UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2011] UKUT 255 (LC)
LT Case Number: LRX/134/2009

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – Landlord and Tenant Act 1985 section 27A – construction of lease – whether obtaining of a Surveyor's Certificate a condition precedent to liability to make on account payments or final payments of service charge – held it was a condition precedent – extent to which (quite apart from the condition precedent point) insurance premiums reasonable and recoverable through the service charge.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE LEASEHOLD VALUATION TRIBUNAL FOR THE SOUTHERN RENT ASSESSMENT PANEL

BETWEEN	**RITA AKORITA**	**Appellant**
	and	
	MARINA HEIGHTS (ST. LEONARDS) LIMITED	**Respondent**

Re: Marina Heights,
63 West Hill Road,
St Leonard's on Sea,
East Sussex
TN38 0NF

Before: His Honour Judge Huskinson

Sitting at: 43 Bedford Square, London, WC1B 3AS

On

21 June 2011

Sophie Weller, instructed by Dodd Lewis, on behalf of the Appellant.
The Respondent was not represented.

The following cases are referred to in this decision:
Leonora Investment Company Ltd v Mott MacDonald Ltd [2008] EWCA Civ 857.
Warrior Quay Management Company Ltd v Joachim (unreported LRX/42/2006).

Decision

Introduction

1. The Appellant appeals to the Tribunal from the decision of the Leasehold Valuation Tribunal for the Southern Rent Assessment Panel ("the LVT") dated 16 August 2009 whereby the LVT determined certain questions regarding the service charges payable under the Appellant's lease of her flat at Marina Heights.

2. Marina Heights is a residential block of flats built about 1989 and divided into 7 flats each of which are similar in size and proportion. Each flat has a designated parking area to the rear of the property and the property itself is situated on raised ground. I take this description from the LVT's decision. I was not invited to view the premises and I was of the clear view it was unnecessary for me to do so. The Appellant holds a long lease of a flat in Marina Heights, which I hereafter refer to as "the Building". The Respondent is the freehold owner of the Building and is a company with six issued shares, each such share being held by the lessee(s) of one of the flats in the building – one lessee is not a shareholder. The purpose of the Respondent is to hold the freehold and manage the building on behalf of the lessees. The Respondent is entitled to recover service charges from the lessees in accordance with the provisions of the relevant leases as referred to below.

3. The Appellant made an application to the LVT under section 27A of the Landlord and Tenant Act 1985 as amended to determine the recoverability of service charges for the years from 2002-2008.

4. There are two aspects of the LVT's determination which are challenged in the present appeal pursuant to the permission to appeal granted by this Tribunal:

1) The Appellant's primary argument is that nothing is recoverable by way of service charge for these years because of a failure by the Respondent to comply with a condition precedent in the lease – i.e. a condition precedent that must be compiled with if any service charges are to be recoverable at all. In summary it is argued (a) that before anything becomes payable by way of a final service charge or a payment on account of service charge it is necessary that the amount to be paid has been properly certified by the Lessor's Surveyor and (b) that no such certificate from the Lessor's Surveyor has been issued in respect of any year.

2) Separately it is argued that the amount included in the service charge demands in respect of insurance premiums is unreasonable and should be limited in accordance with section 19 of the 1985 Act.

5. Originally the Respondent indicated an intention to respond to the Appellant's appeal and the Respondent participated in the procedural preparation for the hearing over a substantial period, including the serving of its proposed experts' reports. However the Respondent, by its solicitors, wrote to the Tribunal on 13 May 2011 with certain enclosures which indicated an intention to withdraw the Respondent's opposition to the Appellant's appeal. The Tribunal on 2 June 2011 wrote to the Respondent's solicitors indicating that their letters were taken as notice pursuant to the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 that the Respondent had withdrawn from the appeal. The Tribunal notified its consent to the withdrawal. At the hearing before me on 21 June 2011, the Appellant was present and was represented by counsel. The Respondent was not represented, although a representative of the Respondent's current managing

agent and also certain directors of the Respondent were present in court throughout the hearing as observers. No application was made to me that the Respondent should be entitled to re-instate its case before the Tribunal in accordance with Rule 20(4) and no attempt was made by any person present who was connected with the Respondent to address the Tribunal.

6. The appeal had been ordered to proceed by way of re-hearing. At the hearing I heard evidence from the Appellant, who confirmed the truth of her written statement which was before me and who added certain further matters of evidence. I heard no further oral evidence. It had been envisaged that each party would call two expert witnesses, namely a building costs expert and an insurance expert. Each party did instruct such experts and the expert reports were exchanged and were sent to the Tribunal. Also the two pairs of experts (one pair in each area of expertise) produced an agreed statement of matters which were agreed and which were disagreed.

7. Miss Weller submitted that if the Tribunal accepted the Appellant's argument on the condition precedent point then that would be the end of the case and would result in the determination that nothing was payable by way of service charge by the Appellant during any of the relevant service charge years. However Miss Weller submitted that the Tribunal should go on to consider the question of the reasonableness of the insurance premiums even if the Tribunal accepted the Appellant's argument on the condition precedent point – she suggested this should be done to cover the possibilities (a) that the favourable decision on the condition precedent point was wrong or (b) that subsequently the Respondent might obtain a certificate from its surveyor for each of the relevant service charge years and might renew the demand for payment, including payment in respect of these insurance premiums. As the point had been raised in the appeal and had been the subject of consideration by the four expert witnesses, Miss Weller submitted it would be appropriate to decide the reasonableness of the insurance premiums in case such a decision became relevant. I indicate now that I consider I should indeed give a decision on the insurance premiums point irrespective of what may be my decision on the condition precedent point.

The Lease

8. By a lease dated 15 September 1992 between the Respondent's predecessor in title and the Appellant's predecessor in title Flat 4 in the Building was demised to the Appellant's predecessor for a term of 125 years from 24 March 1988 at a ground rent of £50 per annum. Clause 4.21 contains a covenant on behalf of the lessee in the following terms:

> "4.21 To reimburse to the Lessor a sum (hereinafter referred to as "the Service Charge") equal to one seventh (or such other proportion as may be determined by the Lessor's Surveyor depending upon the number of Units eventually using the access drains or other communal parts) of the costs expenses outgoings and matters mentioned in the First Schedule hereto the Service Charge to be due and payable on demand and the amount of the Service Charge to be ascertained and certified by the Lessor's Surveyor acting as an expert and not as an arbitrator once a year up to the Thirtieth day of June in each year (or if such ascertainment shall not take place on the Thirtieth day of June then the said sum shall be ascertained as soon thereafter as may be possible as if such sum has been ascertained up to the Thirtieth day of June aforesaid) commencing on the Thirtieth day of June next but not more frequently than once in every yearly period computed from the First day of July to the Thirtieth day of June next following **PROVIDED THEREFOR AND IT IS HEREBY AGREED** that the Lessee shall (if required by the Lessor) with every half-yearly payment of rent pay to the Lessor such sum on account of the Service Charge payable by the Lessee under this clause as the Lessor's Surveyor shall certify the first of such payments being payable on the signing hereof as being a reasonable interim sum to be

paid on account of the Service Charge and that the Service Charge payable by the Lessee hereunder (or such balance as shall remain after giving credit for any half-yearly payment as aforesaid) shall be paid by the Lessee or any proper balance found to be payable to the Lessee shall be so repaid to him on the Twenty Fifth day of December next following the year ending on the Thirtieth day of June to which such contributions shall relate or as soon thereafter as may be possible **PROVIDED LASTLY** that the Lessor shall not be entitled to re-enter under the provisions in that behalf hereinafter contained in respect of non payment only of any such interim sum as is hereinbefore mentioned."

9. The expression "the Lessor's Surveyor" is also used at various other points in the lease namely Clauses 4.6, 4.9 and 4.20 and also in the First Schedule paragraph 7. The First Schedule sets out the costs expenses etc in respect of which the lessee is to make a contribution. These include in paragraphs 1, 6 and 7:

> 1. The cost of keeping the Buildings insured in accordance with Clause 6.2 hereof against loss or damage by firm (sic) storm tempest and comprehensive risks and loss of rent during reinstatement (including the whole of any increased premium payable by reason of any act or omission of the Lessee).
>
> 6. The fees of the Lessor's Managing Agents for the collection of the aforesaid costs and for the general management of the Building.
>
> 7. Such sums or sums from time to time as the Lessor's Surveyor shall consider desirable to be retained by the Lessor by way of a reserve fund as reasonable provision for prospective costs expenses outgoings and other matters mentioned or referred to in this Schedule.

The condition precedent argument

10. It is convenient first to consider the condition precedent argument and then separately to go on to consider the matters raised in relation to insurance.

11. Miss Weller submits that there are three points which arise in the analysis of the condition precedent argument namely:

1) Is the provision of a certificate by the Lessor's Surveyor a condition precedent to the arising of any liability to make payment either of the final service charge or of the on account payment for service charge? – if the answer to this is yes then the next two points arise.
2) What does the condition precedent require the Lessor to do?
3) Did the Lessor do that which it was required to do?

Miss Weller submitted that, although these are the three relevant points in the analysis, point (1) is not a live point before this Tribunal. She argued that before the LVT both parties proceeded on the basis that it was a condition precedent that the amount of the service charge should be certified by the Lessor's Surveyor and she submitted that the LVT also proceeded upon that basis. Miss Weller pointed out that there was no cross appeal by the Respondent. She therefore argued that it was not for this Tribunal to consider Point (1) at all – instead the Tribunal should proceed upon the basis adopted by the parties and by the LVT (being a basis not challenged by a cross appeal) and should therefore assume that the true construction of the lease does indeed lay down that it is a condition precedent to an obligation to pay that there should be the relevant certificate from the Lessor's

Surveyor. She submitted therefore that the only points for this Tribunal were points (2) and (3), namely what did the condition precedent require and had it been provided?

12. I say at this stage that I do not accept Miss Weller's argument on this point. The Appellant argues before this Tribunal, on this appeal which is proceeding by way of re-hearing, that nothing is payable by way of service charge for the relevant years because of the existence of a condition precedent to liability which has not been compiled with. It is in my judgment for the Appellant to persuade this Tribunal that the lease on its true construction does indeed lay down a condition precedent to liability for the payment of service charge. It is not right that I should assume that the lease on its true construction lays down a condition precedent simply because of what occurred before the LVT – it is not right for this Tribunal deliberately to refrain from considering Point (1). I therefore turn to the merits of this argument.

13. Miss Weller submitted that the obtaining of a proper certificate from the Lessor's Surveyor was a condition precedent to the arising of any liability to pay service charge, either by way of on account payment or final payment, because of the following matters:

1) The plain and ordinary meaning of the words in the lease showed that this was the clear intention of the parties.

2) *Woodfall's Law of Landlord and Tenant* at paragraph 7.180 states:

   "Where a lease provides for the amount payable to be certified by the landlord's surveyor or accountant, the issue of a valid certificate will usually be a condition precedent to the tenant's liability to pay".

3) The Court of Appeal decision in *Leonora Investment Co v Mott MacDonald* [2008] EWCA Civ 857 at paragraph 23 was further support for this conclusion.

14. Prior to withdrawing its case in this appeal the Respondent had submitted various documents to the Tribunal including on 1 April 2010 a document entitled Reply which had been drafted by counsel and which advanced certain arguments against the proposition that a Surveyor's certificate was a condition precedent to liability. Bearing in mind that the points raised were points of law and that the Respondent was not represented, I considered it appropriate to ask Miss Weller to deal with the various arguments there raised. Three arguments were raised in the Reply document and they and Miss Weller's response were as follows:

1) It was submitted in the Reply that on the proper reading of clause 4.21 the service charge payment on account was stated as being payable "if required by the Lessor" and the final instalment was stated as being "due and payable on demand". It was argued therefore that the liability to make payment arose, respectively, when the Respondent "required" the payment or when the Respondent made a "demand" for the payment – the relevant date for payment was not limited to a date when the Lessor's Surveyor had given some certificate. It was submitted that the purpose of the Surveyor's certification was to indicate quantum (in his capacity as an expert) but not to act as a trigger without which there was no liability to pay anything. It was submitted that if the Respondent did not engage a Surveyor at all and merely demanded a sum for service charges (whether an on account payment or a final payment) then that sum would as a matter of contract be payable. Miss Weller argued that the approach put forward in the Reply involved disregarding the clear wording of the lease. The Lessor under clause 4.21 was indeed entitled to require something to be paid on account together with each half-

yearly payment of rent, but the answer to the question of what was the Lessor entitled to require to be paid was "such sum on account …. as the Lessor's Surveyor shall certify". Accordingly if there was no certificate there was nothing that the Lessor could require to be paid. Similarly as regards the final payment the Lessor was entitled to demand a payment, but the amount it could demand was "to be ascertained and certified by the Lessor's Surveyor acting as an expert and not as an arbitrator". In the absence of any certificate nothing was payable so nothing could be required and nothing could be demanded.

2) The Reply further argued that the lease must be construed against the background of the existence of section 19(1) of the Landlord and Tenant Act 1985 and the Reply continued:

"In other words no matter what sum is demanded the leaseholder is protected by section 19 of the Landlord and Tenant Act 1985. The statutory protection makes it less likely that the parties intended there to be the contractual protection that the Appellant seeks".

In answer to this Miss Weller submitted that if it is to be assumed that the parties and the draftsman had the provisions of section 19 of the 1985 Act in mind when the lease was entered into, then the building in of further protection beyond that provided for by section 19 of the 1985 Act went to strengthen rather than weaken the argument that what was intended was protection beyond that provided by section 19. If the intention was that section 19 protection would be sufficient then there would be no need to stipulate for a Surveyor's certificate.

3) The third reason raised in the Reply document was to the following effect:

"The Respondent's arguments sit alongside the contractual and statutory context, as explained above, without causing an injustice to either party. The Appellant's arguments, however, may result in considerable injustice that cannot have been the objective intention of the parties when the lease was entered into. This injustice arises from the fact that on the Appellant's case the Lessor commits a breach that can result in many years of service charge being unrecoverable. The Lessor's inability to remedy its breach arises from the statutory fetter that has existed since 1 September 1988 (i.e. since before the Marina Height leases were entered into) due to [section 20B of the Landlord and Tenant Act 1985]. Unless the problem is drawn to the Lessor's attention within 18 months of a cost being incurred then the Lessor will lose once and for all its ability to recover that cost. Thus, as in this case, a Lessee can raise no complaint about the want of a Surveyor's certification and then claim that none of the service charges have hitherto over many years been lawfully payable. Clear words would be required to achieve such a result and they are absent in the instant lease."

In response, Miss Weller submits that appropriate words have been used to make entirely clear that the obtaining of a Surveyor's certificate is a condition precedent to the lessee's liability to pay. She also submitted that the possibility of a problem under section 20B for the lessor subsequently (i.e. after the lack of the necessary Surveyor's certificate had been raised by the lessee) being able to instruct a Surveyor to grant an appropriate certification and then belatedly to make a fresh demand for the payment was a possibility which could not affect the true construction of clause 4.1 of the lease.

15. During the course of argument I enquired as to what the purpose of the present litigation might be having regard to the fact that, if the Appellant successfully established that a lack of any Surveyor's certificate for any of the relevant service charge years meant that nothing was payable by way of service charge for any year, then the position would appear to be either:

1) that the Respondent would be entitled, belatedly, to obtain the relevant Surveyor's certificate (which would of course have to be the result of proper professional consideration of the relevant figures by a surveyor) and could make a fresh demand for the sums in question (arguing that section 20B did not prevent such a fresh demand having regard to section 20B (2)) – in which case the present litigation would merely delay the obligation to pay; or

2) section 20B(2) would be found not to assist the Respondent, such that the Respondent could not follow the course described in sub-paragraph (1) above and could not make any valid fresh demands – in which case the Respondent (a company in which the Appellant is one of the six shareholders) would presumably become insolvent and incapable of managing the property for the benefit of the various lessees including the Appellant.

I was told that the Appellant had felt obliged to pursue the present litigation because she considered it was the only way of bringing to a head complaints which she had raised about the level of service charges and the management of the Building, which she felt had been ignored. As regards the question on whether the Respondent would be entitled, belatedly, to obtain Surveyor's certificates for the relevant service charge years and to make fresh demands and whether section 20B(2) would apply so as to allow the Respondent to avoid the bar that would otherwise arise under section 20B(1), Miss Weller stated that the Appellant wished to reserve her position and all her arguments on that matter. She argued that it was not necessary for the Tribunal to decide this point under section 20B(2) (i.e. as to whether fresh demands based on a Surveyor's certificate would now be too late) and that if I took a contrary view I should allow the Appellant to make further representations. I will state at this stage that I do not think it necessary to decide this point under section 20B (2) for the purpose of reaching a conclusion as to whether, upon the proper construction of the lease, a Surveyor's certificate is a condition precedent to liability and accordingly I say no more about this point beyond recording that the potential argument exists and that the Appellant has reserved her position on it.

16. Having regard to all the forgoing Miss Weller submitted that the Tribunal should find that a Surveyor's certificate was indeed a condition precedent to liability for on account payments or final payments of service charge and that therefore points (2) and (3) in paragraph 11 above arose, namely what was the requirement of the condition precedent and had it been satisfied. On these points Miss Weller submitted that what was required by the lease was a certificate from a Surveyor who had actually considered the question of the proper amount of the service charge – the words "acting as an expert and not as an arbitrator" emphasised this point.

17. Miss Weller submitted that the LVT was wrong in concluding that it was sufficient for there to be a certificate from Chartered Accountants in relation to the Respondent's accounts being accounts where "the service charge component would have been prepared by Ross & Co who are Surveyors and latterly by Labyrinth who are subject to the RICS Code prior to being passed to an accountant" – see paragraph 22 of the LVT's decision.

18. It may be noted that in paragraph 22 of its decision the LVT also stated as follows:

> "It finds that the actual facts before the Tribunal support this view, that prior to the matters being passed to the accountant, the statement of account (page 58 of the Respondent's bundle as one example of the same) was ascertained and certified by the relevant professional Surveyor as envisaged by the Lease."

As regards this, Miss Weller referred to the document which constitutes page 58 and submitted that this could not possibly be taken as being or including a certificate from a Surveyor. Page 58 is a single page document headed "Accountant's Certificate" and signed by Humphrey & Co Chartered Accountants. The certificate is stated to be prepared for the purposes of section 21 of the Landlord and Tenant Act 1985 and records that the accountants have been asked to form an independent opinion of whether the statement of account deals fairly with the matters with which it is required to deal under section 21 etc. The certificate states that the accountants have examined the attached statement of account for the relevant accounting period. The certificate includes the following text:

> "in view of the purposes for which this statement of account has been prepared, we did not form any opinion as to the reasonableness of the costs of payments, or the standard of services or works provided."

Miss Weller argued that this document could not possibly constitute a valid Surveyor's certificate for the purpose of satisfying the condition precedent in clause 4.21 of the Lease.

Conclusions on the condition precedent point

19. In my judgment it is clear on the proper construction of clause 4.21 of the lease that it is a condition precedent to any liability of the Lessee to make payment either on account of service charge or by way of final balancing service charge payment that the Respondent has obtained a Surveyor's certificate certifying the amount of the payment. This is what the clause plainly states. I notice from *Woodfall's Law of Landlord and Tenant* paragraph 1.780 that there is nothing surprising in this conclusion. As recorded above *Woodfall* states:

> "Where a lease provides for the amount payable to be certified by the landlord's surveyor or accountant, the issue of a valid certificate will usually be a condition precedent to the tenant's liability to pay."

As regards the three reasons raised in the Respondent's Reply document of 1 April 2010 whereby it is argued that there is no condition precedent, I am unable to accept those arguments for the following reasons:

1) The plain meaning of the words used do not have the meaning contended for in the Reply document.

2) The fact that the lease was executed against the background of the existence of section 19(1) of the Landlord and Tenant Act 1985 cannot be a reason for concluding that a protection for the tenant which goes beyond the protection in section 19 was unintended and that the parties should be limited to the section 19 protection. Indeed I can see force in Miss Weller's argument that if the parties are to be deemed to have had section 19 in mind when executing the Lease then the fact that they stipulated for greater protection for the tenant than that provided by section 19 indicates that they truly intended that the tenant should enjoy such greater protection.

3) I do not accept that the possible difficulty (if any) under section 20B for the Respondent in serving fresh demands based upon belated Surveyor's certificates is a reason for justifying a construction of clause 4.21 which is contrary to its obvious and natural meaning.

I do not consider there is anything in my decision in *Warrior Quay Management Company Ltd v Joachim* (unreported LRX/42/2006), which is a case referred to in the Reply document, which is in any way contrary to my present conclusions.

20. It has always been central to this case as to whether (a) a Surveyor's certificate was a condition precedent to liability and (b) if it was a condition precedent, whether that condition had been satisfied. The present appeal has been ordered to proceed by way of rehearing. The Respondent had the opportunity to participate in the appeal and was doing so until recently when it withdrew its opposition. The Respondent has not in submission to the Tribunal indicated any document which could even arguably be regarded as a Surveyor's certificate in respect of any of the service charge years. No evidence has been called to show that any Surveyor addressed their mind to the amount of the on account demands or the final demands for service charge and certified them to be appropriate. The certificate provided by the accountants, which the LVT found was capable of constituting a Surveyor's certificate as it included money in respect of the service charge component "which would have been prepared" by Surveyors does not constitute a certificate by a Surveyor "acting as an expert and not as an arbitrator". The fact that the Accountant's Certificate is not a document which in any way certifies the appropriateness of the amounts of service charge demanded, either on account or finally, is emphasised by the express statement in the certificate that

> "… we did not form any opinion as to reasonableness of the costs of payments, or the standard of services or works provided."

There has been no evidence that the accountants were provided with any form of certificate by any surveyor supporting the appropriateness of the amounts demanded.

21. Accordingly I conclude that in respect of each of the service charge years with which I am concerned the amount payable by the Appellant is, at present, nothing, because the condition precedent to liability has not been fulfilled. I say "at present" so as to recognise the possible argument that if the Respondent obtains a Surveyor's certificate for each of these years and makes fresh demands based on this certificate then service charge may become payable by the Appellant pursuant to those demands. However I record that the Appellant reserves all her arguments as to whether, if such a course was followed by the Respondent, the Respondent would be entitled to recover any payments having regard in particular to section 20B of the Landlord and Tenant Act 1985.

Insurance

22. As I have concluded that nothing by way of service charge was properly payable for the relevant service charge years, the question of the amount properly recoverable in respect of insurance premiums, as part of such service charges, does not arise. However as there is evidence before me on the point and as it is a point raised on this appeal and is a point which could become relevant if the Respondent were able validly to serve fresh demands, based upon proper Surveyor's certificates, I think it right to accept Miss Weller's invitation to make a finding on the point of the quantum of the insurance premiums.

23. Accordingly for this part of the decision I am concerned with the question which arises under section 19 of the Landlord and Tenant Act 1985 as to the extent to which relevant costs (i.e. the costs of insurance premiums) can be taken into account in determining the amount of service charge for the relevant periods. The cost of the insurance premiums can be taken into account "only to the extent that they are reasonably incurred."

24. The Appellant explained her concern regarding the level of the insurance premiums in her witness statement from paragraphs 22 – 53. Bearing in mind the manner in which the point has developed at the hearing it is not necessary to examine all of the points raised.

25. In the expert evidence which had been served on behalf of the parties in respect of the insurance premium point there was evidence from building costs experts as to the appropriate declared value for rebuilding the Building and there was evidence from insurance experts as to the appropriate level of premium to be paid in respect of such declared value. There were in substance three points of disagreement:

1) the amount which should be adopted as the appropriate declared value of the Building;

2) the appropriate level of premium to insure the Building with such a declared value;

3) the question of whether the Respondent's managing agent had been obtaining some commission (additionally to the normal commission taken by insurance brokers) such that some of the monies demanded by the Respondent had been not in respect of the cost of insuring the Building but had been in respect of this commission taken by the Respondent's managing agents, namely Labyrinth.

26. Miss Weller accepted that the Appellant could not expect that the cheapest possible insurance be obtained – she was only entitled to complain to the extent that the monies spent on insurance have not been reasonably incurred.

27. At the hearing none of the expert witnesses gave evidence and I therefore had before me their written statements and also their statements of agreement/disagreement. I indicated to Miss Weller that, in the absence of any such oral evidence from the expert witnesses, I provisionally saw a difficulty for the Appellant if she was asking me to conclude that one expert was to be preferred to the other upon the question of declared value or level of premium and was to be preferred to such an extent that I could conclude that the Respondent incurred an unreasonable level of cost in adopting a declared value and paying a premium as spoken to as being appropriate by the Respondent's experts. Miss Weller did not seek to dissuade me from this provisional conclusion.

28. The relevant figures are set out in the following table which shows in the left-hand column the relevant period for the insurance, in the next column the value which was actually declared to the insurers as being the value of the building. The next column shows the Respondent's expert's view as to the appropriate declared value for the building during the relevant year. The next column shows the premium actually paid for that year and the final column shows the view of the Respondent's insurance expert as to what would be an appropriate premium for that year based upon the actual declared value (not on the declared value as spoken to by the Respondent's expert, which is lower).

Dates	Building Declared Value	Declared Value suggested by the Respondent's Expert	Premium	Premium suggested by the Respondent's Expert
5/2/03 - 4/2/04	£1,174,497	£1,095,757	£1,832.16	£1,754.43
5/2/04 – 4/2/05	£1,228,524	£1,118,119	£2,119.13	£1,793.45
5/2/05 – 4/2/06	£1,281,351	£1,235,522	£2,223.66	£1,834.14
5/2/06 – 31/8/06 (6 mths)	£1,681,772	£1,274,656	£1,253.22	£1,060.28
31/8/06 – 30/8/07	£1,765,692	£1,336,153	£2,308.94	£2,181.13
31/8/08 – 30/8/08	£1,870,045	£1,397,649	£2,443.49	£2,256.44

29. As regards the Appellant's complaint regarding the obtaining of commission by the Respondent's managing agents, the Appellant says she was able to obtain this information having taken proceedings for appropriate disclosure in the County Court. The information reveals the following namely that for each of the years 2005 and following the Insurance Brokers retained a commission (and the Appellant raises no complaint about that) but also Labyrinth Properties Limited, the managing agents, separately retained a commission in the following sums:

2005/06 - £219.42
2006/07 - £403.98
2007/08 - £427.53

30. Bearing in mind the matters mentioned in paragraph 27 above, Miss Weller sensibly confined her submissions to the following points:

1) In any event the commissions retained by Labyrinth could not be treated as expenditure by the Respondent which could be recovered through the service charge provisions – such payments were not incurred within the meaning of the First Schedule paragraph 1 of the lease because they were not the cost of keeping the Building insured in accordance with 6.2 of the lease but were instead costs incurred in paying a commission to the managing agents.

2) Miss Weller submitted that the maximum amount which could properly be taken as a reasonable insurance premium for the relevant years was given by the figure adopted by the Respondent's own expert as the appropriate premium for that year. She pointed out that there was an element of generosity in this because the Respondent's expert had based his premiums not on the re-building costs as spoken to by the Respondent's own expert (which were lower than the costs actually declared) still less upon the much lower figures spoken to by the Appellant's expert, but had based the premiums upon the actual declared value of the Building. Also these premiums included certain elements of cover which, Miss Weller submitted, were arguably not strictly chargeable at all, namely the cost of insuring not just the ground rent but a market rent, and also certain insurance in respect of employer's liability in circumstances where the Respondent had no employees.

31. In summary Miss Weller submitted that the proper conclusion for the Tribunal to reach was that in respect of each year in question the reasonable amount of the insurance premium recoverable was given by whichever was the lower of (a) the premium spoken to by the

Respondent's own expert as being the appropriate premium for that year or (b) the premium actually paid for the relevant period minus the commission paid to Labyrinth.

32. I accept Miss Weller's submissions on these points. This appeal has proceeded by way of re-hearing. The Respondent has not put forward any material to suggest that a premium higher than that spoken to by its own expert was a reasonable premium. The premiums spoken to by the Respondent's own expert are generous in favour of the Respondent because they are based upon the actual declared value rather than the lower (and in some years substantially lower) figure which the Respondent's own expert suggested was the appropriate declared value for that year. Accordingly I conclude that in so far as the Respondent expended money on insurance premiums beyond the figures mentioned below, such expenditure was unreasonable and was not recoverable through the service charge provisions:

1) For the year 2003/04 I conclude that the reasonable sum recoverable for insurance premium is £1754.43.
2) For the year 2004/05 I conclude that the reasonable sum recoverable for insurance premium is £1793.45.
3) For the year 2005/06 I conclude that the reasonable sum recoverable for insurance premium is £1834.14.
4) I take the six month period of 5/2/06 – 31/8/06 together with the period of 31/8/06 – 30/8/07, which I conclude represents the period 2006/07 for which Labyrinth received a commission of £403.98. For this period the premiums actually paid totalled £3562.16 and the figures spoken to by the Respondent's expert as being appropriate totalled £3241.41, which is a difference of £320.75. However during this period of 2006/07 Labyrinth received a commission of £403.98. I therefore conclude that the reasonable sum recoverable for insurance premium for this period is £3562.16 minus £403.98, i.e. £3158.18.
5) For the period 2007/08 I conclude that the reasonable sum recoverable by way of insurance premium is given by the premium actually paid of £2443.49 minus the commission retained by Labyrinth namely £427.53, i.e. £2015.96.

Section 20C and costs

33. The LVT did not make any order under section 20C. The LVT noted that the costs of defending the application had been covered by legal insurance and also that the Appellant had not succeeded in respect of the majority of her submissions. There is no appeal against that aspect of the LVT's decision. However the Appellant is entitled to apply to this Tribunal for an Order under Section 20C so far as concerns the costs of the proceedings in this Tribunal. Miss Weller submitted that I must consider the Appellant's application for a section 20C Order but that in doing so I should first consider whether there was any power to claim the costs of these proceedings before this Tribunal through the service charge clause (because if there was no such power then there was no justification for making the section 20C order which Miss Weller submitted would otherwise be justified). Miss Weller informed me of a separate decision of the LVT (not the subject of the present appeal) being a decision between the same parties as were involved in the present appeal to the effect that there was no power to reclaim the costs of the proceedings before the Tribunal through the service charge clause. I agree with that LVT's decision. I conclude that the provisions of the lease do not extend to allowing the Respondent to charge through the service charge provisions the costs of proceedings before the Lands Tribunal in the present case. Accordingly it is not necessary for me to consider whether an order under Section 20(C) should be made. In case the foregoing should be wrong I would add that, bearing in mind that the Appellant has succeeded in this appeal and bearing also in mind the information given to the LVT (which has not been

contradicted before me) that the Respondent's costs were covered by insurance, I conclude that it would be just and equitable to make an order that the costs incurred by the Respondent in connection with these proceedings before the Upper Tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the Appellant. In case it be relevant I do so order under Section 20C.

34. The Appellant did not seek an order for costs against the Respondent beyond the following orders:

1) An order under Rule 10(6) that the Respondent pay to the Appellant an amount equal to the fees paid to the Tribunal in the proceedings (which the Appellant put at £210); and
2) An order quantifying the amount of costs to be paid pursuant to the order of the Tribunal dated 1 September 2010 which ordered the Respondent to pay the costs of that application.

35. I conclude that an order should be made under Rule10(6) but there should be excluded therefrom the £80 paid by the Appellant for two applications whereby she was seeking an extension of time. I therefore order the Respondent to pay £130 under Rule 10(6).

36. As regards the quantification of the costs ordered to be paid on 1 September 2010 I rose briefly at the end of the hearing to allow discussions between the directors of the Respondent (who were present as observers) and the Appellant as a result of which I was informed that it had been agreed that these costs should be quantified in the sum of £300 plus VAT. I therefore order that these costs are to be quantified in that sum. I hope that this piece of agreement between the parties may presage much further agreement such that this building can be run properly and in accordance with the terms of the lease for the benefit of all the lessees and that further litigation between the Appellant and the Respondent (a small company of which she is one out of six shareholders) can be avoided to the benefit of all.

Dated 29 June 2011

His Honour Judge Nicholas Huskinson