IN THE FIRST-TIER TRIBUNAL **Case Reference: LON/00BG/LSC/2019/0277**
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

B E T W E E N :

VARIOUS LEASEHOLDERS REPRESENTED BY THE RESIDENTS' ASSOCIATION OF CANARY RIVERSIDE

Applicant

-and-

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

Respondents

THE RESPONDENTS' GROUNDS OF APPEAL

Ground One

1. **The Tribunal erred in law in holding that it was required or entitled to decide whether the amounts received by Westminster Management Services Limited ("WMS") in respect of insurance commission (the "Disputed Amounts") were contractually recoverable under the terms of the leases**.

2. Paragraph 71 of the Tribunal's Decision dated 21 December 2022 states:

> "*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.*"

3. However, the true position is that the only issue before the Tribunal was Issue (c), not Issues (a) and (b). The Tenants' s. 27A application dated 25 July 2019 asked the Tribunal to decide only "*whether the insurance premium was reasonably*

incurred. Of particular concern is the level of commissions included in the premium and the sum insured." [19][1]

4. The Tenants' Amended Statement of Case dated 25 April 2022 [449] confirmed that the issues before the Tribunal were limited to Issue (c):

> "*1. This application concerns whether the costs of insuring the Canary Riverside Estate ("the Estate") for the service charge years 2010/11 to 2019/20 inclusive were reasonably incurred. ...*
>
> *2. The Applicants are seeking a determination of the amounts in respect of insurance, which they consider to be unreasonably high. They are challenging the reasonableness of the insurance costs because of:*
>
> *2.1. Hidden and unreasonable commission/fees of circa £1.8M (38% of the gross premiums) included in the insurance charges, the majority of which was paid to Westminster Management Services, a company related to the Respondents.*"

5. The Landlords' Statement of Case in Response dated 30 May 2022 [499] confirmed that the pleaded case which they had to meet was limited to Issue (c):

> "*7. First, one considers the terms of the lease(s) and the insuring obligations of the landlord(s). In this case, the Applicants do not allege that the insurance is somehow outside the contractual obligations of the Respondents under the Headlease and Residential Leases. At trial, the Respondents will refer to both leases to show the extent and scope of the insuring duties, but, for present purposes, it is sufficient to note that there is no pleaded challenge on this point.*"

6. In her opening statement Ms Jezard, on behalf of the Tenants, confirmed that she challenged the reasonableness of the insurance commission on the ground that "*there is nothing that they are doing that justifies a commission from the insurance premium*" (page 33H of the transcript for 12 September 2022). She did

[1] References [ ] are to the main bundle; references [Supp] are to the supplementary bundle.

not challenge the Disputed Amounts on the ground that they were outside the terms of the leases.

7. In *32 St John's Road (Eastbourne) Management Company Ltd v Gell* [2021] 1 WLR 6034 the Court of Appeal held at [44-47] and [64-69] that it was up to a tenant challenging a service charge to establish a prima facie case that it was not payable. In *Gell* itself this meant that the tenant could no longer challenge the service charge after his statement of case had been struck out. In the present case it means that the FTT was neither required nor entitled to address Issues (a) and (b) in paragraph 71 of its Decision; the only issue which was before the Tribunal in the Tenants' original and Amended Statement of Case was Issue (c).

Ground Two

8. **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.**

9. The relevant provisions are as follows:

   9.1 Subclauses 24.3.8.1 and 25.2 of the underlease from CREM to each of the Tenants [Supp 94 and 96] requires the Tenant to pay a percentage of "*the Insurance Rent (as defined in the Head Lease*" [Supp 95 and 97].

   9.2 Subclause 1.1 of the head lease defines "*Insurance Rent*" as "*a due proportion … of all sums … which the Landlord shall from time to time pay in respect of the insurances required …*" [Supp 7].

   9.3 Subclause 6.3.1 of the head lease states: "*The Landlord shall be entitled to retain and utilise as it sees fit any commission attributable to the placing of the insurance required by Clause 6.1 and the payment of any insurance sums.*" [Supp 22].

10. As the Tribunal correctly held at paragraph 68, the Landlords "*instructed WMS to secure insurance*". Mr Curtis summarised the relevant services performed by

WMS to the Landlords in paragraph 36 of his witness statement [729-730]. The Landlords' Statement of Case dated 20 August 2020 purported to set out the sums received by Reich and WMS, but Mr Curtis accepted in cross-examination that this summary was incomplete [Day Two, pages 70-71]. It is clear as a matter of *fact* that WMS received the Disputed Amounts; the issue under Ground Two is whether the Landlords were contractually entitled, as a matter of *law*, to recover these amounts under the terms of the leases. There are three separate reasons why the Tribunal made an error of law in this regard.

11. (1) It should have held that the "*sums … which the Landlord shall from time to time pay in respect of the insurances*" meant the gross premiums, irrespective of any arrangement agreed as between the insurer, the Landlords (as insured) and the broker: *Blackstone Investments Ltd v Middleton-Dell Management Co Ltd* [1997] 1 EGLR 185 at 188C-E (Lands Tribunal) and *Williams v Southwark LBC* (2001) 33 HLR 22 at [5] (Lightman J).

12. (2) It erred in holding at paragraphs 73 and 83 that subclause 6.3.1 did not extend to commission paid by Reich to WMS, as distinct from payments by Reich to the Landlords. Reich was the broker; the Landlords were the insured parties (and hence the clients of the broker), and WMS was the Landlord's agent. As between Reich and the Landlords, it was the Landlords who were entitled to recover commission; the correct analysis as a matter of law is that it was the Landlords who directed Reich to transfer the Disputed Amounts to WMS in payment of WMS's fees. This falls within the language of subclause 6.3.1 ("*entitled to retain and utilise as it sees fit*"), in that the Landlords "*utilised*" the Disputed Amounts in discharging WMS's fees. Granted, the commission might not have passed through the Landlords' own bank account before being transferred to WMS, but as Hamblen J held in *Brown v InnovatorOne Plc* [2012] EWHC 1321 (Comm) at [996]: "*the short circuiting of payments may be permissible, both legally and from an accounting perspectiv*e".

13. (3) It erred in holding at paragraph 83 that the commission paid to WMS was not "*in respect of*" the insurances required by the head lease. It reached this conclusion by seeking to distinguish *Williams v Southwark*, on the ground that the payment in that case was for claims-handling services provided by the landlord

which would otherwise have been provided by the insurer. It is true that in the present case the services which were provided by WMS relieved the Landlords, not the insurer, of the need to provide those services, but that is not a valid distinction. The phrase "*in respect of insurances*" is widely drawn and is not limited to services performed on behalf of the insurer. In *Albon v Naza Motor Trading Sdn Bhd* [2007] 1 WLR 2489 at [27], Lightman J quoted with approval the following dictum: "*The words 'in respect of' are difficult of definition, but they have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer*". The correct analysis is that the payment was "*in respect of insurances*" because it was the *quid pro quo* for WMS's services, which were insurance-related, as stated in paragraph 10 above.

14. For the avoidance of doubt, the Landlords accept that it was open to the Tenants to challenge the *quantum* of the commission paid to WMS, on the ground that the Disputed Amounts paid for the performance of such services were not reasonably incurred (see Ground Four).

Ground Three

15. **The Tribunal erred in law in holding at paragraphs 67 and 86 that the burden of proof lay on the Landlords to justify the sums claimed.**

16. The Tribunal's conclusion as to the burden of proof is contrary to *32 St John's Road v Gell*, where the Court of Appeal at [46] and [65] agreed with the Deputy President in *Enterprise Home Developments LLP v Adam* that "*it is for the party disputing the reasonableness of sums claimed to establish a prima facie case*." The Tribunal's error of law as to the burden of proof coloured its approach to the questions: (i) whether the Landlords were contractually entitled to recover the Disputed Amounts (Ground Two); and (ii) whether those amounts were reasonably incurred (Ground Four).

Ground Four

17. **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.**

18. The Tribunal failed to consider whether, or give reasons for concluding that: (i) the nature and extent of the services provided by WMS to the Landlords were unreasonable, or (ii) the amount charged for such services was unreasonable.

19. Even if (which is denied) there were grounds on which the Tribunal could properly have concluded that *parts* of the Disputed Amounts were not reasonably incurred, the conclusion that *all* of these amounts were unreasonably incurred cannot be justified. At its most simplistic, the work which WMS did must have had *some* value.

20. In support of this ground of appeal, the Landlords note that:

    20.1 The Tenants did not produce any evidence that insurance could be obtained more cheaply at a level which did not include the commission paid to Reich and WMS. The Tribunal accepted this point at paragraph 81 of the Decision.

    20.2 Mr Coates (the first Manager appointed by the Tribunal) had himself sought a management order under which a commission of 30% would be paid to himself and his broker (a company associated with his company): see Mr Curtis's witness statement dated 18 August 2022 paragraphs 27-30 [724 at 728] and Mr Coates's draft order at [779 at 801]. For the avoidance of doubt, the Landlords do not accept that Mr Coates's proposed fee represents the upper limit of what is reasonable; they refer to it solely as evidence which was before the Tribunal that this level of commission was not unreasonable.

Ground Five

21. **The Tribunal erred in fact in holding at paragraph 35 that before August 2016 insurance of the estate was arranged by the Landlords. The correct**

position is that at all material times the Landlords engaged WMS to arrange insurance on their behalf.

22. Mr Curtis set out in his witness statement the approximate time spent dealing with insurance-related services for each year. There was no distinction between the nature of the work carried out by WMS before and after the Management Order took effect, just that *more* work was carried out post the Management Order: see Mr Curtis's witness statement paragraphs 37-47 [724 at 730-733]. Mr Curtis further explained in his evidence in chief that the Respondents had no employees of their own but relied on directors and employees who were provided by WMS, and that the services provided by WMS included insurance-related services: Transcript Day 2 at 3G-6FG (especially 6C) and 11B-13C. His evidence to this effect was not challenged in cross-examination.

Ground Six

23. **The Tribunal erred in law in holding at paragraph 88 that the service charge in respect of Insurance Premium Tax was irrecoverable.**

24. The only ground for this finding was that it was parasitic on the conclusion that the commission was wholly irrecoverable.

DAVID HALPERN KC
JUSTIN BATES
6 February 2023