UPPER TRIBUNAL (LANDS CHAMBER)

UT Neutral citation number: [2013] UKUT 0331 (LC)
LT Case Number: LRX/156/2011

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – insurance rent – building comprising commercial units with residential units above – insurance premiums increased by reason of the commercial uses – lessor using a provision of the lease to make an adjustment (favourable to the lessees) in the proportion of the insurance premiums to be payable by the lessees – whether such adjustment was sufficient and was one the lessor was entitled to make and the LVT was entitled to uphold

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

BETWEEN **(1) CHRIS BARNEY** **Appellants**
(2) MARC MORRELL

and

EASTERN GREEN LTD **Respondent**

Re: Flats 4 and 23,
79 Piccadilly,
Manchester
M1 2BU

Before His Honour Judge Nicholas Huskinson
Sitting at 45 Bedford Square, London WC1B 3AS
on 8 July 2013

The first appellant (Mr Barney) represented both himself and Mr Morrell.
Mr Anthony Blasdale FRICS, ACIArb, represented the respondent.

The following case is referred to in this decision:
Shrimpton and Jones, Re 80A Bolton Crescent (LRA/140/2007).

DECISION

Introduction

1. This is an appeal from a decision of the Leasehold Valuation Tribunal for the Northern Rent Assessment Panel ("the LVT") dated 15 August 2011 whereby the LVT decided certain matters regarding the recoverability by the respondent (as lessor) from the appellants (as lessees) of money claimed by the respondent as a contribution from the appellants towards the costs of insuring the building of which the appellants' respective flats formed part.

2. The LVT described the building as follows namely that it is a former textile company headquarters and warehouse converted to a high standard to accommodate 25 residential units of various sizes on the first to fourth floors with retail and commercial units on the ground floor and basement. The ground floor is occupied by a retail shop and a café/fish shop/takeaway. The basement is now used as storage but was formerly a Bier Keller. The building is of substantial brick and masonry construction with a slate roof. It is typical of its era and was said to be both listed Grade 2 and in a conservation area.

3. The LVT recorded that the only issues in the case before it related to the insurance rent for the years 2008-2011 including:

(a) the risks covered;

(b) the amount of cover for loss from the risks;

(c) the amount of the premium; and

(d) the apportionment of the premium as between the commercial and residential premises.

4. In summary it was the appellants' case before the LVT (and it is the appellants' case before the Upper Tribunal) that the cost of insurance is extremely high and that the cost charged to residents is substantially inflated by the commercial activities. The appellants contend that the respondent's methodology for apportioning costs is unsupported by the evidence and is wrong.

5. There is before me a specimen lease which is Mr Morrell's lease whereby his flat (Apartment 4 on level one and described in the lease as "the Property") was demised to him for a term of 150 years from 1 January 2008 in return for a premium and the rents and covenants therein contained. The lease contained the following provisions:

(1) "The Building" is defined as the building shown edged blue on plan 1 known as 79 Piccadilly, Manchester, M1 2BU. It is therefore the entire building including both the commercial premises on the basement and ground floor and the residential premises on the upper floors.

(2) Clause 4.3 contains a covenant by the lessee to pay "the Insurance Rent".

(3) The expression "Insurance Rent" is defined as being:

"The Lessee's Proportion of the premium expended by the Lessor in affecting insurance pursuant to clauses 6.2 and 6.3 hereof."

(4) The expression "Lessee's Proportion" is defined as meaning:

"A proportion based upon the percentage the aggregate square footage of the Property bears to the aggregate square footages of the Commercial Units and residential units within the Building capable of enjoying the benefit of the Services or any of them subject to variation in accordance with paragraph 1 of the Fourth Schedule of this Lease."

(5) Clause 6.2 contains a covenant by the Lessor:

"To keep the Building, including the Lessor's fixtures and fittings and the furnishings of the Internal Common Areas thereof (but not the contents of any residential unit therein) insured against loss or damage by fire, lightning, explosion terrorism, earthquake, storm, flood, escape of water, riot, civil commotion, subsidence, heave or landslip and such other risks as the Lessor shall think fit for a sum equal to not less than the full replacement value thereof including loss or ground rent and all architect's surveyor's and other fees necessary in connection therewith in some insurance office of repute and through such agency as the Lessor shall in its discretion decide…"

(6) Clause 6.3 contains a covenant to insure against the liability of the Lessor to third parties etc.

(7) Paragraph 1 of the Fourth Schedule under the heading of "Computation of the Service Charge Proportion" is in the following terms:

"The Service Charge Proportion shall be a sum equal to the Lessee's Proportion (or such other proportion as may be determined pursuant to the proviso hereto) for each Service Charge Year (computed in accordance with this Schedule) PROVIDED ALWAYS that if in the opinion of the Management Company it should at any time become necessary or equitable to do so the Management Company shall recalculate the Lessee's Proportion and the proportions of the Building Service Charge and Residential Service Charge applicable to the residential units in such manner as the Management Company shall consider to be equitable and shall notify the lessees accordingly and in such a case as from the date specified in the notice (which for the avoidance of doubt can be a date prior to the date of the notice) the new proportion notified to the Lessee in respect of the Property shall be substituted for the Lessee's Proportion set out in the Particulars and the new proportions notified to the other lessees in respect of the other residential units shall also be substituted for those set out in the Particulars of their leases."

6. It will be seen from the foregoing that, absent the exercise by the management company of the powers under the proviso to paragraph 1 of the Fourth Schedule so as to alter the Lessee's

Proportion, each of the appellants would be required to pay a proportion of the insurance premiums incurred by the respondent in effecting insurance in accordance with clauses 6.2 and 6.3 being a proportion calculated on a simple square footage basis, namely by comparing the aggregate square footage of the relevant appellant's flat with the aggregate square footages of all the commercial units and the residential units.

7. The presence of the commercial units on the ground and basement floors (including in particular the presence of a deep fat fryer) has had the consequence that the insurance premium for insuring the Building against all the insured risks is substantially greater than would have been the case if there had not been these commercial units present within the Building and if the entire Building had been in residential use. In recognition of this fact the respondent, through the management company, decided that for the purpose of calculating the Insurance Rent, which requires an apportionment of the insurance premium payable by the respondent, the Lessee's Proportion should be altered so as not to be calculated on this simple square footage basis. Instead the respondent approached the apportionment of the insurance premium as follows, namely it decided that the commercial units should pay a premium per square foot of commercial floor space that was three times the premium which the residential occupiers were required to pay per square foot of residential floor space. The LVT accepted that this approach by the respondent was reasonable and was to be upheld. The appellants appeal against that conclusion.

The LVT's decision

8. At the hearing the LVT received written material and oral representations and also received some evidence from Mr Tony Jackson of Bridge Insurance Brokers who was called as a witness by the respondent.

9. There were in issue before the LVT several additional points which are no longer in issue before the Upper Tribunal. These points included questions regarding:

(1) the declared re-building value;

(2) loss of commercial rent;

(3) insurance against legionellosis;

(4) property owner's liability cover and top-ups;

(5) terrorism cover,

(6) the effect on the premium of the respondent's claims records prior to a certain date;

(7) a sum of £1,700 credited by way of profit share by Royal Sun Alliance to the respondent;

(8) the apportionment of the property owner's liability cover.

10. The LVT also decided that (subject to certain adjustments needed by reason of its decisions upon the points mentioned in paragraph 9 above):

(1) the premium for the insurance for each year in issue was reasonably incurred and the amount of the premium was reasonable; and

(2) the method of apportionment chosen by the respondent was reasonable.

11. As regards whether the premiums were reasonably incurred and were reasonable the LVT concluded in paragraph 30 that, having regard to the evidence and the way in which the insurance had been effected by the respondent, using reputable brokers who had tested the market in a reasonable way and to a sufficient extent, the argument could not be sustained that the insurance costs had been unreasonably incurred. Also the LVT was satisfied that there was not sufficient evidence to enable it to say that the cost of the premiums was unreasonable. The LVT recorded evidence from the appellants of quotations that they had obtained at substantially less than the premiums paid by the respondent, but the LVT observed that these quotations were on a significantly different basis.

12. As regards how the insurance premiums should be apportioned as between the residential units and the commercial units the LVT summarised the contentions of the parties and then gave its own conclusions in the following terms:

"42. The applicants contentions re Apportionment are:-

42.1. The increased premium due to the increased risk of the commercial premises, especially the deep fat fryer, should be borne solely by the premises upon which the risk is situated, or at the very least, not by the residential tenants.

42.2. The use of floor area is not a fair and reasonable way of apportioning the premium because the premium is predicated on risk, not on floor area.

42.3. Absurdly, a very highly rated risk occupying a very small area has the effect of increasing the premium for the whole building. The value of the whole building is millions of pound whereas the value of the small premises in which the risk is situated may only be thousands of pounds.

42.4. The respondent has provided no breakdown of the costs incurred against the requirements of the lease versus the additional risks associated with the commercial operations.

42.5. If the risk factors are assessed as 3:1 then the premium should be apportioned as to 75% to the commercial lettings in the building and 25% to the residential part of the building and then apportioned between the residential tenants (about which there is no issue).

42.6. At the very least some way should be found to relieve the residential tenants from the burden of such part of the premium (possibly as much as £4000 or even, if combined

with the adverse effect of the landlords claims record, up to £11000) as can be attributed to the existence of the deep fat fryer.

43. The Respondents contentions re apportionment are:-

43.1. This is, and always has been during the relevant period since redevelopment, a mixed commercial/residential occupancy.

43.2. The café with deep fat fryer exists, and needs to be disclosed to insurers.

43.3. It inevitably has an effect on premiums.

43.4. The best advice is that the commercial premises have a risk factor of 0.6% and the residential premises have a risk factor of 0.2%. That is how the 3:1 weighting is arrived at.

43.5. To establish a weighted figure which is also based on floor area the floor area of the commercial premises has been multiplied by a factor of 3. The consequent arithmetical calculation (Commercial – 10,970 sq ft x 3 and Residential 27,233 sq ft x 1) produces an apportionment of 54.72% Commercial and 45.28% Residential. The arithmetic is not challenged.

44. The Tribunals determination is as follows:

44.1. We reminded ourselves of the detailed provisions set out in the lease and particularly those summarised in paragraph 11 above.

44.2. It is apparent that the landlord has elected to charge the insurance costs through the Building Service Costs rather than the less refined route of the basic 'Insurance Rent'. This enables a 'weighted' figure to be calculated. That in our view is a proper course of action, producing a significantly fairer (or less unfair depending on one's point of view) outcome. Nothing we say or determine should be taken as indicating that the crude 'Insurance Rent' provisions should be adopted by the landlord. Taking the figures postulated for 2010-11, as an example only, and without endorsing them, a crude floor area division (strictly in accordance with the 'Lessees Proportion') would mean the Residential occupiers bore 72% (£16,582) of the premium for Buildings Insurance and Terrorism. Applied in the way for which the landlords contend, (45.28%) the figure is £10,427. Applied in the way for which the applicants contend (25%) the figure is £5,757.

44.3 Much has been said about 'risk'. Some precision in the use of terminology is helpful. Although clause 6.2 of the lease lists the '*risks*', it is in reality a reference to what might better be described as '*perils*'. The 'risk', that is the basis of the insurers assessment of the premium, is the likelihood of the occurrence of one of the perils e.g., especially in this case, a fire.

44.4. The landlord has not insured against any perils that are not authorised by the lease (given our finding re Legionellosis). It is obliged to so insure.

44.5. The only issue is whether the increased risk arising from the commercial use, and a particularly risky commercial use at that, should have no effect on the premium paid by the

residential tenants. Should the residential tenants be charged only on the basis that the entire building was, in effect, residential or at least had other users that did not create a significant increase in the premium?

44.6 That may be desirable, but it is not what the lease says. The fact is that there are commercial premises on the ground floor. They are risky. They were even more risky when the basement was used as a Bier Keller.

44.7. Those premises are part of the 'Building' as defined in the lease. The landlord is obliged to insure 'the Building'. The tenants have signed a lease, presumably upon taking appropriate advice, agreeing to pay the insurance of the Building in respect of the risks (perils).

44.8. No distinction is drawn between the commercial and residential premises on the basis of risk rating. There is no provision for an adjustment of the sort sought by the applicants, save through the route chosen by the respondents i.e. the 'weighted' figure via the Building Service Costs.

44.9 However desirable it may have been for the vending agents on behalf of the developer to have been more open about the likely cost of the insurance (of which we conclude they were aware, because very similar factors would have applied to the Builders insurance whilst the redevelopment work was in progress) there is no basis upon which we can imply an obligation on the landlord to deal with the insurance premiums in the way sought by the applicants."

13. The LVT then drew attention to the decision of the Lands Tribunal (George Bartlett QC, President) in *Shrimpton and Jones, Re 80A Bolton Crescent* (LRA/140/2007) and in particular to passages in paragraphs 13 and 14 thereof which are in the following terms:

"…An insurance premium incurred in insuring the building against the risk specified would not be made unreasonable if, by reason of the ground floor being in commercial use, the premium was higher than it would have been if the ground floor had been in residential use. The obligation is to insure the building against risks of the specified categories, and this obligation is not qualified by the particular uses that may be made of other parts of the building. On the other hand if the landlord insured against risks additional to those normally insured against under a householder's comprehensive policy the cost associated with these additional risks would not, in my judgment, be a cost reasonably incurred.

14. An alternative construction, which as I understand it is the one contended for by the appellants, is that the liability of each tenant is limited to his proportion of the cost that the landlord would incur in insuring the building on the assumption that the whole of the building was in residential use. This, however, is not what either lease provides, and I can see no reason for implying a term to this effect."

14. In the light of the foregoing the LVT concluded at paragraph 44.16 that the method of apportionment chosen by the landlord for building insurance and terrorism cover was reasonable.

The hearing before the Upper Tribunal

15. In the grounds of appeal by reference to which the appellants sought permission to appeal from the Upper Tribunal (the LVT having refused permission) the appellants sought to challenge the LVT's decision upon the apportionment of the insurance premium. The Tribunal in granting permission to appeal stated:

> "It is arguable that the LVT erred in its consideration of the reasonableness of the apportionment of the insurance premium by failing to have regard to the tenants arguments as to how the figure should be apportioned and/or by failing to consider the reasonableness of the landlord's approach to apportionment. Further, the LVT appears to have misconstrued *Shrimpton & Jones* LRA/140/2007, a decision in which the reasonableness of the apportionment between residential and commercial floorspace did not arise.
>
> The appeal will be dealt with by way of review."

16. At the hearing before me Mr Barney (the lessee of flat 23) represented himself and Mr Morrell. The respondent was represented by Mr Blasdale. At the outset of the hearing Mr Barney indicated that the appellants wished to argue not merely that the LVT's decision upon the apportionment of the insurance premium was wrong but also that the LVT was wrong in its conclusion that the amount of the premium paid for insuring the Building against the insured risks had been reasonably incurred and was reasonable. He indicated an intention to refer to a letter obtained after the LVT's decision from Gallagher Heath dated 25 August 2011 (at tab 13 of the bundle) containing an insurance quotation which it was said supported the appellants' contention that the amount of the premium paid by the respondent was unreasonably high. Mr Blasdale objected that this was not a point open to the appellants having regard to their grounds of appeal and the terms of the grant of permission to appeal. He also pointed out that in any event this further quotation from Gallagher Heath is subject to survey and subject to any further relevant information and does not deal with the relevant claims history. However quite apart from these additional points raised by Mr Blasdale I have reached the firm conclusion that the appellants cannot be allowed to pursue this argument. In their grounds of appeal on the basis of which they sought permission to appeal from the Upper Tribunal the appellants did not seek to challenge the LVT's decision upon whether the premium paid was reasonable or was reasonably incurred. The LVT reached its conclusion upon this having considered all the material including receiving assistance orally at the hearing from Mr Jackson of Bridge Insurers Brokers. This is an appeal which is proceeding by way of review. It would wrong upon such an appeal to allow a wholly fresh topic, previously unchallenged in these appeal proceedings, to become the subject of challenge.

17. In summary Mr Barney on behalf of the appellants advanced the following arguments:

(1) that the amounts charged to the residential lessees by way of insurance rent were extraordinarily high;

(2) that the amount of the insurance rent must be reasonable by market norms;

(3) that in deciding how to apportion the insurance rent it was necessary to apply the proviso to paragraph 1 of the Fourth Schedule so as to require an apportionment which was equitable having regard to the RICS Code;

(4) that this had not been achieved by the respondents because the premium charged to the residents is inflated by the commercial activities in the lower parts of the building;

(5) that the LVT's decision is wrong because the apportionment adopted does not remove from the bill presented to the residential lessees the extra costs arising from insuring the commercial premises;

(6) that the amount of insurance rent payable by the appellants should be calculated by charging to the residential lessees the amount which they would have to pay by way of insurance premium if the entire building were residential;

(7) that the respondent as lessor can (for its own profit) choose to put in commercial uses generating higher insurance risks in the lower parts of the building, but the respondent or its commercial tenants should pay the additional insurance costs of such an arrangement;

(8) that the respondent recently did some fire separation works in relation to the commercial units which allowed a re-survey of the fire risks and a 22% drop in premium. This confirmed how close a relationship there was between the commercial uses and the premiums charged;

(9) that the insurers were not concerned with a calculation based upon how much should be charged per square foot of commercial premises and how much should be charged per square foot of residential premises. Instead the insurers will note that they are liable for the insured value (£8.5m) and that if there is a fire in the commercial premises then this can cause the loss of the whole building; and

(10) that, having regard to the evidence before the LVT, the proper conclusion which the insurers would reach is that there is three times greater risk of an £8.5m loss arising for them by reason of activities on the commercial premises as compared with such loss arising from activities on the residential premises.

By reason of the foregoing arguments Mr Barney argued that the proper apportionment of the premium was that the entire premium should be allocated 75% to the commercial premises and 25% to the residential premises. This 25% would then be divided up between the residential lessees in accordance with the percentage which the aggregate square footage of the relevant lessee's flat bore to the aggregate square footage of the residential units. He submitted that the President's decision in *Shrimpton and Jones* had been misunderstood by the LVT and was not helpful. He submitted there was nothing in that decision which dealt with the question of the proper apportionment of the premium, which is what the present appeal is concerned with.

18. On behalf of the respondent Mr Blasdale asked that a respondent's response submitted to the Upper Tribunal dated 19 April 2012 should stand as its statement of case. I agreed that this should be so.

19. Mr Blasdale advanced the following arguments:

(1) If the insurance rent was calculated by reference to a Lessee's Proportion as laid down in the lease (and without reliance on the proviso to paragraph 1 of the Fourth Schedule) then the residential units would be required to pay 71.28% of the total insurance premium.

(2) However the respondent and the management company had recognised that this would be not be equitable and that the proportion to be paid should be adjusted under this provision in the Fourth Schedule, with the result that the residential units are required to pay 45.28% of the total insurance premium.

(3) The respondent took advice from its brokers who in turn consulted insurers as to an appropriate adjustment.

(4) The respondent made it clear to the LVT that the way it had adjusted the apportionment was by treating the premium to be paid per square foot of space to be three times as great in the commercial units as in the residential units. This was the relevant 3:1 proportion. By way of example, as shown on the documents submitted to the LVT, the matter could be approached on the basis that the risk was calculated at 0.6% for the commercial premises and 0.2% for the residential premises. The respondent never placed any evidence before the LVT to suggest that the relevant 3:1 apportionment was not an apportionment involving the commercial units paying three times as much per square foot as the residential units but was instead an apportionment involving the commercial units paying 75% of the premium and the residential units paying 25% of the premium (such that the total charge to the commercial units was three times the total charge to the residential units). Nor did the appellants submit any evidence justifying such an apportionment before the LVT. There was no shred of evidence supporting the apportionment now contended for by the appellants.

(5) It was the task of the respondent, through the management company, to decide upon the amended amount for the Lessee's Proportion for the purpose of calculating the Insurance Rent. The wording of the proviso to paragraph 1 of the Fourth Schedule does not place the making of the decision as to this substitute apportionment in the hands of the LVT. The LVT is entitled to consider whether the method chosen by the respondent for the substitute apportionment is reasonable. The LVT did consider this and decided that the apportionment was indeed reasonable.

(6) The appellants are not entitled to require that an apportionment be made so as to ensure that they pay no more by way of insurance premium than they would if there were no commercial occupation in the Building at all.

(7) The LVT was entitled to find the decision in *Shrimpton and Jones* of assistance.

Discussion

20. It is important to note that in the present case the respondent (through the management company) has decided that the proviso to paragraph 1 of the Fourth Schedule ("the Proviso") should be brought into operation for the purpose of recalculating the Lessee's Proportion so far as this is applicable in the calculation of the Insurance Rent. This is a decision which works to the appellants' advantage and results in them paying a substantially lesser proportion of the insurance premiums than would be recoverable from them if the Proviso had not been brought into operation. I observe that there is no express reference by the LVT to evidence as to what was the specific opinion of the management company (as opposed to the opinion of the respondent) upon the relevant matters under the Proviso. However neither party to this appeal suggested there was any significance in this fact. Also I observe that it is the appellants' contention that the landlord and the management company are effectively the same entity. I make no finding as to whether or not that is so. I merely record these points for the purpose of explaining that the absence of express evidence as to the state of mind of the management company is not a live point for the purpose of the present appeal.

21. I can see scope for possible argument as to what the respective rights of the parties might be under a lease such as the present if a lessee contended that the Proviso could and should be brought into operation through the forming of the relevant opinion by the management company, but where the management company declined to form that opinion such that the lessor demanded the relevant charge based upon the Lessee's Proportion as defined in the lease without any amendment. However these considerations do not arise in the present case because the management company has formed the opinion relevant to bring the Proviso into operation. The respondent accepts that a method of apportionment for the calculation of the Insurance Rent should be adopted which is different from the basic definition of the Lessee's Proportion (based solely on square footages) and which is more favourable to the appellants.

22. It appears that both the appellants and the respondent accept that the Lessee's Proportion can be recalculated solely in respect of the method of apportionment to be adopted for the calculation of the Insurance Rent. I do not understand the Lessee's Proportion to have been recalculated for any other purposes. The appellants and the respondent also both accept that the LVT was in error in stating (in paragraph 44.2) that the respondent had elected to charge the insurance costs through the Building Service Costs rather than as Insurance Rent. There was power for the respondent to operate the Proviso in respect of the proportion to be paid of the Insurance Rent and the parties accept that this is what occurred..

23. The position which has been reached therefore is that, so far as concerns the method of apportionment to be adopted for the calculation of the Insurance Rent, the management company has formed the opinion that it is necessary or equitable to recalculate the Lessee's Proportion. The consequence of this opinion having been formed by the management company is:

> "…the Management Company shall recalculate the Lessee's Proportion…. applicable to the residential units in such manner as the Management Company shall consider to be equitable…"

Therefore the contractual provision of the lease, as contained in the Proviso, is not that the Lessee's Proportion shall be recalculated in accordance with any particular yardstick (such as the RICS Code referred to by the appellants) nor is it that the Lessee's Proportion shall be such proportion as is reasonable in all the circumstances. Instead what is required is that the management company shall

recalculate the Lessee's Proportion in such manner as the management company shall consider to be equitable.

24. A question therefore arises as to the extent of the LVT's power to examine the method of apportionment which the management company has concluded to be equitable. The LVT's power arises not from section 19 of the Landlord and Tenant Act 1985 as amended because a decision as to the method of apportionment to adopt under the Proviso is not a decision as to whether relevant costs have been reasonably incurred. However the LVT has jurisdiction under Section 27A to determine whether a service charge (which includes a charge in respect of insurance) is payable and, if so, the amount which is payable. This enables the LVT to consider whether the Insurance Rent demanded by the respondent (calculated on the basis of the method of apportionment adopted under the Proviso) is properly payable. This therefore enables the LVT to decide whether the method of apportionment adopted by the respondent (through the management company's decision) is a method of apportionment which the respondent is entitled to adopt.

25. However the test to be applied by the LVT in reaching a decision on this point is not for the LVT to make the management company's decision for it and to decide what it (the LVT) considers to be the equitable method of apportionment in all the circumstances. Instead the test to be applied is in my judgment the test which the LVT correctly applied in the present case (see paragraph 44.16 of its decision) namely whether the method of apportionment chosen is reasonable.

26. The LVT considered that the method of apportionment adopted by the respondent was reasonable. In my judgment the LVT was entitled so to conclude for the reasons it gave.

27. The appellants argued that the LVT misunderstood the evidence and that such evidence as there was before the LVT (which the appellants complained was limited – they said further evidence should have been provided by the respondent) was to the effect that a fair analysis of the risk for the insurers was that the 3:1 ratio applied to the following comparison namely: risk of loss arising from commercial units as compared to risk of loss arising from residential units. In other words the appellants argued that the 3:1 ratio of risk was a comparison in which floor area played no part – the risk to the insurers was three times greater from the commercial units and accordingly the insurance premiums to be paid by the occupiers of the commercial units should be three times that paid by occupiers of the residential units. In consequence the appellants contended that the LVT should have found that the only reasonable method of apportionment was for the premiums to be allocated 75% to the commercial units and 25% to the residential units – with this 25% then being allocated between the residential units on a square footage basis.

28. In my judgment it is the appellants who have misunderstood the evidence not the LVT. The documents before the LVT included the respondent's responses in accordance with the LVT's directions dated 10 May 2011 (Tab 3 in the bundle) and the respondent's response to the appellants' response dated 17 June 2011 (Tab 1 in the bundle). Paragraph 1 of the document at Tab 3 and paragraph 3 of the document at Tab 1 make it clear that the respondent was contending, on the basis of advice from insurers and brokers, that the commercial risk was calculated at 0.6% and the residential risk at 0.2% and this meant that the rate per square foot to be charged by way of insurance

premium to the residential units was to be one third of the rate per square foot charged to the occupiers of the commercial units. The respondent having made clear in its written submissions what it contended should be the method of apportionment for the calculation of the Insurance Rent and why it so contended, there was a hearing before the LVT. At this hearing the respondent made available Mr Tony Jackson of Bridge Insurance Brokers who, as recorded by the LVT, assisted at the afternoon part of the hearing (paragraph 18 of the decision). It is clear from the LVT's decision that the LVT correctly understood how the respondent contended the method of apportionment should be calculated and why it so contended. There is nothing before me to indicate that there was any evidence before the LVT to support the method of apportionment contended for by the appellants. However there was evidence before the LVT from the respondent as to how it had calculated the method of apportionment and why it had done so (advice from insurers and brokers) and the respondent made Mr Jackson available to assist the LVT. The LVT applied the correct test, namely whether the method of apportionment adopted by the respondent was reasonable. The LVT concluded it was reasonable and gave reasons for so concluding. I see nothing wrong with the LVT's decision.

29. This is an appeal which is proceeding by way of review. I therefore remind myself that I am reviewing the LVT's decision not substituting my own judgment. The Upper Tribunal can only interfere if the LVT has gone wrong in principle, or left material factors out of account, or its balancing of the material factors led it to a result which was clearly wrong. Applying this test I conclude that I cannot interfere with the LVT's decision. I would however go further and record that, for the avoidance of doubt, I agree with the LVT's decision that the method of apportionment adopted by the respondent was reasonable.

30. The LVT referred to the decision of the Lands Tribunal in *Shrimpton and Jones* and cited from paragraphs 13 and 14 of the President's decision in that case. It was argued by the appellants that the LVT had misunderstood the decision in *Shrimpton and Jones* because the LVT had failed to recognise that certain matters were left over in *Shrimpton and Jones* as being not capable of being examined in that case for want of evidence having been called. In that case there were in effect three units, a commercial unit on the ground floor and two residential units above. The two residential leases (which were in different terms) contained provisions to the effect that the landlord was to insure against certain matters which could be described as normally insured against under a householders comprehensive policy (or could be described as normal residential risks). The Lands Tribunal pointed out that if the insurance premium incurred by the landlord was merely incurred in insuring the building against the risks specified in the leases, then the amount demanded by the landlord by way of reimbursement of a proportion of the premium would not be made unreasonable if, by reason of the ground floor being in commercial use, the premium was higher than it would have been if the ground floor had been in residential use. The point which the Lands Tribunal left over was the question of whether the premium was unreasonable (and outside the terms of the lease) by reason of the cover not being merely for risks normally insured against under a householder's policy (or not being normal residential risks) but being instead a policy extending beyond a householder's policy or normal residential risks. In the present case there is nothing in clause 6.2 to limit the respondent to placing insurance for normal residential risks or risks normally insured against under a householder's policy. It is however true that in *Shrimpton and Jones* there was no provision such as that in the Proviso under which an amended method of apportionment could be adopted. However there is nothing in that case to show that the LVT's decision in the present case is wrong. Also the

LVT made clear in paragraph 44.10 of its decision that it reached the conclusions it did quite apart from *Shrimpton and Jones* and that that case merely served to reinforce the LVT in the correctness of its view. The LVT was not in error in so concluding.

Conclusions

31. For the reasons given above I conclude:

1. The appellants are not entitled in this appeal to challenge the LVT's decision as to the extent to which the insurance premiums were reasonable or were reasonably incurred.

2. The appellants' appeal against the LVT's decision that the method of apportionment adopted by the respondent for the calculation of the Insurance Rent was reasonable is an appeal which fails and must be dismissed.

32. It was common ground between the parties that, having regard to the nature of the LVT's decision and its recognition that certain adjustments needed to be worked out consequent upon other parts of its decision (which are not the subject of this appeal), it would not be possible for the Upper Tribunal to reach a conclusion as to precisely how much was payable by way of an Insurance Rent by each of the two appellants for each of the relevant service charge years. I merely say therefore that the appeal is dismissed.

Costs

33. At the end of the hearing Mr Blasdale submitted that the appellants' appeal was ill-founded and that it was a frivolous or unreasonable appeal and that an order for costs (limited to the statutory maximum of £500) should be made against the appellants. The appellants submitted that, even if they were to lose the appeal, they had not acted unreasonably or frivolously.

34. I remind myself that Section 175(6) of the Commonhold and Leasehold Reform Act 2002 limits the jurisdiction to make an order for costs against a party to an appeal such as this to circumstances where the Upper Tribunal concludes that the relevant party has acted "frivolously, vexatiously, abusively, disruptively or otherwise unreasonably in connection with the appeal."

35. I do not consider that there has been any incidental conduct by the appellants in relation to the appeal which could be said to fall within these words. Accordingly if the respondent is to be entitled to costs it can only be on the basis that the very bringing and pursuing of this appeal falls within the relevant words. However I note that the present appeal could only be brought with permission and that a judicial member of the Upper Tribunal granted permission to appeal, which would only have been done if it appeared that there were reasonable grounds for concluding that the LVT may have been wrong. Accordingly I conclude that the appellants have not in any way acted in a manner which could justify the making of an award of costs against them.

36. At the hearing the appellants orally made an application for an order under Section 20C of the Landlord and Tenant Act 1985, i.e. for 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.

37. I notice that before the LVT it was stated on behalf of the respondent that there was no intention to charge the cost of the proceedings to the service charge account or to treat them as relevant costs. No such statement was made to me by Mr Blasdale so far as concerns the costs before the Upper Tribunal. I make no finding as to whether on the proper construction of the lease the costs of these proceedings before the Upper Tribunal could properly be included as part of either the Building Service Charge or the Residential Service Charge as provided for in the lease. However bearing in mind the ultimate conclusion that I have reached on the merits of the appeal, namely that the LVT was correct and that the appeal must be dismissed, I do not consider it just and equitable in the circumstances to make an order under section 20C. Accordingly no section 20C order is made.

Dated: 15 July 2013

His Honour Judge Nicholas Huskinson