IN THE UPPER TRIBUNAL (LANDS CHAMBER) **CASE NO.: LC-2023-000372**

PREMISES: CANARY RIVERSIDE ESTATE, WESTFERRY CIRCUS, LONDON E14

B E T W E E N:

(1) CANARY RIVERSIDE ESTATE MANAGEMENT LIMITED
(2) OCTAGON OVERSEAS LIMITED

Appellants

-and-

SANDRA CANTLAY AND OTHERS
(VARIOUS LEASEHOLDERS REPRESENTED BY THE RESIDENTS' ASSOCIATION OF CANARY RIVERSIDE)

Respondents

STATEMENT OF CASE ON BEHALF OF THE RESPONDENTS

In these submissions:

(1) References in bold square brackets are to pages in the "CREM Bundle to support grounds of appeal"
(2) "CREM" means the First Appellant
(3) "Octagon" means the Second Appellant
(4) "The Landlords" means the Appellants together
(5) Unless otherwise stated, the terms and headings used in the Appellants' Renewed Grounds of Appeal dated 13.3.23 are adopted to same effect for convenience. No admissions are to be implied into the adoption of such labels.

Introduction

1. By a Decision dated 13.2.23 ("the PTA Decision") the FTT granted permission to appeal against its decision dated 21.12.22 ("the Decision") on 2 grounds only (grounds 2 and 4). On 2.8.23 this Tribunal (Martin Rodger KC, Deputy President) dismissed a renewed application for PTA on other grounds.

2. This statement of case is served on behalf of various leaseholders represented by Residents' Association of Canary Riverside ("the Leaseholders")[1] pursuant to the directions dated 2.8.23. The Tribunal directed that a single respondent's notice may be served on behalf of all those represented by the Residents' Association.

3. This Tribunal has heard multiple appeals relating to this Estate and, it is therefore assumed, will be familiar with the context in which the s.27A application in relation to insurance premiums was made: see [2016] UKUT 470 (LC); [2017] UKUT 190 (LC); [2018] UKUT 31 (LC); [2022] UKUT 98 (LC); [2022] UKUT 302 (LC); [2023] UKUT 137 (LC).

Ground 2: If, contrary to the Landlords' primary case under Ground 1, 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.

4. The FTT's findings relevant to this issue were as follows (references in square brackets below are to paragraphs in the Decision):
   (1) The Landlords instructed WMS to secure insurance. WMS then instructed Reich to act as broker [68].
   (2) Neither WMS nor Reich provided any services for the insurer [68].
   (3) The Landlords did not receive a payment from the insurer [68].
   (4) Reich agreed a commission structure with the insurer and paid WMS an amount for fees said to have been incurred, retaining the commission. [68]
   (5) These were arrangements for the payment and sharing of a commission, rather than a rebate or discount [71].
   (6) The work carried out by Reich amounted to the supply of services relating to the insurance of the Estate as identified in the definition of Insurance Rent in the Headlease, and that, as such, the Leaseholders were contractually obliged to contribute towards the costs incurred [75].
   (7) 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." This is a narrow

[1] Dr Ashley Steel, the leaseholder of 151 Berkeley Tower, has instructed counsel under the Bar's Public Access Scheme. The Leaseholders (including Ashley Steel) continue to be represented by the Residents' Association of Canary Riverside ("RACR"). The other leaseholders/RACR have not instructed counsel purely for administrative reasons, i.e. it would be necessary for all of them to provide evidence of their identity in accordance with money laundering regulations and to sign a client care letter.

definition which extends to costs of and related to the insurance itself, and not to the Landlords' own activities, connected with taking out or claiming on insurance [83].

(8) 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 [83].

(9) In other words, WMS' fees are "management costs", not "sums … in respect of the insurances required by Clause 6.1(a)(i) (iii) and (iv)" [84], [85].

5. The Leaseholders' primary submission is that, although the FTT was correct to find that WMS's "fees" were for management services, not sums in respect of the insurances required by Clause 6.1(a)(i) (iii) and (iv) of the Headlease, the FTT's analysis of the relevant lease provisions was wrong.

6. The FTT did not make any finding as to whether Octagon or CREM arranged the insurance but, as shall be explained, the distinction matters.

7. Clause 6.1 of the Headlease requires Octagon to insure the Estate **[363-364]**. In fact, it appears that CREM has been arranging the insurance: see paras 4 and 7 of the Landlords' SoC dated 22.11.19, a copy of which is attached hereto **[Annex 1]**; and para 6 of Mr Curtis' w/s dated 22.11.19, a copy of which is attached hereto **[Annex 2]**. This evidence was not challenged.

8. CREM's insurance obligations are contained in Part Four of the Underlease, a copy of which is attached hereto **[Annex 3]**. They include:

(i) by clause 22.1 of the Underlease to enforce Octagon's obligation to insure the Estate.

(ii) by clause 22.3 of the Underlease to comply with clause 6.3.2 of the Headlease.

9. Clause 6.3.2 of the Headlease provides:

"[CREM] will not take out any insurance in respect of the matters which [Octagon] is to insure or procure the insurance of under clause 6.1 provided that this clause 6.3 shall not prevent [CREM] from insuring in accordance with 6.1 to the extent that and for as long as [Octagon] fails to insure or procure the insurance in accordance with clause 6.1 and [Octagon] shall pay to [CREM] on demand, the proper cost of any such insurance affected by [CREM] in such circumstances".

10. CREM appears to have insured the Estate pursuant to clause 22.3 of the Underlease and the proviso in clause 6.3.2 of the Headlease ("the Proviso").

11. By clause 23.2 of the Underlease the tenant covenanted to pay a specified percentage ("the Building Service Charge Percentage") of the Building Expenditure, which by clause 24.3.8, includes the costs of insurance, in particular:

    24.3.8.1 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

    24.3.8.2 The cost of insurance against loss of Building Service Charge for a period of five years or such longer period as the Landlord shall deem appropriate to effect

    24.3.8.3 The cost of insuring all items used or provided in connection with the Services including without limitation all furniture soft furnishings carpels chattels and effects in the Serviced Areas and all plant machinery tools and equipment

    24.3.8.4 Property owners liability and public liability or such other insurances as the Landlord may from time to time deem appropriate to affect

    24.3.8.5 Works required to the Serviced Areas in order to satisfy the insurers of the Serviced Areas

    24.3.8.6 Any amount which may be deducted or disallowed by the insurers pursuant to the excess provision in the Landlord's insurance policy upon settlement or adjudication of any claim by the Landlord provided that such excess shall be no greater than that generally applicable in the market for such insurance.

12. By clause 1 of the Headlease **[362]**, the "Insurance Rent" means:

    "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)"

13. At [72] of the Decision the FTT held:

"We agree with Mr Bates that the starting point in this case is the definition of Insurance Rent in the headlease. This provides that costs incurred in connection with the supply to the Landlord, of services relating to insurance are payable by CREM to Octagon".

14. This abbreviated definition of Insurance Rent is apt to mislead. The phrase "goods or services relating to insurance" applies only to "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 … as an input credit)".

15. A more accurate abbreviation of Insurance Rent is:

"a due proportion … of all sums which [Octagon] shall from time to time pay in respect of the insurances required by Clause 6.1(a)(i) (iii) and (iv) … and the whole of the sums which [Octagon] shall from time to time pay for insuring against loss of rents pursuant to clause 6.1(iii).

16. Where the insurance is arranged by CREM pursuant to the Proviso, no Insurance Rent is payable by CREM under the Headlease.

17. The Underlease does not make express provision for such an eventuality. The tenant's obligation to contribute towards the cost of the insurance incurred by CREM must therefore be implied.

18. The obvious term to be implied would be to insert words in clause 24.3.8.1 of the Underlease which mirror the relevant part of clause 6.3.2 of the Headlease ("the proper cost of any such insurance affected by [CREM] in such circumstances") as underlined below:

24.3.8.1 The Insurance Rent (as defined in the Headlease) <u>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</u> 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.

19. Importantly, clause 6.3.1 of the Headlease, which entitles Octagon to retain and utilise any commission attributable to the placing of the insurance does not apply where CREM insures or procures the insurance.

The proper cost of insurance

20. On this analysis, the tenant's contractual liability is limited to its contribution to "the proper cost of [CREM] insuring or procuring the insurance in accordance with clause 6.1 of the Headlease".

21. The question therefore becomes what is the "proper cost of [CREM] insuring or procuring the insurance under clause 6.1."

22. The FTT's finding that WMS's "fees" were for management services, not sums in respect of the insurances required by Clause 6.1(a)(i) (iii) and (iv) of the Headlease is effectively a finding that WMS' fees were not a proper cost of CREM insuring or procuring the insurance under clause 6.1.

23. If, contrary to the position set out above, the FTT did not effectively find that WMS' fees were not a proper cost of CREM insuring or procuring the insurance under clause 6.1, the FTT fell into error and this Tribunal should make that finding.

The FTT was correct for the reasons it gave

24. In the alternative, it is submitted that the FTT was correct to find that WMS's "fees" were for management services, not sums "in respect of" the insurances required by Clause 6.1(a)(i) (iii) and (iv) of the Headlease for the reasons it gave.

25. The Landlords rely on a passage in *Albon (trading as NA Carriage Co) v Naza Motor Trading Sdn Bhd* [2007] EWHC 9 (Ch); [2007] 1 W.L.R. 2489, a case on service under what was CPR r.6.20(5), in which Lightman J quoted a decision of the Supreme Court of Victoria in *Trustees Executors and Agency Co Ltd v Reilly* [1941] VLR 110, a case on whether proceedings to recover possession were proceedings 'in respect of' a debt.

26. These cases provide no assistance whatsoever on the proper interpretation of clause 1 of the Headlease. The principles of contractual interpretation are well known. The construction of the wording in a lease very much turns upon the particular wording; previous authorities give little or no assistance as to the correct construction.

27. The ordinary and natural meaning of "in respect of the insurances required" in clause 1 of the Headlease does not include fees for management services.

Ground 4: The Tribunal erred in holding at paragraph 86 that the Disputed Amounts were not reasonably incurred. No reasons were given for this conclusion, save for the supposed burden of proof.

28. The challenge to the finding that the charges were not reasonably incurred is surprising given the findings at [69] and [70]:

> "69. There is considerable uncertainty about the exact arrangements regarding that commission structure because we have not had sight of any contractual documents between the Respondents and either WMS or Reich concerning the sharing of commission, payment of fees or otherwise. In cross-examination, Mr Curtis said that he had not seen any such contractual documentation, and when asked if WMS invoiced Reich for the sums paid to it, his response was that he did not think they did. He believed that WMS would just be told about the fees payable on the premiums being placed and then the money would be sent to them. The Respondents have not sought to tender any evidence from either Reich or WMS.
>
> 70. In our view, the Respondents' complete lack of transparency with leaseholders regarding these commission payments, paid since 2010, has been lamentable. The sums involved are large and constitute a very substantial percentage of the premium towards which leaseholders were asked to contribute, without any notification to them as to the nature and amount of the commissions involved. It was only through these proceedings that the full extent of these commissions became apparent."

29. In the PTA Decision, the FTT stated that its conclusion on whether the fees paid to WMS were reasonably incurred 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."

30. The FTT then conceded (correctly) that one does not necessarily follow the other. The FTT also considered that the question of whether the costs were reasonably incurred may have to be remitted.

31. Given that the Leaseholders' principal challenge to the insurance commissions was that they were not reasonably incurred (and particularly in the context of the endless litigation at this Estate), the Leaseholders' frustration at these observations cannot be underestimated.

32. But, with respect to the FTT, the observations in the PTA Decision are in fact wholly inconsistent with the Decision itself. Para 86 is clear enough:

> "In our determination, not only are the leaseholders not contractually obliged to pay these sums, the Respondents 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." (Emphasis added.)

33. The FTT did not hold that because there was no contractual liability on the Leaseholders to pay, it followed that the costs had not been reasonably incurred. They gave a totally different reason, namely that the Landlords had also failed to satisfy the burden on them to prove that such costs were reasonably incurred. In reviewing the Decision, the FTT misunderstood or became confused as to what it in fact held.

34. Both the FTT and this Tribunal have already dismissed the Landlords' argument (ground 3) that the FTT "erred in law in holding at paragraphs 67 and 86 that the burden of proof lay on the Landlords to justify the sums claimed."

35. In refusing permission this Tribunal held:

> "The FTT was satisfied that the leaseholders had established a prima facie case that the sums claimed were not payable. No criticism is made of that proposition. There is therefore no basis on which it can be said that the evidential burden felon [sic] the appellant to establish what the payments were for, that they had been reasonably incurred, and were of a reasonable amount."

36. The sums in dispute were very significant, amounting to £1,517,372 in total. A breakdown of this sum is in the table at [43] of the Decision. The FTT set out (and therefore clearly had regard to) the Landlords' evidence on the services provided by WMS (see [44] to [47]).

37. The FTT's finding at [86] must be read with the findings it made at [69] and [70] (quoted above). Taken together, the FTT was perfectly entitled to find that the Landlords had not discharged the evidential burden upon them.

38. For all these reasons, the appeal should be dismissed.

JONATHAN UPTON
TANFIELD CHAMBERS
LONDON WC1R

ANGELA JEZARD
RESIDENTS' ASSOCIATION OF CANARY RIVERSIDE
2ND SEPTEMBER 2023

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STATEMENT OF CASE ON BEHALF OF THE RESPONDENTS

Jonathan Upton

Tanfield Chambers
2-5 Warwick Court
London
WC1R 5DJ

Tel: 020 7421 5300

jonathanupton@tanfieldchambers.co.uk

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