests not to dispute Ms Jezard's calculation.

56. The other material which the leaseholders supplied to the FTT was evidence of insurance at a development called New Providence Wharf. Ms Jezard explained in her oral evidence that she did not rely on New Providence Wharf as a comparator of what a reasonable commission might be, but only to show what information leaseholders of a different landlord had been supplied with. In fact, the FTT made use of the broker's fee of approximately 11% as confirmation that the commission received by Reich in respect of the Estate was reasonable.

57. The FTT also had evidence given by Mr Curtis that the original manager, Mr Coates, had proposed a commission structure of "up to 30% of premium" which was to be split equally between him and his broker (the fees Ms Jezard estimated to have been paid to WMS and Reich were more than 37% of the total premiums she apportioned to the Estate, or 41% if tax and finance payments are omitted for better comparison with Mr Coates). Mr Coates' "up to 30%" had been relied on by the Landlords before the FTT and was relied on again by Mr Halpern KC. That proposal, which was contained in an amended draft of the management order for which Mr Coates applied in February 2018 would have imposed a ceiling of 30% on the aggregate of all fees, brokerage or commissions and would have required that these be split equally between Mr Coates and the broker. It was never ruled on by the FTT, having been withdrawn before it was considered. Although I was told the leaseholders had supported Mr Coates' application for variations to the management order in 2018, they had proposed a flat fee of only £10,000 in place of the commission in the current application.

58. There are other difficulties with using Mr Coates' proposal. Although it provides evidence of a commission ceiling, and of the proportions in which the total was to be shared with the broker, in practice the ceiling might not have been reached in all or any year, and the agreement to share the commission will have been part of a wider agreement about who was to undertake the various tasks for which the commission was being paid. The evidence is that annual commissions fluctuate as a percentage of the total premium paid (sometimes significantly, as the information about New Providence Wharf shows).

59. I therefore feel unable to accept Mr Halpern KC's implicit suggestion that the total commission should be recalculated so that it represents 30% of the premium, rather than 38% or 41%, and that so much of the total as has not already been allowed to Reich by the FTT should be taken to be the reasonable cost of the services provided by WMS. There is no evidence to support that approach and, if Mr Coates' proposal is taken as the benchmark, it would be overgenerous to the Landlords; not only would it allow a total of 30% a year (rather than "up to 30%") it would also leave WMS with much more than half of the total.

60. Nor can I be confident that adopting a more conservative approach and allowing WMS a commission of 15% (i.e. assuming an equal split with the broker, as Mr Coates' proposed) would not be overgenerous. That would still treat what was intended as a maximum as if it was annual entitlement.

61. I remind myself at this stage that it is for the Landlords to satisfy the Tribunal that the costs they have claimed have been reasonably incurred. The Landlords sought permission to appeal the FTT's determination that the burden of establishing that the commissions were reasonable fell on them, but they were refused. The leaseholders more than adequately discharged the burden of raising a prima facie case that needed to be answered by establishing that the premiums they were required to pay were not the result of an arm's length negotiation in an open market and included undisclosed sums to take account of services which the Landlords' agent had agreed to provide in return for a commission calculated as a percentage of the premium. It was then for the Landlords to show what work had been done to justify that commission, and why the commission itself was reasonable.

62. Despite the lack of evidence there are some patches of firm ground on which weight can be placed. In particular, I can take it that Reich's fee was a reasonable one, as the FTT allowed it in full. It was said to be around 8.9% but that figure did not include a broker's fee which was also payable. The total paid to Reich was comparable to the commission of 11% received by the broker who arranged the insurance at New Providence Wharf.

63. Reich was paid a total of £483,182 in commission during the ten years under consideration. It also received annual fees the amount of which was said by the leaseholders to have varied between £4,828 and £5,828 a year and by the Landlords to have amounted to roughly £6,000 a year for the years 2016 to 2020. These were accepted as reasonable by the leaseholders. (The total sum received by Reich was inflated by a financing arrangement, but the FTT did not add those sums to the commission it sanctioned). Taking an average broker's fee of £5,300 over the 10 years would produce an estimated total fee of £53,000 for the whole period. Adding that to the commission which the FTT found to be payable gives a total of £536,182 as the reasonable cost of Reich's services.

64. Mr Coates' proposal was that a commission of up to 30% should be split equally between him and his broker with no additional fees. There is no evidence of the arrangements which he intended to agree with the broker about the division of responsibility for policy administration, claims handling and the like, but his proposal has the attraction that it relates to the Estate. It was also made by someone who had by then been managing the Estate, with all its complexities, for two years and who would have known what work needed to be done in relation to those matters. At the time, the proposal appears to have been supported by the leaseholders. It is the only evidence of a reasonable charge for arranging and administering the insurance of the Estate.

65. It is the Landlords who rely on Mr Coates' proposal, and in the absence of evidence to the contrary it is not unreasonable to assume that the division of responsibility between WMS and Reich was not different from the division proposed by Mr Coates in which his fee would be equal to the broker's. On that assumption I feel justified in concluding that the leaseholders would not pay more than was reasonable if the sum payable in respect of work done by WMS was the same as the total received by Reich (i.e. the aggregate of the commission found by the FTT to be reasonable, plus the undisputed broker's fee).

66. On the basis of Ms Jezard's apportionment, the premiums payable for the insurance of the Estate totalled approximately £5.38m over ten years. Using the same apportionment

approximately £2m was paid by the insurer in fees and commissions, leaving a net premium of £3.38m. If the same sum is allowed to WMS as was allowed to Reich by the FTT (£536,182) the aggregate sum for broker's and agent's fees and commission would be approximately £1.07m. That figure represents 24% of a notional gross premium of £4.45m (3.38 + 1.07 = 4.45). If (as suggested in one version of the respondents' apportionments) the net premium retained by the insurer was only £2.8m, an aggregate sum for fees and commissions of £1.07m would represent 27.6% of a notional gross premium of £3.87m.

67. This calculation provides comfort that the approach I have taken does not result in a charge inconsistent with Mr Coates' proposal of "up to 30%".

Disposal

68. The FTT found that the leaseholders had contributed £1,517,372 in respect of fees paid to WMS between 2010 and 2020. For the reason I have given I am satisfied that the Landlords have failed to demonstrate that they are entitled to any more than £536,182 of that total. That is therefore the figure which I find to have been payable in respect of the services provided by WMS which were remunerated through the commission received from the insurer.

69. I therefore allow the Landlords' appeal and in place of the FTT's finding that nothing was payable, I substitute a determination under section 27A, Landlord and Tenant Act 1985, that the leaseholders were liable to pay £536,182 and not £1,517,372 for the work of WMS. Including Insurance Premium Tax the total sum payable is £579,039 instead of £1,638,709.

Martin Rodger KC,
Deputy Chamber President

26 March 2024

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.