



**FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL
PROPERTY)**

Case references : **LON/00BG/LSC/2019/0277**

Property : **Canary Riverside Estate,
Westferry Circus, London E14**

Applicants : **Various leaseholders represented by the
Residents Association of Canary
Riverside**

Respondents : **(1) Canary Riverside Estate
Management Limited
(2) Octagon Overseas Limited**

Interested Persons : **(1) Mr Sol Unsdorfer
(2) Mr Alan Coates**

Type of application : **Liability to pay service charges**

Tribunal : **(1) Judge Amran Vance
(2) Judge Nicola Rushton KC
(3) Mr Ian Holdsworth FRICS**

Venue : **10 Alfred Place, London WC1E 7LR**

Date of Decision : **13 February 2022**

DECISION ON APPLICATIONS FOR PERMISSION TO APPEAL

Covid-19 pandemic: description of determination

This has been a determination on the papers which has not objected to by the parties. The form of remote hearing was P:PAPERREMOTE. A face-to-face hearing was not held because all issues could be determined on paper.

DECISION OF THE TRIBUNAL

1. The tribunal has considered two applications for permission to appeal its decision dated 21 December 2022: (a) the leaseholder Applicants' application dated 6 February 2023; and (b) the application made by Canary Riverside Estate Management Limited and Octagon Overseas Limited (together "the Landlords"), also dated 6 February 2023. As the tribunal extended time to appeal its decision over to 6 February, both applications were received in time.
2. The tribunal determines, in respect of the **Applicants'** application, that:
 - (a) it will not review its decision; and
 - (b) permission be refused.
3. The tribunal determines, in respect of the **Landlords'** application, that:
 - (a) permission to appeal is granted in respect of grounds two and four; and
 - (b) permission is refused on grounds one, three, five and six.
4. You may make a further application for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made no later than 14 days after the date on which the First-tier Tribunal sent notice of this refusal to the party applying for permission to appeal.
5. Where possible, you should make your further application for permission to appeal on-line using the Upper Tribunal's on-line document filing system, called CE-File. This will enable the Upper Tribunal to deal with it more efficiently and will enable you to follow the progress of your application and submit any additional documents quickly and easily. Information about how to register to use CE-File can be found by going to this web address: [https://www.judiciary.uk/wp-content/uploads/2021/07/Practice-Note-on-CE-filing-Lands-Chamber-17.6.21 .pdf](https://www.judiciary.uk/wp-content/uploads/2021/07/Practice-Note-on-CE-filing-Lands-Chamber-17.6.21.pdf)
6. Alternatively, you can submit your application for permission to appeal by email to: Lands@justice.gov.uk.
7. The Upper Tribunal can also be contacted by post or by telephone at: Upper Tribunal (Lands Chamber), 5th Floor, Rolls Building, 7 Rolls Buildings, Fetter Lane, London EC4A 1NL (Tel: 020 7612 9710).

REASONS FOR THE DECISION

8. For the benefit of the parties and the Upper Tribunal (Lands Chamber), the tribunal records below its comments on the grounds of appeal and any procedural points raised. References in square brackets are to page numbers in the hearing bundle.

Name: Amran Vance

Date: 13 February 2022

Leaseholders' Application

Financing Charges

1. It is suggested that at paragraph 103 of our decision that we incorrectly recorded that “the Applicants made no challenge to the rate or quantum of the financing”. We do not agree that this was an incorrect statement. The Applicants position was that finance charges were not payable at all, because there was no need for the Respondents to resort to financing. They did not seek to argue that if, contrary to that contention, financing was appropriate, that the calculation of the interest charges included in the total premiums for the provision of that financing was unreasonable. There is no error of fact or law in this aspect of our decision.
2. It was not part of the Applicants case before us that if we concluded that the fees charged by WMS were not payable by them, that there should be a consequential reduction in their contribution towards the financing charges. This is a new point being advanced by the Applicants, and does not evidence an error of law in our decision.

Other Matters

3. Whilst not pursued as a ground of appeal, the Applicants suggest that at paragraph 118 of our decision we incorrectly found that valuation reports obtained by the Respondents represented professional advice on the apportionment of insurance premiums. However, we made no finding at paragraph 118. The paragraph records the evidence tendered by Mr Curtis.
4. There is no need for us to review our decision in order to make the further directions sought by the Applicants. They are correct to say that they are entitled to a determination from the tribunal as to the amounts payable by them towards insurance costs. They also correctly point out that at the hearing the tribunal expressed the hope that the amounts could be agreed by the parties following the tribunal’s determination. The parties should seek to do so, and if agreement is not reached either may apply to the tribunal for the issue to be determined by way of an addendum decision to our decision of 21 December 2022. However, as we have granted the Respondents permission to appeal that decision to

the Upper Tribunal, any such application should await the outcome of that appeal, so that it is known whether our determinations are upheld.

Landlords' Application

Ground One - the tribunal erred in law in holding that it was required or entitled to decide whether the amounts received by Westminster Management Services Limited in respect of insurance commission were contractually recoverable under the terms of the leases.

1. It is correct that the Applicants framed their challenge in terms of whether insurance premiums had been reasonably incurred, and that they did not expressly argue that the costs were not contractually recoverable under the terms of their lease. However, in examining whether costs have been reasonably incurred for the purposes of s.19 of the Act, a tribunal has to first consider the landlord's contractual entitlement to recover the service charges claimed, before proceeding to determine whether those costs were reasonably incurred. Contractual entitlement is a condition precedent to the recovery of the service charges, and it would be erroneous for the tribunal to fail to address that entitlement even though the point was not specifically raised by the Applicants. This two-stage process was recognised in *Knapper v Francis* [2017] UKUT 3 (LC), para 39 in the context of on-account service charges.
2. Moreover, as identified in paragraph 60 of our decision, the importance of considering the contractual framework was recognised by Mr Bates, counsel for the Respondents, who sought to persuade us that all of the insurance costs, including commissions and fees, fell within the definition of "Insurance Rent" in CREM's headlease, which were then passed through to the residential leaseholders by clauses 24.3.8 and 25.2 of their lease. He also argued that the costs were payable in respect of a relevant cost for the purposes of s.18 of the 1985 Act, and invited us to find that these were service charge costs that the leaseholders were contractually obliged to pay. Given the Respondents own emphasis on the contractual framework, and its contention that these were relevant costs under s.18, it cannot realistically be argued that the tribunal was wrong to have regard to these matters when reaching its determination.

Ground Two – if it was open to the Tribunal to decide whether the Landlords were contractually entitled to recover the Disputed Amounts from the Tenants, the Tribunal erred in law in concluding that these amounts were not contractually recoverable.

3. At paragraph 9.2 of their Grounds of Appeal the Respondents quote subclause 1.1 of the head lease which defines "Insurance Rent" as "a due proportion ... of all sums ... which the Landlord shall from time to time pay in respect of the insurances required ..." [Supp7]. However, they have not set out the full wording of the definition, which reads as follows

“which the Landlord shall from time to time pay in respect of the insurances required *by Clause 6.1(i) (ii) and (iv)*... [of the Headlease] [italics added for emphasis]. Clause 6.1(i) concerns the shell and core of the buildings and structures etc. comprising the Estate. Clause 6.1(ii) concerns loss of rents, and clause 6.1(iv) concerns property owner’s liability and other insurances that the Landlord may deem necessary.

4. It was our determination that any payment to WMS for the work described by Mr Curtis did not amount to “sums... [paid] in respect of the insurances required by Clause 6.1(i) (ii) and (iv)...” of the Headlease, and did not extend to the landlord’s own activities connected with taking out or claiming on insurance, or the work carried out by WMS. We do not agree that we should have held that the “sums ... which the Landlord shall from time to time pay in respect of the insurances” meant the gross premiums, irrespective of any arrangement agreed as between the insurer. Nevertheless, we accept that the argument has a realistic prospect of success, justifying the grant of permission to appeal.
5. The contention that we erred in holding at paragraphs 73 and 83 that subclause 6.3.1 did not extend to commission paid by Reich to WMS, as distinct from payments by Reich to the Landlords, has a realistic prospect of success on appeal given that the subclause refers to both retention and utilisation.
6. The contention that we erred in holding at paragraph 83 that the commission paid to WMS was not “in respect of” the insurances required by the Headlease also has a realistic prospect of success.

Ground Three - the Tribunal erred in law in holding at paragraphs 67 and 86 that the burden of proof lay on the Landlords to justify the sums claimed.

7. We agree that it is for the party disputing the reasonableness of sums claimed to establish a *prima facie* case. The Applicants did so. They raised the issue of insurance commissions in their application [15] and questioned whether the inclusion of such commissions in the premiums demanded from them meant that the costs had not been reasonably incurred (see the tribunal’s directions of 9 July 2020 [157], para. 1). They sought a rule 20(1)(b) order against Reich that included details of commissions and commission-sharing arrangements. Although their application was initially refused, Judge Vance subsequently made a rule 20(1)(b) order against Reich on 8 October 2021 [380] which resulted in Reich, on 15 March 2022, providing a one-page spreadsheet [520] setting out the premiums paid under the Yianis Group policy, as well as the total commission retained by Reich, and the total fees paid to WMS. Following provision of that spreadsheet the Applicants served their Amended Statement of Case in which they directly challenged the reasonableness of the commissions and fees included in the insurance premiums [450], paras 2-3,23-50].
8. In light of that background, it cannot realistically be argued that the Applicants failed to establish a *prima facie* case. Once they had done so,

it fell to the Respondents to rebut their case, with the burden of satisfying the tribunal that the gross premiums charged had been reasonably incurred resting on them (*Sadeh and ors. v Mirhan and ors* [2015] UKUT 428 (LC)).

Ground Four - the Tribunal erred in holding at paragraph 86 that the Disputed Amounts were not reasonably incurred.

9. Our conclusion at paragraph 86 that the fees paid to WMS had not been reasonably incurred in insuring the Estate was reached on the basis that if there was no contractual liability on the Applicants to pay them, it followed that the costs had not been reasonably incurred. We agree that this does not necessarily follow, as contractual entitlement to recover the service charges claimed is a separate issue to the question of whether those costs were reasonably incurred for the purposes of s.19. As such, this ground of appeal has a realistic prospect of success. However, any error on our part did not, in our view, have a material impact on our determination. This is because having reached our determination on contractual liability, there was no need for us to go on to determine whether the Disputed Amounts were reasonably incurred because that question was rendered academic.
10. We recognise that if the Landlords' appeal is successful on the contractual interpretation point (ground 2), then the separate question of whether the costs were reasonable in terms of what they were incurred for, and their quantum, may have to be remitted to this tribunal for determination.

Ground Five - the Tribunal erred in fact in holding at paragraph 35 that before August 2016 insurance of the estate was arranged by the Landlords.

11. This ground has no realistic prospect of success. Regardless of whether the Landlords engaged WMS to assist them, it was the Landlords who were responsible for securing and placing the insurance. This is clear from the decision of the Deputy President in *Octagon Overseas Limited v Coates* [2017] UKUT 0190 (LC) [219], e.g. paras. 4, 6, 20, 21, 23, 29.

Ground Six - the Tribunal erred in law in holding at paragraph 88 that the service charge in respect of Insurance Premium Tax was irrecoverable.

12. This ground of appeal had no realistic prospect of success. Our determination was the inevitable result of our conclusion that the underlying commission was irrevocable. If that conclusion is found by the Upper Tribunal to be incorrect then the issue of Insurance Premium Tax will need to be redecided, but that does not warrant us granting permission to appeal on this ground when there is evident no error of law in our decision.