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 Hearing	:	**12 – 14 September 2022**
Date of Decision	:	**21 December 2022**

DECISION

Description of hearing

The hearing of this matter took place between 12 – 14 September 2022 by remote video conferencing (HMCTS code: Remote: CVP). The Applicants provided a hearing bundle (969 pages) in PDF format and references in square brackets and in bold below are to page numbers in that bundle. The Respondents provided a supplemental bundle and references in square brackets and in bold with a prefix Supp: below are to page numbers in that bundle. No party objected to a video hearing.

Delay in Issue of Decision

For reasons explained to the parties, in general terms, there has been some delay in issue of this decision.

Decisions

1. The Applicants are not liable to contribute towards payment of the sums of: (a) **£1,517,372**, being fees paid to Westminster Management Services Limited; and (b) Insurance Premium Tax of **£121,338.58** on that sum.

2. The Applicants are liable to contribute towards payment of the sums (a) totalling **£483,182**, being fees in the form of commission payable to brokers Reich; and (b) Insurance Premium Tax of **£38,696.42** on that sum.

3. Financing charges included in the insurance premiums for the years 2011/12 – 2016/17 were not unreasonably incurred and are payable by the Applicants.

4. The Applicants' case that the reinstatement value of the Estate had been overstated for the years 2010/11 - 2019/20, resulting in inflated premiums, fails.

5. The Applicants' case that a flawed apportionment methodology had been used when allocating insurance costs to the leaseholders of car parking spaces serving the Estate also fails.

Background

6. The Canary Riverside Estate ("the Estate") is a mixed-use, purpose-built development comprising 325 flats, a hotel, health club and commercial units. Octagon Overseas Limited ("Octagon") is the freehold owner of the Estate. Canary Riverside Estate Management Limited ("CREM") is the leasehold owner of a large part of the Estate. The Applicants are sub-lessees of residential flats in the Estate, all held under long leases. CREM is and has, at all material times, been the applicants' immediate landlord.

7. On 5 August 2016, the tribunal made a Management Order **[183]** in respect of the Estate under the provisions of s.24 Landlord and

Tenant Act 1987 ("the 1987 Act"), appointing the First Interested Party, Mr Alan Coates, as Manager. The Management Order has since been varied by the tribunal on several occasions. Mr Sol Unsdorfer is the current Manager, having replaced Mr Coates on 9 September 2019.

8. This is a determination of the Applicants' application, brought pursuant to s.27A Landlord and Tenant Act 1985 ("the 1985 Act"), dated 25 July 2019, in which they sought to challenge the payability of costs incurred by the Respondents in insuring the Estate for the service charge years 2010/11 to 2019/20 inclusive.

9. S.27A permits an application to be made to the tribunal for a determination as to 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.

10. Service charge is defined in s.18 of the 1985 Act as meaning an amount payable by a tenant of a dwelling as part of or in addition to the rent: (a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements, insurance or the landlord's costs of management; and (b) the whole or part of which varies or may vary according to the relevant costs.

11. S.19(1) provides that relevant costs shall be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred, and 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. S.19(2) provides that 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.

12. The application has a long and somewhat complicated procedural background, the key points of which we now summarise.

13. At a Case Management Hearing ("CMH") on 26 September 2019, the tribunal directed that it would determine a preliminary issue raised by the Respondents, namely, "whether the applicants have, by their conduct or otherwise, admitted liability to pay service charge costs concerning insurance for the service charge years 2010/11 to 2015/16 inclusive". In a decision dated 12 May 2020 **[93]** the tribunal determined that they had not.

14. Directions issued by the tribunal on 1 October 2019, amended 16 October 2019 **[30]** required the Respondents to disclose documents concerning the insurance of the Estate to the Applicants and the Interested Parties. Those directions also made reference to the disclosure of "a breakdown of commissions or other benefits in kind

whatsoever paid by or on behalf of the insurer or any broker to either of them or to the Landlord or any agent, company, or person connected with the Landlord or its officers or directors in any way whatsoever, showing both the amount paid and the recipient(s)". This provision was wrongly characterised in the directions as a matter of disclosure. What was actually intended was for the Respondents to provide a breakdown of the insurance premiums said to be payable by the Applicants. This was clarified in further directions issued by the tribunal on 9 July 2020 **[157]**, in which the Respondents were directed to send to the Applicants a written statement setting out, and breaking down:

"(a) any remuneration, commission, or other sources of income or benefits, relating to the placing or managing of insurance, received by either of the respondents, or any agent, broker, company, or person connected with the Landlord or its officers or directors;

(b) any other sources of income and related income or other benefits including commissions arising from the provision of insurance; and

(c) what services, if any, [were] provided for the income received;"

15. The Respondents provided that written statement on 28 August 2020 **[162]**. In it, they stated that:

    (a) through their managing agent, Westminster Management Services Limited ("WMS"), they had engaged Reich Insurance Brokers Limited ("Reich") to assist with placing the insurance of the Estate, and that Reich received a broker's fee for doing so. For the years 2016/17 – 2019/20, the fees said to have been received by Reich amounted to roughly £6,000 per year. A list of services provided by Reich appears at paragraph 10 of the statement;

    (b) WMS were paid management fees for providing these services out of income "generated from the commercial property interests within the respective companies". For the years 2016/17 – 2019/20, the management fees paid to WMS were said to range from between £110,000 to £145,000 per year, Paragraph 7 of the Respondents' statement reads as follows: "For the avoidance of doubt, these fees are for all property services and not specifically for insurance related services.";

    (c) the Respondents did not have access to, and neither were they aware of, any other insurance related income received by either Reich or WMS.

16. The Applicants were dissatisfied with contents of the Respondents' 28 August statement and sought an order for further extensive

disclosure of documents. The tribunal was of the view that the Applicants needed to have some key information to prepare their statement of case, and therefore issued further directions on 5 October 2020 **[166]**. Those directions included provision by the Respondents of a schedule for the service charge years in dispute, which was to provide a breakdown of the insurance premium payable, including, amongst other matters, the information regarding commissions, and other sources of income, previously ordered in the 9 July 2020 directions.

17. A schedule was subsequently provided by the Respondents to the Applicants on 13 November 2020 **[256]** which gave a breakdown of the insurance premiums and brokers fees paid to Reich for the 2013/2014, 2014/15, and 2015/16 service charge years. That schedule contained the following footnote regarding commissions received by Reich:

> "Reich insurance brokers have since confirmed that although they do not receive commissions on a property by property basis, they do receive commissions on the global insurance policies that they place on behalf of the Yiannis Group of companies. They do however estimate that from 2013 - 2019 (7 years) they have earned total revenues across all of the CREM policies (inclusive of broker fees) of £201,077, which equates to an average of £28,725.38 per year. All such commissions are incorporated within the premiums."

18. Also disclosed by the Respondents to the Applicants was an email from Nick Symes, a Property Director at the Reich Group of Companies, to Mr Paul Curtis at the Yiannis Group (of which the Respondents are subsidiary companies), sent on 13 November 2020 **[337]**. That email reads as follows:

> "As discussed, our earnings are calculated at policy level which includes all your assets and not for each individual building.
>
> However, I can confirm the total commission and fees retained by Reich on CREM for the period 2013 to 2019 amounted to £201,077.65"

19. In the view of the Applicants, the schedule and disclosure provided did not comply with the tribunal's previous directions regarding the disclosure of insurance commissions. They therefore made an application for an order under rule 20(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") on 24 November 2020, in which they sought an order that Reich provide details of all remuneration received for services provided to the Respondents in respect of insurance cover for the Estate for the relevant years, together with details of all commissions, commission-sharing arrangements and/or any other remuneration accruing to the Respondents, and/or their agents, in respect of the

insurance cover placed by Reich for those years. In a decision dated 30 June 2021 **[340]**, Judge Vance dismissed the application because, in his view, the pursuit of such an order, before the Applicants had served their initial statement of case was premature.

20. However, Judge Vance's understanding of the position regarding service of the Applicants' statement of case was incorrect. It had, in fact, been served on 18 December 2020 **[173]** but a copy had not been included amongst the documentation submitted in support of the Rule 20(1)(b) application, and no reference to it had been made by the Applicants when presenting their case. After this was pointed out by the Respondents' solicitors in an email dated 8 July 2020 **[358]**, Judge Vance instructed the tribunal's case officer to write to the parties, which she did on 18 August 2021 **[368]**. In that letter Judge Vance acknowledged his misunderstanding, and stated that if a party considered the 18 December statement of case should have been before him but was not, or if there had been some other procedural irregularity in the determination of the application, then it was open to them to pursue a late application to set aside the decision under Rule 51 of the tribunal's 2013 Rules. No such application, or appeal against the 30 June decision was pursued.

21. A further CMH was held before Judge Vance on 27 September 2021, with further directions issued on 29 September (amended on 8 and 26 October 2021) **[376]**. Alongside those directions, Judge Vance, on his own volition made a rule 20(1)(b) order against Reich **[380]** requiring it to answer questions and to produce documents in respect of the contents of Mr Symes' email of 13 November 2020. Reich was ordered to provide a statement detailing and breaking down the commission or remuneration it received in relation the Estate, either from the Respondents or from any party acting on behalf of the Respondents, for the years 2013 to 2019 inclusive, together with copies of any relevant letter, emails or other documents concerning receipt of such commission or remuneration for the years in question.

22. Reich responded in the form of a witness statement from Mr Symes dated 1 November 2021 **[382]** in which he stated that Reich did not receive any commission or renumeration in relation to the Estate "either from the Respondents or from any party acting on behalf of the Respondents". This narrow reading of the Order was criticised by Judge Powell in a letter from the tribunal dated 23 November 2021 **[388]** and led to the Applicants applying to vary the rule 20(1)(b) order. That application was considered at a hearing on 22 February 2022, and in a decision dated 1 March 2022 the tribunal replaced the order it made on 29 September 2021 with an order requiring Reich to provide a copy of its electronic spreadsheet(s) which sets out a detailed breakdown, by annual insurance period, of the amount of any commission or remuneration which either: (a) it has received; or (b) it has paid, or which has been paid through it, to the Respondents, or their agents; and/or to any third party, in either case in relation to

the insurance of the Estate for the insurance periods 2013/14 to 2019/20 inclusive.

23. In response to that order, on 15 March 2022 Reich provided a one-page spreadsheet **[443]** setting out the premiums paid under the Yiannis Group policy, as well as the total commission retained by Reich, and the total fees paid to WMS. Although the spreadsheet identified the amount of the total premium attributable to the Estate for the years 2013 to 2020, it did not do so in respect of the commission retained by Reich, or the fees paid to WMS. Instead, it identified the total amount of the commission retained, and fees paid, and what percentage each figure was of the total premium for the relevant year.

24. The Applicants then served an amended statement of case dated 25 April 2022 **[449]**, and the Respondents served a statement of case in response on 30 May 2022 **[498]**. The application finally proceeded to a three-day hearing that commenced on 12 September 2022.

The hearing

25. The hearing took place by remote video conferencing. Ms Jezard, the Secretary of the Residents' Association of Canary Riverside represented the Applicant leaseholders. The Respondents were represented by Mr Bates, of counsel. Ms Cattermole, of counsel, represented Mr Coates, and Mr Rowan, also of counsel, represented Mr Unsdorfer. Counsel for the two managers attended as observers and did not make representations. Mr Louca, in-house counsel for CREM also attended, as did the solicitors for the Respondents, Mr Coates, and Mr Unsdorfer.

26. Mr Paul Curtis, an employee of WMS and, since 2015, the Financial Controller for CREM and Octagon, attended the hearing, and gave witness evidence on behalf of the Respondents. We had the benefit of a witness statement from him dated 18 August 2022 **[724]**. Exhibited to Mr Curtis' statement is an undated witness statement from Mr Simon Taylor, CEO of the Reich Group, said to have been prepared in March 2017, and served in the tribunal application that led to the making of the initial Management Order. Mr Taylor did not attend the hearing. We also had the benefit of a witness statement from Ms Jezard **[503]** who was cross-examined on her evidence by Mr Bates. Several other observers attended various parts of the hearing.

27. The Applicants provided the digital hearing bundle. Freeths LLP, the solicitors for the Respondents, had prepared a supplemental bundle that contained: copies of the CREM headlease; an example residential underlease; and written submissions made by Dr Ashley Steel, a residential leaseholder and partner of Ms Jezard, dated 2 July 2018, made in respect of an earlier application by Mr Coates to vary the Management Order. Mr Bates informed us that Dr Steel's

submissions had been included in the event that a particular line of questioning arose, and it was unlikely to be necessary to have regard to them. We allowed the two leases to be relied upon in evidence as they were crucial to our determination and said that we would consider whether to do so in respect of Dr Steel's submissions in the event that the anticipated line of questioning arose. It did not, and we have not had regard to those submissions when reaching our determination.

28. At the hearing Ms Jezard confirmed that the Applicants were not contesting the quantum of the premiums, except in respect of the four challenges identified below. The Applicants agreed that aside from those challenges, the insurance secured was at a competitive rate, and they made no challenge as to the market testing carried out by Reich. They appreciated that only a limited number of insurers were willing to insure for estates such as Canary Riverside.

29. The four issues raised by the Applicants were that:

    (a) insurance commissions and fees included in the insurance premiums were not payable by them, and had been unreasonably incurred;

    (b) the insurance premiums included inappropriate financing charges;

    (c) the reinstatement value of the Estate had been significantly overstated, resulting in the Estate being too insured for too high a sum, leading to inflated premiums; and

    (d) a flawed apportionment methodology had been used when identifying the allocation of insurance costs to the leaseholders of car parking spaces serving the Estate.

30. We will look first at the lease provisions and the arrangements in place in respect of insurance. We will then take the Applicants' four challenges in turn, setting out the parties' submissions and evidence on each, as well as our determination.

Lease Provisions and insurance arrangements

31. Clause 6.1 of the headlease between Octagon and CREM **[921]** obliges Octagon to insure the buildings and structures comprised within the Estate, as well as the installations and common parts, etc with one or more companies of repute or with Lloyds Underwriters. Such insurance must be in a sum which represents, in the Respondents' reasonable opinion, its full reinstatement costs. It must cover loss of rent, certain plant and machinery, property owners' liability, and such other insurances as the landlord may from time to time deem necessary.

32. Insurance Rent in the Headlease **[Supp. 8]** is defined as *"meaning 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 .....which the Landlord shall from time to time pay in respect of the insurances required by Clause 6.1(a) (iii) and (iv)....."*

33. Clause 6.3.1 reads as follows:

> *"The Landlord shall be entitled to retain and utilise as it sees fit any commission attributable to the placing of insurance required by Clause 6.1 and the payment of any insurance sums"*

34. Extracts from the residential underlease between CREM and the residential leaseholders are at page **[927]**. A full copy of the underlease was included at **[Supp. 89]**. Clause 22 obliges CREM to comply with the insurance provisions contained in the headlease. Clauses 23 - 25 make provision for CREM to recover its costs of doing so from the residential leaseholders, through the service charge, with clause 24.3.8 specifying that the costs to which the leaseholders must contribute, by way of a Building Service Charge, include the Insurance Rent, as defined in the headlease, excluding a due proportion in respect of insurance of the car park. Clause 25.2 then obliges the leaseholders to contribute towards a due proportion of the Insurance Rent, as defined in the headlease, referrable to the Car Park.

35. Prior to the making of the Management Order in August 2016, insurance of the Estate was carried out by the Respondents, who then recovered the costs incurred through the service charge. When the initial Management Order was made the tribunal transferred responsibility for insuring the Estate to the Manager **[235]**, a decision that was reversed in March 2017, following the landlords' successful appeal to the Upper Tribunal in *Octagon Overseas Limited v Coates* [2017] UKUT 0190 (LC) **[219]**.

36. The current position is that the Respondents engage WMS to liaise with its broker, Reich, who in turn places the insurance for the Estate. Reich then demands a contribution from the Manager, who seeks recovery of that contribution through the service charge. Up until 2021/ 2022 the Estate was insured under a block policy taken covering 40 Yiannis Group properties. Since then, it has been insured under a standalone policy.

Challenge 1: Insurance commissions and fees

37. The cost of insurance shown in the accounts for the service charge years 2010/11 to 2015/16 is as follows:

Year	Residential Flats	Residential Car Park	Estate (shared service)	Commercial Car Park	Commercial	Total
2010/11	£238,367	£31,539	£16,024	£12,132	£100,670	£398,733
2011/12	£324,136	£42,887	£26,495	£16,497	£137,237	£547,252
2012/13	£324,136	£42,887	£25,862	£16,497	£137,237	£546,439
2013/14	£318,876	£42,106	£25,560	£16,314	£135,010	£537,866
2014/15	£316,076	£41,736	£25,495	£16,171	£133,825	£533,303
2015/16	£318,875	£42,106	£25,560	£16,315	£135,011	£537,867
Totals	£1,840,467	£234,261	£144,817	£93,926	£778,990	£3,101,460

38. The Respondents agree that these figures are accurate, save that (a) Estate Shared Services 2012/13 should read £25,682 (not £25,862); and (b) the total for the Residential Car Park should read £243,261 (not £234,261).

39. Following the appointment of the Manager the billing/accounting for insurance changed and the service charge accounts no longer record the total insurance costs across the Estate, only the residential contribution. The Residential apportionment of insurance costs, as detailed in the accounts, prepared by the Manager was as follows:

Year	Residential Flats	Residential Car Park	Total Residential	Total Estate (shared service)
2016/17	£335,555	£44,528	£398,293	£25,151
2017/18	£303,019	£74,539	£377,558	-
2018/19	£309,830	£55,861	£367,564	£2,688
2019/20	£331,110	£79,008	£413,545	£4,924

40. Mr Bates' position was that Respondents were not responsible for the accounts, and so could not formally accept the accuracy of these figures, but that they were not proposing to advance any other figures and realised that it is likely that the FTT will work from those figures. That assumption was correct. In the absence of alternative figures, we see no reason not to do so.

41. Details of the payments made to Reich and WMS for the years 2013/14 – 2019/20 are set out in the schedule disclosed by Reich **[520]**. For example, for 2013/14, total commissions and fees paid in

respect of a premium of £1,234,841.07 amounted to £454,300.18 (36.79%), with fees paid to WMS being £344,436.15 (27.89%), and commission retained by Reich amounting to £109,864.03.

42. However, the schedule covers *all* properties in the Yiannis Group block policy, and whilst the apportioned premiums for the Estate are specified, the same is not true for the fees paid to WMS, and the commissions retained by Reich. We only have figures for the whole portfolio. That being the case, the Applicants have attempted an exercise in 'reverse engineering' the figures provided by Reich, in order to identify the commissions and fees attributable to the Estate **[519]**. At paragraph 3 of his skeleton argument, Mr Bates explains that whilst the Respondents could not accept these figures, they also could not advance any alternative figures and that it was realised that the FTT was likely to work from the figures provided.

43. Again, Mr Bates was correct in that assumption. At the hearing, Ms Jezard, who created the table at **[519]** provided us with an explanation as to how she had calculated at the figures stated in it. In summary, she identified the percentage of the gross total premium that was attributable to the Estate and then applied this percentage to the totals provided for the fees paid and commissions retained. As Reich had not provided figures prior to 2013/14, she used the 36.79% figure specified as being the amount of the gross premium attributable to fees and commissions, and then applied that retrospectively for the years 2010/11 – 2012/13. Ms Jezard's approach is logical and given that fees and commissions were clearly calculated across the whole Yiannis portfolio, and as no alternative methodology is being advanced by the Respondents, we are satisfied that it is appropriate for us to proceed using Ms Jezard's calculations. This results in the following sums being subject to challenge by the Applicants:

	Fees paid to WMS	**Reich Net Retained**
2010/11	£99,834	£31,844
2011/12	£160,636	£51,238
2012/13	£160,409	£51,165
2013/14	£150,548	£48,020
2014/15	£146,684	£49,735
2015/16	£162,272	£44,817
2016/17	£162,200	£51,687
2017/18	£143,487	£53,257

2018/19	£154,897	£56,632
2019/20	£176,405	£44,787
Totals	**£1,517,372**	**£483,182**

Work carried out by WMS

44. Details of the work undertaken out by WMS appear at paragraph 36 of Mr Curtis' witness statement **[729]** which we set out in full:

"36. The services carried out by WMS include:

36.1 Liaising generally with the broker;

36.2 Negotiating the premiums with the insurance broker;

36.3 Recharging insurance premiums once agreed;

36.4 Reviewing policies to ensure they meet the needs of the policy holders;

36.5 Administering claims with broker/insurer/tenant (prior to my involvement WMS employed someone whose role included dealing with this);

36.6 Negotiating with banks to minimise banking demands from insurers;

36.7 Negotiating with insurers to ensure that banking insurance requirements are met;

36.8 Arranging and attending insurance surveys;

36.9 Reviewing insurance survey reports;

36.10 Reviewing insurance premium financing;

36.11 Processing insurance premium payments;

36.12 Preparing loan agreements with managing agents;

36.13 Accounting for and managing loan agreements with managing agents;

36.14 Arranging reinstatement valuations;

36.15 Analysing reinstatement valuations and determining VAT status;

36.16 Dealing with direct and indirect tenants insurance queries;

36.17 Reviewing property regulatory requirements that may impact on property insurances;

36.18 Appointing independent loss adjusters to insure full payment of claims;

36.19 Seeking quotes for insurance repairs;

36.20 Reviewing fire risk and health and safety assessments e.g. cladding;

36.21 Reviewing alterations to the buildings on the Estate and the potential impact on the insurance;

36.22 Dealing with ad hoc insurance matters.

45. In oral evidence at the hearing, Mr Curtis stated that he personally performed all the functions itemised at paragraph 36, except for those at 36.5, 36.8, 36.9, 36.11, 36.12, 36.16, 36.17-36.21, which were performed by other members of his team, potentially with some involvement from him.

46. Exhibited to Mr Curtis' statement was a schedule said to provide an estimate of the approximate time spent by WMS in dealing with insurance-related services. Mr Curtis asserted that CREM policies are some of the most complex policies WMS deals with, and they therefore require greater involvement from senior staff. The schedule **[807-8]** sets out an estimate of time spent, and costs incurred, by WMS in 2020 on each of the items of insurance-related work identified by Mr Curtis at paragraphs 36.2 – 36.22 of his statement. Mr Curtis confirmed in cross-examination, that it covered all 40 policies in the Yiannis Group policy. Five grades of fee earner are identified with hourly rates ranging from £75 per hour for a Grade 1 fee earner, to £525 per hour for a Grade 5 fee earner (Mr Curtis being a Grade 5). Total time spent is recorded as 1649 hours (525 of which are at Grade 5 level), and total costs as £538,325.

47. At paragraph 38 of his statement, Mr Curtis states that in addition to the time identified in the schedule, some tasks were undertaken specifically in relation to the Estate, including chasing for payment of insurance contributions from both FTT managers and the individual commercial tenants, and also chasing the Managers for an insurance 'float'. He set out details of the steps taken in chasing payment from Mr Coates and Mr Unsdorfer at paragraphs 39 – 50 of his statement.

48. At paragraph 51, Mr Curtis explained that the decision to remove insurance of the Estate from the Yiannis Group block policy was taken by the landlord following complaints raised by RACR regarding the inappropriateness of the block policy.

Work carried out by Reich

49. Details of the work caried out by Reich are summarised at paragraph 10 of the landlords' statement of 28 August 2020 **[163],** which we reproduce in full:

"

- Understanding the complex portfolio of Canary Riverside, both buildings, liabilities and residential/commercial covers, as well as operational aspects of the business.
- Liaison with clients throughout the year on all the various insurance related issues, from surveys to all general aspects.
- Obtaining terms from the wider insurance market.
- Keeping close to the wider insurance market regarding risk appetite.
- Watching closely market capacity, critical for an estate of this size, complexity and value.
- Ensuring banking covenants are complied with in full and liaising with lenders as required.
- Organising revaluations of the estate to ensure it is adequately covered and not underinsured.
- Discussing the risk with the insurer market well in advance of the renewal of the portfolio.
- Negotiating with multiple insurers well in advance of the renewal to ensure they have the capacity to underwrite the policy and working with the market to get the best deal in terms of cover and cost.
- Analysing quotations received.
- Discussion of renewal options with the clients at length prior to placing the insurances
- Renewing policies to ensure they meet the requirements of the policy holders with the multiple insurers
- Invoicing and collection of premiums for the insurers
- Obtaining quotations to finance insurance premiums when funding is not available.
- Negotiating 3rd party finance premiums.

- Administering insurance claims throughout the year and liaison with the loss adjusters and managing agents on all cases.

- Liaison with insurers for surveys of the risk during the insurance year

- Addressing any other ad hoc insurance related issues"

50. In his March 2017 witness statement **[298]** Mr Taylor confirmed that CREM appointed Reich to arrange insurance for the Estate in 2010, and that it did so without the involvement of CREM's managing agents at the time, Marathon Estates. He explained how Reich constantly checked the insurance market to ensure appropriate protection, and why, in 2014, it replaced RSA with Tokyo Marine Kiln as lead insurer, together with two co-insurers, because no single insurer was keen to underwrite 100% of the risk.

51. At paragraphs 5 – 13 of its 6 March 2017 decision **[208]**, the tribunal that made the original Management Order recorded that at the hearing before it Mr Taylor amplified on his statement, saying that he checked the insurance market throughout the year, and that he would commence discussions with insurers six months after the start of the financial year. He explained how the bad claims history on the Estate made it difficult to find an insurer.

52. Mr Bates drew our attention to documents included in the bundle that provided examples of the work carried out by Reich, namely the reinstatement assessment commissioned by Reich from IPS Limited dated July 2014 **[261]**, and Reich's 2021 Insurance report **[750]** which explained the basis on which the Estate's insurance had been renewed, together with a claims overview and details of how the market had been tested prior to renewal. He also referred us to an email from Mr Symes dated 16 August 2022 to Mr Curtis **[773]** in which Mr Symes provided further details of the work Reich undertakes, both before and after renewal of the insurance. Post renewal work included billing the premium, arranging finance when required, accepting claim notifications, dealing with claims, and facilitating insurance surveys and revaluations.

<u>The Applicants' case on fees and commissions</u>

53. The Applicants contend that the fees paid to WMS and the commissions retained by Reich were unreasonably incurred in their entirety and were not payable. In doing so, they relied upon the decision in *Sadeh and ors. v Mirhan and ors* [2015] UKUT 428 (LC) as authority for their proposition that the burden lies on the Respondents to satisfy the tribunal that the gross premiums charged had been reasonably incurred. In that case HHJ Huskinson held that

the onus was on a s.24 Manager to prove that commission paid to her by insurers formed part of the cost reasonably incurred for insuring the building and was therefore recoverable from the tenant through the service charge.

54. The Applicants' challenge in respect of Reich's commission was primarily focused on the lack of transparency regarding the commissions retained. They point out that until Reich had been compelled by the tribunal to provide details of such commissions by the Order issued in March 2022, leaseholders had no idea that commissions and fees accounted for approximately 38% of the annual gross insurance premiums charge. They did not challenge a broker's fee paid to Reich of between £4,828 and £5,828 per annum which they assumed had not been included in the commission retained by Reich.

55. As for the fees paid to WMS, the Applicants point out, at paragraphs 41 and 48 of their amended Statement of Case **[458]** that WMS appears to be a Yiannis Group company which employs senior staff whose responsibilities extend across the Yiannis portfolio of properties, including the company secretary, in-house solicitors, and financial controller. In evidence, Mr Curtis said that whilst WMS is not within the Yiannis Group of companies, he is employed by WMS, as are the directors of several of the Yiannis Group companies. CREM, he said, did not have its own employees. Those engaged with work on behalf of CREM were all employed by WMS.

56. The Applicants referred to the judgment of Mr Justice Lightman in decision in *Williams -v- London Borough of Southwark* [2000] All ER (D) 377 in which the judge said that he was required to determine three questions concerning the lease between Mr Williams and the Council. This was in circumstances where the Council had entered into a series of insurance policies which entitled it to discounts and commissions of various kinds, but where it had then sought recovery of the full premiums from leaseholders, without making any allowance for the discounts and commissions. The first two of those questions are relevant to this application and were addressed at paragraphs 5 and 6 of his judgment, as follows:

> "5. The first question is how much of the premium payable to Zurich is the Council entitled to include as a cost or expense in respect of which the Claimants are liable to pay a proportion as part of the Service Charge due from them. It is common ground that the benefit of the 5% loyalty payment should have been passed on to the Claimants. The Claimants contend that the Council should have passed on the balance of the commission (namely the 20%): the Council contend that they were entitled to retain this. It is clear that under the 1995 Agreement the full premium (less the 5% loyalty payment) 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 these 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. By clause 4(6) the Council covenanted to insure; by clause 2(3) (a) the Claimants covenanted to pay the Service Charge; and paragraph 7(3) of the 3rd Schedule provided that the Service Charge should include all costs and expenses of and incidental to insurance. It is I think clear that even as the full 95% was the premium payable, so the full 95% was the cost and expense of insurance within the meaning of paragraph 7(3). I recognise that some concern may be felt that the Council has taken advantage of its position as landlord to enter into the 1995 Agreement and to obtain the benefits flowing to it from it. But the Claimants make no complaint in this respect and there is no reason to believe that the lessees have in anywise been prejudiced. In the circumstances I can see no reason why the position should be any different in the case where Zurich's contract for local claims handling is with the Council from the case where Zurich retained the responsibility or employs some other agent to fulfil it. The 20% payment to the Council is not in law or fact a rebate or deduction from the premium payable. It is a payment for services. The Council was accordingly under no obligation to pass it on to the Claimants. The Council is therefore correct in maintaining that it is entitled to retain the 20% and include the full 95% of the premium as a cost and expense a fair proportion of which was chargeable to the Claimants.
>
> 6. The second question raised is whether, if the Council was obliged to credit the 20% to the Claimants, the Council could nonetheless include the costs and expenses actually incurred in claims handling.....as costs in respect of which the Service Charge is payable. This turns on whether they fall within paragraphs 7(3) and 7(5) of the 3rd Schedule as cost and expenses of and incidental to the provision of insurance. In view of my answer to the first question, this second question does not arise. But I should say that, if it did, I would answer it in the affirmative. For these are the costs of discharging the duties ordinarily assumed by the insurance company in return for the premium as part of its services as insurer...."

57. In the Applicants submission the payments to WMS were not remuneration for services provided, but rather a rebate, or discount associated with the Yiannis block policy which, as with the 5% loyalty payment in Williams, could not be retained by the landlords.

58. Ms Jezard also submitted that the work said to have been carried out by WMS were tasks that a managing agent would usually conduct on behalf of a landlord, and that up until 2016 this was what the contract between CREM and Marathon Estates envisaged. She referred us to paragraph 3.2.48 of that contract dated 1 October 2012 **[949]** which stated that when instructed by CREM to do so, Marathon was entitled to demand and collect in insurance contributions from leaseholders

and also to submit, or assist in submitting, insurance claims against the policy.

The Respondents' case on fees and commissions

59. In his oral submissions Mr Bates took us first to the provisions of the headlease, pointing out that the defined term "Insurance Rent"**[Supp:8]** includes "all sums….which may become payable in connection with the supply to the Landlord of goods or services relating to insurance….", so it is not just limited to the premium itself. Further, he said, clause 6.3.1 **[Supp:23]** entitles Octagon to retain and utilise, as it sees fit, any commission attributable not just to the placing of insurance, but also any commission attributable to the payment of any insurance sums.

60. CREM, he said, is therefore obliged to pay the insurance rent under the headlease, which is then passed through to the residential leaseholders through the Building Service Charge under clause 24.3.8 and the obligation to contribute towards the costs of insuring the car park at clause 25.2. In Mr Bates' submission, the entirety of the insurance charges demanded from the leaseholders, including the commissions and fees, were sums payable in connection with the supply to the landlord of services relating to insurance, as defined by the term Insurance Rent. Moreover, they were payable in respect of a relevant cost for the purposes of s.18 of the 1985 Act because they were costs incurred directly or indirectly by a landlord in respect of services…insurance etc. and were included in the premium payable by Octagon. They were therefore service charge costs that Mr Bates said the leaseholders were contractually obliged to pay.

61. In addition, he submitted that both the fees paid to WMS, and the commission retained by Reich, were payments for services, which, according to the *Williams* can be retained by the landlord subject to one caveat which was not addressed in *Williams*, namely whether the costs were reasonably incurred for the purposes of s.19.

62. If, said Mr Bates you translate the decision in *Williams* into a general residential service charge case, it is obvious that unearned sums, including insurance commission, or in *Williams*, the 5% loyalty bonus, could never be reasonably incurred, and must be given back to leaseholders. However, earnt monies can in principle be reasonably incurred, as in *Williams* itself, where the landlord provided a service that the insurance company would otherwise have undertaken.

63. What mattered therefore, according to Mr Bates, was whether the payments to Reich and WMS represented a reasonably incurred cost for services provided. If they did, then, in his submission the charges were permissible and recoverable. If not reasonably incurred, the tribunal could reduce the charges in the usual way that it does when disallowing part of a service charge item in a service charge case.

64. In that respect, he argued that the Applicants had failed to provide any evidence, by way of comparable evidence or otherwise, to suggest that it was possible to obtain insurance without these payments, nor as to what the impact would be in financial terms, assuming a lower premium was realised, but a new set of charges incurred via the service charge account for the work undertaken.

65. One piece of evidence that Mr Bates suggested we did have available to us, in terms of what constitutes reasonably incurred costs, was Mr Coates' proposals when he put himself forward as the proposed Manager. Paragraph 2 to Schedule 3 of the proposed Management Order **[801]** suggested that the appointed broker should be entitled to charge a fee for brokerage or commission of up to 30% of the premium, divided equally between the broker and the Manager. That, suggested Mr Bates, was not out of kilter with what Reich was paid.

Decision on insurance commissions and fees

66. In *Williams*, the payment received by the landlord was not, in fact, a rebate or deduction from the premium, but instead a payment for services provided by the landlord on behalf of the insurer. As such, the landlord was not obliged to pass on the benefit of the payment to leaseholders. Although the point was not addressed in *Williams*, we are of the view that where a gross premium includes a payment to a landlord for services carried out on behalf of an insurer, it would still be open to a leaseholder to argue that costs were not recoverable under the terms of their lease, or to mount a s.27A challenge, arguing that the provision of the services, or the amount of costs incurred were unreasonable.

67. Where, however, the payment received is a discount or commission, the question of whether the payment can be retained by the landlord, or if its benefit needs to be passed on to leaseholders to reduce the cost of insurance, depends on the terms of their lease. If leaseholders are asked to pay the costs of a gross insurance premium, that includes the payment received by the landlord, their liability to do so depends on: (a) whether the terms of their lease entitle the landlord to retain the payment; (b) whether the payment is for costs that amount to relevant costs for the purposes of s.18; and (c) whether such costs have been reasonably incurred for the purposes of s.19. We agree with the Applicants that, when considering if such sums have been reasonably incurred, the decision in *Sadeh* is authority for the proposition that the burden of proof lies on the landlord.

68. Unlike in *Williams*, this is not a case where either WMS or Reich provided services for the insurer. Nor did the landlord receive a payment from the insurer. Instead, what happened is that the Respondents instructed WMS to secure insurance. WMS then instructed Reich to act as broker, and Reich found an insurer. Reich then appears to have agreed a commission structure with the insurer (possibly with WMS involvement) and paid WMS an amount for fees

said to have been incurred, retaining the remainder of the commission.

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.

71. On the available evidence, we find that these were arrangements for the payment, and sharing, of a commission, rather than a rebate or discount as suggested by Ms Jezard. As such, we consider the questions we need to address are: (a) whether the work said to have been carried out by WMS and Reich were costs that the Applicants were contractually obliged to contribute towards under the terms of their leases; (b) if so, whether they amounted to relevant costs; and (c) if so, whether the costs were reasonably incurred.

72. 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. The residential leaseholders are then obliged to contribute towards those costs through the service charge mechanism in their leases, as identified by Mr Bates.

73. We accept that if Octagon had received any commission attributable to the placing of insurance, then Clause 6.3.1 of the headlease entitled it to retain and utilise that commission as it saw fit (which might include paying or arranging for it to be paid to others). However, that is not what happened. The recipients of the commission were WMS and Reich, not Octagon or even CREM, and clause 6.3.1 is therefore not engaged. WMS is a separate standalone company which the Respondents say is not part of the Yiannis Group. In the absence of any evidence that any of the commission in issue was payable to Octagon (or CREM), or any contractual documents assigning any

such right to commission to WMS and/or Reich, or which arranged for such commission to be paid or payable to WMS and/or Reich instead, clause 6.3.1 has no application.

74. However, this still leaves the question of whether the commissions were nevertheless payable as costs for work carried out by WMS and/or Reich to which the Applicants were contractually obliged to contribute (and if so, if they were relevant costs and reasonably incurred).

Reich

75. We find that 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, and that, as such, the Applicants were contractually obliged to contribute towards the costs incurred. In our judgment, the work undertaken by Reich was clearly insurance-related services that were intrinsic to the securing of insurance and the management of claims against the policy. This is evidenced by:

    (a) the work described at paragraph 10 of the landlords' statement of 28 August 2020 **[163]** and itemised in paragraph **[49]** above;

    (b) Mr Taylor's March 2017 witness statement **[298]**, and his oral evidence as recorded in the tribunal's 6 March 2017 decision **[208]**

    (c) the reinstatement assessment commissioned by Reich from IPS Limited dated July 2014 **[261]**;

    (d) the obtaining of Reich's 2021 Insurance report **[750]**. Although this relates to a period after the period in dispute in this application, we agree with Mr Bates that its consistent with evidence apparently given by Mr Taylor at the 2017 tribunal hearing and it is more likely than not that this exercise was carried out each year;

    (e) Mr Symes' email of 16 August 2022 to Mr Curtis **[773]** providing further details of the work undertaken by Reich; and

    (f) Mr Symes' witness statement of 4 February 2022 **[409]** prepared when Reich objected to the broad scope of the amended r.20(1)(b) Order sought by the Applicants in which he stated that there were about 5,000 entries in Reich's electronic diary system relating to insurance of the Estate over the years in issue that might be relevant to the documents and information sought by the

Applicants. This suggests substantial work being carried out by Reich.

76. We are also satisfied that the costs incurred by Reich constitute variable service charges as defined in s.18, being amounts payable under the terms of their leases, either directly or indirectly, for services or insurance.

77. The question then arises as to whether such costs have been reasonably incurred. There was no suggestion by the Applicants that the work undertaken by Reich was unnecessary, and the available evidence does not suggest to us that the costs incurred were excessive in amount.

78. Ms Jezard suggested that the insurance position regarding the development at New Providence Wharf was a useful comparator, and referred to an insurance summary from Marsh, the broker who insured that development, dated 7 October 2021 **[571]** which referred to an underlying commission of 2% plus a 2.5% work transfer fee, and a 5% commission on terrorism insurance. This, she suggested, evidenced how excessive the commission payments for the Estate had been.

79. However, historical data from Marsh showed that the underlying commission retention for the insurance of New Providence Wharf **[314]** for 2015/16 – 2019/20 was much higher than in 2020/21, in the region of approximately 11% per annum. The reduction achieved in 2021 was, said Ms Jezard, the result of leaseholders challenging the insurance commissions that they were being asked to pay. Mr Curtis, in oral evidence, had a different explanation. He suggested that the reduction may have been due to a major fire at New Providence Wharf in May 2021 which could well have resulted in the freeholders, Ballymore, having problems in finding an insurer on short notice before the upcoming renewal date. These difficulties, he speculated, might have led to Marsh substantially reducing the commission sought.

80. There is no evidence before us from Marsh to explain why the level of its commissions dropped significantly in 2021. On the balance of probabilities, we consider that the lower rate for 2021 is likely to be exceptional. Looking at the table prepared by Ms Jezard **[522]** Reich received commission of around 8.9%. In our opinion as an expert tribunal that is not unreasonable for a development with the complexity of the Estate, a conclusion is supported by the historical data provided by Marsh in respect of New Providence Wharf.

81. The Applicants did not provide evidence to suggest that it was possible to obtain insurance without incurring such commissions, and in the absence of any alternative quotes from brokers, or any other useful evidence to the contrary, we determine that Reich's costs

were reasonable in amount, reasonably incurred, and therefore payable by the Applicants.

82. The total sum of £483,182 as set out in the table at paragraph [43] above is therefore payable, as is the element of Insurance Premium Tax ("IPT") which was payable on that sum. Ms Jezard calculated in her table at **[519]** that the total IPT paid on both the Reich and WMS commission was £160,035. As set out at paragraph [88] below, the tribunal has accepted that calculation, and calculates that £121,338.58 of this was IPT on the WMS commission, so £38,696.42 will have been the IPT on the Reich share of the commission, which the tribunal determines is payable.

WMS

83. In our determination, any payment for the work that WMS is said to have carried out, as described at paragraph 36 of Mr Curtis' witness statement **[729]**, and in his oral evidence at the hearing, 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.

84. Responsibility for obtaining insurance for the Estate rests with the landlords. If they had discharged that responsibility themselves, rather than appointing WMS, matters such as liaising with Reich, arranging insurance surveys and reinstatement valuations (as opposed to the cost of the valuations themselves, which is covered by "Insurance Rent"), seeking quotes for insurance repairs, and all the other work described by Mr Curtis, would all have concerned management of the Estate. Prior to the appointment of the Manager, CREM's ability to recover such costs of management from leaseholders would have depended on the service charge provisions in their leases concerning recovery of management costs.

85. Now that the Management Order is in place (albeit with an exception for obtaining insurance), there would need to be specific provision in the Management Order if such a liability were to be imposed on leaseholders. The landlords did not, however discharge the responsibility to obtain insurance themselves; they appointed WMS to do so. That election was open to them, but liability to pay the costs then incurred by WMS would, absent clear provision in the residential leases to the contrary, be a matter between the landlords and WMS. They cannot, in our view, be recovered from leaseholders,

as costs of insurance, because they do not fall within the definition of Insurance Rent.

86. It may be some of the costs could have been recoverable under clause 24.3.7 of the residential underlease, which allows for the recovery of the cost of the management, administration and supervision of the residential buildings on the Estate. However, if so, the costs should have been properly demanded as such through the service charge. Instead, the landlords have sought to seek to recover such costs from leaseholders by arguing that they are costs of insurance that were included in the insurance premium, but not declared to the leaseholders. 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.

87. As there was no contractual liability on the leaseholders to contribute towards these fees paid to WMS, we determine that the sums in question are not payable by them.

88. There is then the question of IPT due on the premiums received by the insurer, and which, said Ms Jezard, had included the fees paid to WMS, and commission retained by Reich. The Applicants contended that they were not liable to pay the IPT on the commission and fees which have been unreasonably passed on them. In our determination, if the leaseholders have no contractual liability to pay the fees charged by WMS, they have no liability to pay the IPT charged on the amount of the premium attributable to those fees. Ms Jezard submitted that the IPT rate ranged from 5% to 12% across the years in dispute **[519]**. Mr Bates did not dispute this. As such, we accept her submission and determine that the following sums are not payable by the Applicants:

Year	**WMS Fees**	**IPT Rate**	**IPT on WMS Fees**
2010/11	£99,834	5	£4,991.70
2011/12	£160,636	6	£9,638.16
2012/13	£160,409	6	£9,624.54
2013/14	£150,548	6	£9,032.88
2014/15	£146,684	6	£8,801.04
2015/16	£162,272	6	£9,736.32
2016/17	£162,200	9.5	£15,409.00
2017/18	£143,487	10	£14,348.70
2018/19	£154,897	12	£18,587.64
2019/20	£176,405	12	£21,168.60
Totals	**£1,517,372**		**£121,338.58**

89. As we have determined that the Applicants were contractually obliged to pay towards the services provided by Reich, it follows that they are obliged to pay the IPT due on the cost of such services, as set out above, and at the rates mentioned in the previous table.

Challenge 2: Financing charges

90. Reich was appointed as broker for the Estate in 2010. Its first invoice for the year ending 31 March 2011 **[580]** shows an interest charge on the total premium of £13,149.66, at a rate of 4%. Reich provided the financing arrangements to allow the Respondents to pay the premium in monthly instalments, rather than as an up-front payment. The Respondents have confirmed that similar financing arrangements were incurred in subsequent years **[470]**, namely: 2013/14 (£19,988.39); 2014/15 (£19,988.39); 2015/16 (£19,988.39); and 2016/17 (£31,023.02). The Applicants assume that similar financing arrangements were in place for 2011/12 and 2012/13.

91. It is the Applicants' contention that there was no need for the Respondents to resort to financing because leaseholders paid their service charges in advance, on 1 April and 1 October each year, and there should have been sufficient sums available in the service charge account to pay the insurance premiums without recourse to financing. As such, they argue that these sums were not reasonably incurred.

92. By way of example, Ms Jezard took us to the service charge accounts for the year ending 31 March 2011 **[865]** and pointed out that the accounts showed total service charge monies held by the managing agents and the landlord in the sum of £1,198,450.62 (although she acknowledged that the amount said to be held by landlord being £305,000 had been clarified to be a debtor, and so was not cash available to the landlord). Ms Jezard argued that accounts for subsequent years continued to show substantial sums being held, with cash at bank as of 31 March 2012 recorded as £1,121,317 **[866]**, and £1,544,834, as of 31 March 2013 **[868]**. She also suggested that the accounts showed considerable surpluses on the income and expenditure account, whereby the service charges demanded were significantly higher than the year's expenditure, for example in 2015 **[876]**, where the surplus is recorded as being £226,000.

93. Ms Jezard argued that whilst a few leaseholders might not pay their advance service charges on time, a good majority would, meaning that the Respondents would have the advance payments made for the first six months of the service charge year available to them as well as the cash reserves held at the bank. This, she said, should have been sufficient to fund the entirety of the annual premium due on 1 April.

94. Mr Curtis addressed the finance charges at paragraphs 53- 59 of his witness statement, **[733]**, where he stated that the insurance

premium needed to be paid, in full, by the beginning of April each year, before all the service charge funds had been collected, and that the service charge funds available to do so was diminished by the fact that not all leaseholders paid their demands on time, and because of the existence of substantial service charge arrears.

95. In oral evidence Mr Curtis referred to the balance sheet for 31 March 2013 **[868]** and said that it was important to distinguish between what is stated as being cash at the bank, and the cash that is actually available. He pointed out that whilst cash at bank for that year is stated as being £1,544,834, the amount held in the reserve funds is recorded as £993,564. He understood that reserve fund money to be ring fenced, and therefore the reserves could not be utilised to help fund the insurance premium. In addition, the amount stated for accruals is £481,949, which, said Mr Curtis refers to services that have been provided, or work undertaken but which has not yet been paid for. So, if the amount held in the reserve funds and the amount identified as accruals, is deducted from the cash at bank figure of £1,544,834, there would not, he said, be enough funds available to pay the insurance premium of £539,296, which had to be paid before midnight on 31 March, hence the need for financing.

96. As for the year ending 31 March 2011 **[864-5]** he pointed out that service charge monies held by the managing agents/landlord is recorded as £1,198,450.62. If the reserve fund balance of £730,818.13 is deducted, you are left with a balance of £467,632.50. However, under current liabilities you have creditors and accruals of £365,571.21, and an VAT due to HMRC of £154,988.03, so again, he said, there is a need to use financing to pay the insurance premium.

97. Mr Curtis' evidence was that the same financial situation arose in all the years under consideration in this application, and that every balance sheet he looked at had the same end result, namely that there would not be sufficient funds available to pay the insurance premium without financing.

98. In addition, said Mr Curtis, even if every residential leaseholder paid the interim service charges due on 1 April immediately, they were only being asked to pay for half of the sum due in respect of the insurance premium, with the remaining half being billed in October. The balance of the sum demanded in April was, he said, needed to run the Estate. Further, commercial lessees paid their service charges quarterly, not biannually.

Decision on financing

99. We agree with Mr Curtis' analysis of the service charge accounts. We agree that the position reflected in the 2010/2011 and 2012/13 accounts was such that once amounts held in the reserve funds and creditors and accruals were deducted from the cash held at bank,

there would be insufficient funds available to pay for the insurance premium that had to be paid, in full, before 1 April in each year.

100. Ms Jezard said that when considering this question, regard should be had to sums identified on the balance sheets as deferred income, which Mr Curtis explained refers to sums demanded, such as advance service charges, but which have not yet been paid. We agree with Mr Curtis that it would not be appropriate to do so because the Respondents would not know when such monies would be received, and because the insurance premium had to be paid in full before 1 April, the date on which the first interim service charge payment was due.

101. Ms Jezard also suggested that the Respondents could have utilised the reserve fund monies to help pay the premium. Clause 23.1.3.2 of the residential underlease allows for the use of a Building Reserve Fund "for the purpose of providing for periodically recurring items of expenditure whether or not of a capital nature and whether recurring at regular or irregular intervals and for anticipated expenditure…….".

102. Even if Ms Jezard's submission was correct, and recourse could have been had to the reserves, the Respondents decision not to so, and to instead have recourse to a financing arrangement, was not, in our view, an unreasonable position for them to take. As indicated at paragraph 7.5 of the Royal Institution of Chartered Surveyors ("RICS") Service Charge Residential Management Code, 3rd edition, reserve funds are primarily intended to ensure that monies are available when required for major works, cyclical works or replacing expensive plant. They are not, in our view, generally to be used to fund routine service charge expenditure, and the Respondents' decision not to do so cannot now, retrospectively, be considered to be outside of the range of decisions which a reasonable landlord might have taken. This is particularly so when the residential underlease makes specific provision for CREM to pay the costs of borrowing to finance services, including the provision of insurance (clause 24.3.10.2 **[96]**).

103. The Applicants made no challenge to the rate or quantum of the financing, and we therefore determine that the charges were reasonably incurred and are payable by the Applicants.

Challenge 3: Reinstatement/rebuild value overstated

104. The Applicants contend that the rebuild value for the Estate, used between 2011 – 2019, when taking out insurance, had been significantly overstated, resulting in higher premiums than should have been the case. They identified the rebuild values stated in policy certificates to be as follows:

2010/11	£223.3M	
2011/12 - 2014/15	£350.0M	**[550], [107],[113]**

2015/16 - 2018/19	£340.0M	**[120], [126], [134], [141]**
2019/20	£350.2M	**[149]**
2020/21	£315.8M	

105. They point out that between 2010/11 and 2011/12 the rebuild value increased by £126M (57%) to £350M, resulting in a 37% increase in the insurance premium demanded.

106. Ms Jezard drew our attention to the following reports:

(a) a 17 July 2014 report carried out by IPS Ltd **[261]**, commissioned by Reich for the Respondents in which the reinstatement value for the Estate was stated as £340M (excl. VAT).

(b) a December 2016 report carried out by Shaw & Co **[472]**, commissioned by Mr Coates, the original Manager in which the reinstatement value was stated as £256M (excl. VAT and fit-out of commercial areas); and

(c) an October 2019 report carried out by QuestGates **[267]** commissioned by Reich for the Respondents in which the reinstatement value was stated as £316M (excl. VAT).

107. The Applicants say that IPS is a company related to Reich, and that the rebuild value stated in its report of 340M is a significant outlier, a value that was then used when effecting insurance up until Shaw & Co's December 2016 report. They assert that the Respondents adopted the IPS report, which Ms Jezard viewed as sub-standard, because an overstated rebuild value resulted in inflated premiums and increased commissions, from which they or WMS benefited. Ms Jezard also said that the fact that QuestGates valuation at £315M in 2019 was significantly lower than the IPS value of £340M in 2014 suggests that something was clearly wrong with the IPS figure.

108. They argue that the reinstatement values stated in the 2016 and 2019 reports were more reliable as they accorded with building cost indices compiled by Costmodelling Limited from information published by the Office for National Statistics, the RICS and UK construction cost consultancies **[588]**.

109. To calculate the amount of the overstated value the Applicants suggest either using the QuestGates 2019 valuation of £316M and extrapolating backwards, resulting in an overstated value of 31%, or taking the rebuild value used in 2010/11 and extrapolating forwards, uplifting it by the annual building indices, resulting in an overstated value of as much as 50%.

110. Mr Curtis addressed this issue at paragraphs 61 – 105 of his witness statement **[735].** He explained that as he started working for WMS

in 2015, he did not know why the reinstatement value increased in 2011/12. He said that he had made enquiries of Reich, who had said that it did not have records going back that far. It was his view that the Respondents took independent specialist advice from IPS, a company with which he says it has no connection, and that it was entitled to rely upon the declared values stated in that report. It was not appropriate, in his view, to take the QuestGates report and to conduct a reverse calculation.

Decision on Rebuild Value

111. In our determination there is no persuasive evidence to support the Applicants' contentions. We accept that the reinstatement valuation in the IPS report appears unusual given the lower valuation in the subsequent QuestGates valuation. However, if the Applicants wished to challenge the accuracy of the IPS report what was needed was expert evidence to address the question of whether its reinstatement value was overstated, or if the report had been produced on an incorrect basis. The Applicants could have, but did not, seek permission from the tribunal to obtain and rely upon such expert evidence.

112. We see no reason to doubt the independence of both companies that carried out those valuations. Even if IPS is related to Reich, as Ms Jezard suggested, there is no evidence to suggest that it is connected to the Respondents. In our view, it was entirely reasonable for the Respondents to rely upon the reinstatement valuations stated in those reports when securing insurance, given the potential serious consequences that could have flowed if the Estate was underinsured.

113. We also agree with Mr Bates' contention that as the hotel pays the largest single proportion of the insurance costs, it would be illogical for the Respondents to have manipulated affairs so that a connected company had to pay a higher charge than would otherwise be the case.

Challenge 4: Apportionment of insurance costs

114. The Applicants contend that, historically, the methodology used by the Respondents to allocate insurance premiums between 2010 and 2020, resulted in an unreasonable allocation of insurance costs to the leaseholders of car park spaces. They say that no allowance was made for the fact that the reinstatement cost for a concrete car park area was significantly lower than for other areas of the Estate.

115. They suggested that in 2010 the proportion of insurance costs charged to residential car park leaseholders was 8%, which then increased to 13.4%, apparently in 2016 following a report from Gross Fine, an extract of which appears at **[469]**. Then, in 2020, following the QuestGates report, it was reduced to 1.83% (or 1.75% according to the Applicants). The Applicants' position is that the historic apportionment was incorrect, and that a corrected apportionment figure should be applied retrospectively.

116. Mr Curtis commented on apportionment at paragraphs 85 - 99 of his witness statement **[739]** and in his oral evidence. He provided a useful table which explained how insurance costs had been apportioned across the Estate **[826]**. His evidence was that it was his involvement that led to the 2020 reapportionment that resulted in the allocation to the car park areas being reduced. This came about because on looking at the previous reports prepared by IPS, Shaw & Shaw, and QuestGates, he could not understand why the allocation to the carpark was as high as it was. It was his view that the valuers had incorrectly valued the carpark by failing to separate out the cost of the foundations. This meant that the cost of insuring the foundations was all being allocated to the carpark, when most of it should have been allocated to residential buildings above it.

117. He therefore went back to QuestGates and asked them to carry out a reapportionment exercise, separately identifying the cost for the foundations. This resulted in the apportionment for the residential carpark spaces being reduced by 11.58 % to 1.83%, and the apportionment for residents with flats being increased by 14.74% to 70.94%.

118. In his view, however, it would not be appropriate to apply this reassessment retrospectively as the Respondents had acted on the apportionment recommended in the professional reports received previously.

Decision on Apportionment

119. It appears that both parties agree current apportionment figure of 1.8%. The question is therefore whether the insurance contributions previously demanded from the Applicants, prior to the 2020 revaluation were unreasonable in amount and should be limited to 1.8%, or 1.75%, as the Applicants suggest. In our determination, the answer to that question is no.

120. We agree that it was reasonable for the Respondents to have acted upon the advice contained in the earlier reports. In addition, the Applicants have not explained how any reapportionment in favour of residents with car parking spaces should be accounted for in terms of adjustments to the remaining allocation. They have not had regard to how this would impact on other persons. If it is their position that the 2020 reapportionment should be applied historically, then we do not consider this would be reasonable. This is because we agree with Mr Curtis that the main losers in doing so would probably be the residents, and that the main beneficiary would be the landlord (albeit subject to any limitation on recovery of service charges imposed by s.20B of the 1985 Act).

121. This is because, having regard to the table at **[826]**, we agree with Mr Curtis that the persons that benefited from the historic position were the residents, because the contribution payable by a resident without

a car parking space was too low, as the weighting in respect of the foundations was incorrect. On the other hand, those who only had a car parking space, and no flat were asked to pay a disproportionately high amount. If you had both a residential flat and a car parking space, then you would have paid too much in respect of the car parking space, and not enough in respect of the flat, and these would roughly balance each other out. But Mr Curtis explained that it was essentially the Respondents which owned car parking spaces which did not have an associated flat. The Respondents own 175 car parking spaces, which meant that they had probably paid between them about £24,000 - £25,000 too much per annum, based on the £137 average figure for a car parking space advanced by Ms Jezard. As such, the main beneficiary in respect of a historic reapportionment would, on the balance of probabilities, be the landlord. For all these reasons, the Applicants' challenge fails.

S.20C Landlord and Tenant Act 1985 and Para. 5A of Schedule 11 Commonhold and Leasehold Reform Act 2002

122. The Applicants' application contained requests for orders under both statutory provisions. However, at the hearing we deferred consideration of both, as well as the question of reimbursement of tribunal fees, until final determination of this application. We anticipate that one, or both of the parties may wish to seek permission to appeal this decision to the Upper Tribunal. As such, we stay both the s.20C and paragraph 5A applications, and the application for reimbursement of fees until further order of the tribunal, to allow any such application for permission to be made, and if granted, for the appeal to be finally determined.

Concluding Remarks

123. In her closing submissions Ms Jezard explained how exhausting the long-running litigation regarding the Estate has been for her. We have no doubt about the sincerity of that remark. We commend her for the way in which she has conducted herself throughout the proceedings on behalf of the Applicants. There can be little doubt that the information finally provided by Reich regarding the amount of commission it retained, and the fees paid to WMS, would not have emerged if not for her determined efforts.

124. The service charge accounts are silent on the question of commissions and fees; the amount of commission said to have been retained by Reich in the Respondents' 28 August 2020 statement was woefully inaccurate, as was the figure specified in the schedule provide three months later, in November 2020, which stated that Reich had estimated that from 2013 - 2019 they earned total revenues across all of the CREM policies (inclusive of broker fees) of an average of £28,725.38 per year.

125. The level of commission retained by Reich was, in fact, much greater than that, roughly £50,000 per year, as indicated in the table at paragraph [42] above. It was only following the second Rule 20(1)(b) order that any meaningful information regarding the amount of commissions retained, and fees paid eventually emerged.

126. We agree with Ms Jezard's closing remarks about the need for greater transparency in insurance fees and commission charges. Paragraph 12.1 of the 2013 RICS code states that Insurance fees (including commissions) and all other sources of income and related income or other benefits in relation to the service charge arising out of the management should be declared annually to the client and to leaseholders and should reflect the level of work carried out. We urge the Respondents to ensure compliance with these recommendations in future.

Amran Vance

21 December 2022

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions

A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

1. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties.

2. If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed despite not being within the time limit.

3. The application for permission to appeal must state the grounds of appeal and state the result the party making the application is seeking.