UPPER TRIBUNAL (LANDS CHAMBER)

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TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

LANDLORD AND TENANT – service charges – commercial unit on the ground floor and lessees' flats above -- how the proportion of the insurance premium attributable to (i) the risk from the commercial premises and (ii) the property owners liability cover should be dealt with under the service charge provisions -- extent to which the management fees (charged through the service charge) of a manager and receiver appointed by a leasehold valuation tribunal could be challenged

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

BETWEEN **(1) ISAAC SADEH** **Appellants**
(2) DEBORAH KOL
(3) CAROLINE EBBORN

and

(1) MIRHAN AND AZZNIV (CHARITABLE TRUST)
(2) MARY-ANN BOWRING **Respondents**

Re: 66 Rosslyn Hill,
London,
NW3 1ND

Before: His Honour Judge Huskinson

Sitting at: Upper Tribunal (Lands Chamber), Royal Court of Justice, Strand, London WC2A 2LL
on
25 June 2015

The first and second named appellants appeared on behalf of themselves and the third named appellant
No appearance or representation on behalf of either respondent

The following cases are referred to in this decision:

Lucie M v Worcestershire County Council [2002] EWHC 1292 (Admin)
Flannery v Halifax Estate Agencies Limited [2000] 1 WLR 377
English v Emery Reimbold Strick Limited [2002] 1 WLR 377
Maunder Taylor v Blaquiere [2003] 1 WLR 379
Ralphs v Peachey (BRI/39/UF/LSC/2009/0018)
Green v 180 Archway Road Management Co Limited [2012] UKUT 245(LC)
Forcelux Limited v Sweetman [2001] 2 EGLR 1973
Wilson v *Hurstanger Limited* [2007] EWCA Civ 299

DECISION

Introduction

1. This is an appeal from the decision of the First-tier Tribunal Property Chamber (Residential Property) ("the F-tT") dated 26 July 2013 whereby the F-tT gave various decisions in relation to the service charge payable by the appellants for the year 2012 and in relation to the on account service charge payable by the appellants for 2013.

2. Each of the three appellants holds a long lease at a low rent in respect of a residential flat in 66 Rosslyn Hill, London, NW3 1ND ("the building"). Mr Sadeh is lessee of flat 1, Ms Kol of flat 2 and Ms Ebborn of flat 3. These flats are on the first, second and third floors respectively of the building. On the ground floor of the building there is a commercial use namely a dry cleaning business.

3. Various issues arose between the appellants and the first respondent (who was then the freeholder of the building and therefore the appellants' lessor) regarding the management of the building and in particular regarding the insurance premiums payable. This led to applications being made to the leasehold valuation tribunal ("LVT") in 2010 under section 27A of the Landlord and Tenant Act 1985 for determination of the amount of service charge payable by the appellants to the first respondent in respect of certain service charge years. There was also an application made by the second appellant for the appointment of a manager under section 24 of the Landlord and Tenant Act 1987. In summary the result of these applications was a decision dated 4 August 2011 whereby the LVT made determinations regarding the service charge payable for the years 2004 - 2011 and also appointed a manager pursuant to section 24 of the 1987 Act. The manager who was appointed was Ms Jane Bowring, a partner of Ringley Chartered Surveyors, i.e. the second respondent in the present proceedings. Ms Bowring was appointed receiver and manager of the building upon the terms of the order appointing her which was included in the appendix to the LVT's decision. Ms Kol had argued that a person chosen by the appellants should be appointed manager of the building, but the LVT gave careful consideration to this manager proposed by the appellants and also to Ms Bowring, the manager proposed by the first respondent as lessor. The LVT decided that Ms Bowring should be appointed. Her appointment was for a period of 2 years namely until 4 August 2013. The order appointing her contemplated the payment to Ms Bowring of a basic management fee of £1750 plus VAT.

4. Unfortunately disputes arose between the appellants and Ms Bowring in respect of various items concerning the 2012 service charge and the on account payments in respect of the 2013 service charge. This led to an application by the appellants under section 27A for a determination by the tribunal (now the F-tT) and to an application by Ms Bowring for a variation of the order appointing her so as to make provision for her ability to recover her legal costs arising out of certain matters. It is these two applications which resulted in the decision of the F-tT dated 26 July 2013 which is the subject of the present appeal. There is no appeal before the Upper Tribunal in respect of

the variation in the terms of the order appointing Ms Bowring. There is an appeal regarding certain aspects of the F-tT's decision under section 27A in respect of the service charges.

5. So far as concerns that part of the F-tT's decision which concerns service charges, various parts of that decision are not the subject of the present appeal. However the appellants were granted permission to appeal in respect of three aspects of the F-tT's decision namely:

> (1) whether the full amount of the management fee was properly chargeable as part of the service charge;
>
> (2) whether the insurance which was placed by Ms Bowring in respect of the building for 2012 and 2013 involved the payment for risks which were not envisaged by the lease (and which could not properly be charged for through the service charge) and whether the amount of the service costs should be credited with the amount of a commission obtained by Ms Bowring in respect of one aspect of the insurance for 2013; and
>
> (3) whether the costs of preparing a notice for the purposes of section 20 of the 1985 Act as amended could properly be charged on top of the management fee.

6. The appellants sought judicial review of the decision of the Upper Tribunal (Martin Rodger QC, Deputy President) to limit the grant of permission to appeal to these three points. Permission to seek judicial review was refused. Accordingly the present appeal is concerned with the three points mentioned in the previous paragraph. It was ordered that the appeal would proceed by way of review.

7. By a communication dated 17 February 2014 Ms Bowring informed the Upper Tribunal that, in view of the fact that her appointment ended in August 2013 and that she was no longer in receipt of instructions, it was not appropriate for her to respond to the application for permission to appeal. The Tribunal wrote to her on 21 February 2014 noting that she did not wish to be a party to the appeal and that her name had been removed from the database. By a further letter dated 14 May 2014 the Tribunal wrote again to Ms Bowring enclosing a copy of the order granting permission to appeal and enclosing a respondent's notice if she wished to respond within a stipulated time. The letter informed her that if by that date the Tribunal did not hear from her then the Tribunal would assume that she still did not wish to be a party to the appeal. No further communication was received from Ms Bowring. Accordingly this appeal has proceeded without her participation as a respondent. So far as concerns the first respondent they indicated by letter dated 14 April 2014 that they did not wish to respond to the appeal – and they stated that they had sold the building on 12 December 2013 and so were no longer the freeholders.

8. In these circumstances the present appeal has proceeded before the Upper Tribunal with no participation from either respondent. In particular neither respondent has appeared or participated in the hearing, and neither respondent has submitted any documentation or representations in relation to the present appeal.

9. At the hearing before me Ms Kol and Mr Sadeh appeared in person. Ms Kol presented the substance of the argument on behalf of herself and the other two appellants. Mr Sadeh addressed me briefly at the end of the hearing and adopted all that Ms Kol had said.

The Facts

10. As already mentioned above, the building comprises four floors. On the ground floor there is a commercial unit namely a dry cleaning business. The upper floors comprise the three separate flats, one of which is held by each of the appellants. The approximate division of space as between the commercial unit and the residential flats is that about one third of the floor space of the building comprises the commercial unit and the remaining two thirds is made up of the three upper floors comprising the three flats. For this reason it was accepted by the appellants that where a cost in relation to the building was incurred, being a cost that was properly to be divided between the commercial unit and the flats, then two thirds of the cost should be allocated to the flats.

11. There was before the F-tT a copy of the lease of the first floor flat dated 4 July 1988 whereby the original lessor demised to the original lessee that flat for a term of 99 years from 25 December 1981 at a rent of £50p.a. and upon the terms and conditions therein contained. The lease reserved by way of further rent:

> "AND ALSO PAYING by way of further rent a fair proportion of the yearly sum or sums expended by the Lessor in insuring the Building of which the demised premises form part and the Lessor's fixtures and fittings therein against loss or damage by fire explosion flood storm tempest lightning civil commotion impact aircraft in peacetime and any articles dropped therefrom and other risks normally covered by a comprehensive policy and against such other risks as the Lessor shall reasonably think necessary (hereinafter called "the Insured Risks") in the full reinstatement value thereof (including Architects' and Surveyors' fees demolition and site clearance charges and the two years' loss or rent) in some insurance office of repute such amount to be paid by the Lessee on demand after the said sum or sums shall have been expended by the Lessor.

12. By clause 2(1)(b) the lessee covenanted with the lessor:

> "(b) To pay to the Lessor the Interim Charge and the Service Charge (as hereinafter defined) at the time and in the manner provided in the Second Schedule hereto annexed both such charges to be recoverable in default as rent in arrear."

13. By clause 3(2) the lessor covenanted with the lessee:

> "(2) To keep the Building of which the demised premises forms part insured against loss or damage by the Insured Risks in the full reinstatement value and (unless the insurance of the demised premises shall have been forfeited or vitiated by the act or default of the Lessee) to cause all monies received by virtue of such

insurance (except the insurance relating to loss of rent) to be laid out in or towards rebuilding and reinstating the demised premises as soon as practicable.

Also in clause 3(5) it was provided that, subject to contribution and payment by the lessee, the lessor would at all times during the term do various matters including in paragraph (f):

> "(f). Without prejudice to the foregoing do or cause to be done all such works installations acts matters and things as in the absolute discretion of the Lessor may be necessary or advisable for the proper maintenance safety and administration or the Building."

The second schedule made provision for contribution towards maintenance. Paragraph 1 provided as follows:

> "1. In this part of the Schedule the following expressions have the following meanings respectively:
>
> (a) "Total Expenditure" means the total expenditure incurred by the Lessor in any accounting period (as hereinafter defined) in respect of its obligations under Clause 3 hereof.
>
> (b) "The Service Charge" means a proportion of one third of the total expenditure incurred in relation to the entire upper residential part of the Building and the reserved parts.
>
> (c) "The Interim Charge" means such sum to be paid on account of the service charge in respect of each accounting period as the Lessor or its Agents shall specify at their discretion to be a fair and reasonable interim payment.
>
> (d) "Accounting Period" means a period commencing on the 1st day of January and ending on the 31st day of December every year."

Paragraph 2 made provision for when the interim charge was to be paid. Paragraphs 3 and 5 made provision for the preparation after the expiration of each accounting period of certain certificates showing various matters from which there could be calculated whether the interim charge (together with any carried forward surplus) was less than or exceeded the service charge for the relevant accounting period. Provision was made for, respectively, the payment by the lessee of the shortfall or the crediting to the lessee's account of the surplus.

14. In 2010 various disagreements between the first respondent and the appellants arose which led to the several applications to the LVT which were decided together in a decision dated 4 August 2011. I have already referred above to how Ms Bowring became appointed manager and receiver of the building. So far as concerns the disputes concerning service charges, one of the principal matters in dispute was the way in which the first respondent had placed the insurance policy and the premium payable and, in particular, the amount of commission received by the then managing agents from the insurance brokers. The LVT noted that the insurance premium for 2011 (where no commission was paid) was substantially less than the premiums for 2004-2010. It decided that for all of the years in dispute a premium not exceeding that for 2011 was

reasonable. The F-tT rejected the first respondent's submission that it had no fiduciary duty to the appellants regarding the commissions obtained by the first respondent's agent (although the LVT accepted that the first respondent was unaware of these commissions). The LVT also reduced the amount claimed by way of management fees. The LVT also considered certain further points not presently relevant.

15. The result of this decision of the LVT in August 2011 was that Ms Bowring was appointed manager and receiver of the property. Also it followed from the decision that the appellants had been overcharged substantial sums through the service charge in respect of the years 2004-2011. As a result of this the appellants considered that they were entitled to be repaid by the first respondent the amount of the over payment. I was told that there was a disagreement between the first respondent as freeholder and the appellants as to how much had been overpaid, but it appears that at minimum (i.e. even on the basis of the first respondent's calculations) the following sums had been overpaid by the appellants namely:

Mr Sadeh (Flat 1)	£2,630.84
Ms Kol (Flat 2)	£1,738.53
Ms Ebborn (Flat 3)	£3,100.86

The appellants contended that these sums should be paid back forthwith to them. However Ms Bowring had been appointed manager and receiver. One of the various complaints made by the appellants against Ms Bowring was that she had wrongly intercepted these funds and kept them over a substantial time for the credit of the appellants' respective service charge accounts rather than ensuring that they were paid back to the appellants. In due course the appellants had various complaints regarding the service charges for 2012 and 2013. So far as presently relevant, i.e, so far as concerns those complaints which are the subject of the present appeal, the complaints were raised under three headings, namely regarding the management provided by Ms Bowring and her consequent management fee; regarding the insurances; and regarding the amount charged as part of the management fee by Ms Bowring in respect of the preparation of a document for the purposes of section 20 consultation.

16. The appellants applied to the F-tT for a decision regarding the service charges payable in respect of 2012 and in respect of the service charges payable on account for 2013. The appellants put in detailed and extensive written representations supported by a substantial bundle of documents. So far as concerns the three topics of complaint presently relevant the following matters can be noted.

17. For the year 2012 a management fee of £1,750 + VAT had been included. This was the amount contemplated by the order appointing Ms Bowring as manager. As regards 2013 I understand that a management fee at that rate had been applied pro rata for the period of Ms Bowring's appointment, i.e. until 4 August 2013. The appellants contended that a substantially lower management fee was properly chargeable. They supported that argument by reference to various matters of complaint against Ms Bowring including in particular:

(1) The alleged misappropriation by Ms Bowring of the money owing by the first respondent to the appellants in respect of the overpaid service charges for previous years. They complained that Ms Bowring had, without authority, intervened in the debtor/creditor relationship between landlord and tenant and that this was no part of her management of the property. It seems that the overpayments were eventually restored to the appellants, but they complained that this was much later than it should have been because Ms Bowring had held onto the appellants' money and had not released it until June and July 2012.

(2) The appellants complained that Ms Bowring had never set foot in the property and had never seen it and that, until the appellants filed their application to the Tribunal, not one of Ms Bowring's property management staff had ever met with the appellants.

(3) The appellants complained that new insurance had been placed by Ms Bowring in circumstances where she had given unacceptably short notice to the appellants of her intention to change insurers for 2013. They further complained that in respect of the 2013 insurance Ms Bowring had obtained a commission of £184.90. They were particularly concerned about this bearing in mind the experience they had had regarding excessive insurance premiums over previous years which had been substantially attributable to wrongly taken commission.

(4) The appellants complained regarding significant delays by Ms Bowring, or on her behalf, in responding to important questions seeking explanation in respect of the service charge accounts.

(5) They complained regarding Ms Bowring's reluctance to prepare accounts without the assistance (and expense) of an accountant which the appellants contended was unnecessary and unjustified.

(6) They complained regarding a potential conflict of interest because they said that Ms Bowring had acted as an agent for the first respondent as freeholder in relation to the sale of the freehold.

18. So far as concerns the appellants' complaints regarding the contribution made by insurance premiums to the service charges for 2012 and 2013 these can be summarised as follows:

(1) For 2012 insurance had been placed through Willis & Co, insurance brokers, who had provided a breakdown of the premiums for the information of the appellants. The appellants contended that the commercial risk loading premium of £239.20 should be allocated 100% to the commercial unit, rather than this being part of the overall insurance premium such that the appellants between them paid two thirds of this sum.

(2) They also complained that £83.63 of the premium was referable to "Property Owners Liability Premium." The appellants contended that this could not be included as part of the service costs for two reasons. First, the wording of the

provisions of the lease did not permit a charge for such insurance cover. Secondly the insurance was placed solely for the benefit of the freeholder and did not provide any cover for the appellants as lessees.

(3) As regards 2013, Ms Bowring had changed insurance companies. In particular she had decided to take out two separate policies, namely a policy covering everything except terrorism which was placed with AXA Insurance Group at a premium of £1029.98 and a separate policy covering only terrorism with Beech Underwriting at a premium of £355.29. It was the general insurance policy at a premium of £1029.98 which had included a commission of £184.90 for Ms Bowring. For the year 2013 the appellants' further complaints were as follows.

(4) Once again the appellants raised the arguments regarding the proper treatment of the commercial loading aspect of the insurance premium (although they did not have definitive separate figures for how much it was for 2013). Also they repeated their argument that the premium for property liability could not be charged through the service charge although once again they did not have a definitive figure for this for 2013.

(5) The appellants further complained that the taking of two separate policies was unreasonable and exposed the appellants to potential hazard because of the possible arguments between insurance companies as to which if either or them were liable for a particular loss. Also so far as concerns the terrorism cover the appellants drew attention to the fact that the policy was subject to a £5,000 excess. They pointed out that previously the policy had had a far lower excess for a terrorism claim. They pointed out that the obligation was to insure against certain risks in the full reinstatement value and they argued that the placing of insurance with so large an excess did not involve placing insurance in the full reinstatement value. Accordingly the placing of this terrorism insurance involved the placing of an insurance otherwise than in accordance with the terms of the lease. The result was that nothing was recoverable through the service charge for the premium payable because the policy was not taken out in accordance with the terms of the lease. Alternatively the placing of this separate insurance with so large an excess involved the incurring of an unreasonable expense within section 19 of the 1985 Act.

19. The third heading of complaint was that there had been included in the service charge for one of the years (it is unclear to me which) a sum of £300 for the preparation of a notice by way of consultation under section 20 in respect of proposed works. The appellants drew attention to the terms of the order appointing Ms Bowring and in particular to the terms regarding her remuneration which stated:

"5. The Manager shall be entitled to the following remuneration (which for the avoidance of doubt will be recoverable under the service charge):

(a) A basic fee of £1750 plus VAT per annum in respect of the Property for performing the duties set out in paragraph 2.5 of the Code.

(b) In the case of works of a net cost greater than £1,000 excluding VAT the Manager shall be remunerated at a reasonable fee up to a maximum of 10% of the contract sum."

The appellants drew attention to paragraph 2.5 of the RICS Code 2nd Edition regarding residential premises which sets out a list of numerous duties in various lettered subparagraphs and which provides so far as concerns the opening words and subparagraph (b), as follows:

> "As part of the terms of engagement, a "menu" of charges for duties outside the scope of the annual fee could include the following. Some of these charges may be the responsibility of individual tenants:
>
> (b) Preparing statutory notices and dealing with consultations where qualifying works or qualifying long term agreements are proposed …

The appellants pointed out that the basic fee of £1,750 plus VAT was in respect of performing the duties set out in paragraph 2.5 of the Code. Accordingly Ms Bowring was not entitled to charge a further £300 on top for preparing this section 20 notice, because that was a task referred to in paragraph 2.5 of the Code, namely in sub paragraph (b) thereof.

The F-tT's decision

20. At the hearing before the F-tT on 15 May 2013 Ms Bowring was legally represented. The first respondent (i.e. the freeholder and landlord) did not appear and was not represented. The appellants also did not appear and were not represented at the hearing, but they had provided the F-tT with comprehensive submissions in writing.

21. It appears there was a substantial bundle of documents before the F-tT. This bundle has not been produced to the Upper Tribunal for the purpose of the present appeal, but the written material prepared by the appellants has included various extracts from that bundle. At the hearing I was told by the appellants that they understood there to have been a witness statement from Ms Bowring before the F-tT. That witness statement has not been made available to me. Ms Kol said it involved a denial of the appellants' allegations but Ms Kol did not think that the document went into the details of the allegations.

22. As regards the management fees the F-tT determined that the fee of £1,750 plus VAT was reasonable and payable by the appellants (presumably this was intended as a finding that it was reasonable and payable for 2012 and that it was reasonable and payable in respect of 2013 in a pro rata sum for the period until the end of Ms Bowring's appointment on 4 August 2013, such that any on account contributions could be calculated on that basis).

23. There is wording in paragraph 16 and 17 of the F-tT's decision which raises a question as to the extent to which the F-tT considered it appropriate to examine the

appellants' complaints regarding the manner in which Ms Bowring had carried out her appointment, because these paragraphs read as follows:

> "16. Further, the tenants challenge the manner in which the manager has carried out appointment and contend that the appointment of Ms Bowring is unlawful.
>
> 17. The issues outlined in paragraph 16 above do not fall within the scope of an application under section 27A of the Landlord and Tenant Act 1985 and the Tribunal does not have jurisdiction to impugn its previous determination."

It is convenient to observe at this point that if the F-tT was here directing itself that it was not open to the appellants to allege that the management services were not of a reasonable standard or to rely upon section 19(1)(b) of the Act, then I cannot agree with that conclusion. The order appointing Ms Bowring as manager made provision for her remuneration.

> "… which for the avoidance of doubt will be recoverable under the service charge …".

Section 19 is relevant to the calculation of what is properly payable by way of service charge. I can see that it would not be open to the appellants to argue that the sum of £1,750 plus VAT was unreasonably high (supposing that management was properly carried out) because the order appointing the manager has laid down what is the appropriate remuneration for her services. But if the allegation is that those services have not been provided (or have not been properly provided) then in my view the appellants are entitled to raise before the F-tT the question of whether an amount less than £1,750 + VAT should be paid for such management as was in fact provided.

24. However it appears that the F-tT did not decline to look at this point at all, because the F-tT returned to this topic in paragraphs 81-84 when giving its conclusions upon the issue:

> "81. The management fee was set by the Tribunal in its order of 4 August 2011 at £1750 plus VAT (£2100 total). This is the figure that the tenants were being asked to pay.
>
> 82. The tenants made serious allegations about the conduct of the manager. The reliability of these allegations could not be fully tested not least because the tenants did not appear at the hearing and so could not be cross examined by Mr Tang.
>
> 83. Although the manager may not have been as person-centred as the tenants may have liked, it was important that the tenants should understand that the manager, having been appointed by the Tribunal under section 24 of the Landlord and Tenant Act 1987, was answerable solely to the Tribunal and was not answerable to the tenants.
>
> 84. Looking at the all of the documentary evidence it was clear that the manager had acted in good faith throughout. The tenants had failed to establish any grounds upon which the management fee could be reduced."

That is the totality of the F-tT's reasoning in relation to the issues raised by the appellants in relation to the activities of Ms Bowring as manger and receiver and as to their arguments that less than £1,750 plus VAT should be paid as remuneration through the service charge.

25. As regards insurance the F-tT first considered the question of the property owner's liability element of the insurance policies. The F-tT referred to a passage in the earlier decision of the LVT on 4 August 2011 (i.e. the decision whereby Ms Bowring was appointed) where the same point had been raised by the appellants and rejected by the LVT. The F-tT set out the following passage from that earlier decision:

> "The Tribunal considered that the Respondents' submissions were founded on a misunderstanding of the law relating to the legal responsibility of those owning, controlling or managing premises. Briefly stated, in the case of loss or damage of any kind to a third party, any, and every person owning, controlling or managing premises, from the caretaker to the freeholder, is potentially liable if some contractual liability or breach of duty to the injured party can be proved. Thus the Respondents, as property owners of long leasehold interests, fall within the group of persons exposed to liability. This point was put to the Respondents at the hearing. The Respondents also seemed unaware of the legal liability for the loss of rent that falls upon the tenant unless there is a contractual agreement to the contrary. Further, property owners liability is a standard element of cover under most comprehensive insurance policies. Contrary to the Respondents' submissions, the matter is covered by the clear words of clause 1 …"

The F-tT agreed with this statement by the LVT. The F-tT also observed that bearing in mind that there had been no application for permission to appeal this LVT's decision and the fact that the appellants had put forward no grounds to show that this earlier decision could be regarded as wrong, it was an abuse of process yet again to raise the very same argument.

26. The F-tT rejected the appellants' argument regarding the commercial risk loading of the premium. The F-tT observed that the insurance of the building could not be divorced from the physical state of the building which was mixed residential and commercial. The landlord had to insure the building. The appellants were obliged to pay a proportion of such insurance. The F-tT concluded that they were being asked to pay a fair proportion of the insurance as required by the lease.

27. The F-tT found that Ms Bowring's placing of the insurance could not be faulted; that she acted reasonably in placing the insurance as she did; that there was nothing in the evidence and submissions that led the F-tT to conclude that the cost of the insurance was not reasonably incurred or that Ms Bowring had acted unreasonably in placing the insurance as she did. The insurance obtained for 2013 was slightly cheaper than the previous year. The terms of the lease entitled Ms Bowring to include terrorism cover within the policy.

28. As regards the commission of £184.39 the F-tT concluded as follows in paragraphs 61-63:

> "61. With regard to commission, of £184.39, alleged to have been paid to the manager, the Tribunal found that evidence from both the tenants and the manager deficient. It was not sufficient to allege without more evidence that commission was paid. It was incumbent upon the tenants to set out their case as to why the manager should account for the commission. If the tenants were in doubt about the position they should have asked the manager for clarification. There was no excuse for the deficiency in the evidence. Commission was a feature of the earlier Tribunal proceedings and the Tribunal in its earlier determination had set out law in a manner which was both lucid and concise so as to enable the parties to understand what such a challenge entailed.
>
> 62. Likewise, it was not sufficient simply for Mr Tang to submit that the manager was responsible for handling claims, without producing evidence of that fact or at the very least written evidence from the manager to that effect.
>
> 63. Although the sum involved was relatively small, the onus nevertheless remained on the tenants to prove that the manager was liable to account for the commission. The Tribunal concluded that the tenants had not discharged this onus."

29. As regard the separate point regarding the £300 charged by Ms Bowring, through the service charge, in respect of the preparation service of section 20 consultation notices, the F-tT found (paragraph 79) that this was clearly contemplated by paragraph 2.5 of the RICS Service Charges Residential Management code and accordingly was not included in the figure set out in the management order.

The appellants' submissions

30. The appellants prepared a bundle for the hearing which was introduced by a document entitled Statement of Case for Appeal to Upper Tribunal (pages 2-23 of the bundle). The bundle then contained extracts from the appellants' statement of case to the F-tT. Thus schedule A was an extract dealing with management fees (pages 25-35), schedule B was an extract regarding insurance risks (pages 36-52), and schedule C was an extract regarding the section 20 notice (page 53). The bundle then included in schedule D copies of documentary exhibits submitted to the F-tT as contained in the appellants' bundle to the F-tT (which constituted pages 155-244 in the F-tT bundle). The bundle also contained a letter from the appellants to the President of the Property Chamber London Residential Property, Her Honour Judge McGrath dated 21 November 2013 with certain accompanying documents. The bundle then included the copy lease to which I have previously referred, a copy of the order appointing Ms Bowring, a copy of a communication from Ms Bowring dated 10 January 2013 confirming that her firm received £184.90 commission in relation to the buildings insurance premium (apart from terrorism) of £1029.98. The bundle of course also contained a copy of the decision of the F-tT which is the subject of the present appeal and a copy of the grant of permission

to appeal. It was pointed out that schedules A B and C constituted verbatim extracts of the appellants' original statement of case to the F-tT.

31. In summarising the arguments put by the appellants to the F-tT I have already summarised the general thrust of the arguments put to the Upper Tribunal, because the appellants relied upon schedules A, B and C which were the documents setting out their arguments to the F-tT. However Ms Kol, in the further written material and in her clear and courteous presentation, added certain further submissions the principal points of which I can summarise as follows.

32. As regards the management fee Ms Kol advanced the following arguments:

(1) The F-tT was obliged to give proper and adequate reasons for its decision so that they were intelligible. Such reasons must deal with the substantial points raised so that the parties can understand why the decision has been reached. Reference was made to *Lucie M v Worcestershire County Council* [2002] EWHC 1292 (Admin) per Lawrence Collins J (as he then was). On this point Ms Kol further referred to *Flannery v Halifax Estate Agencies Limited* [2000] 1 WLR 377 and to *English v Emery Reimbold Strick Limited* [2002] 1 WLR 377 where Lord Phillips MR stated:

> "We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost."

Ms Kol submitted that the reasoning of the F-tT did not meet this standard.

(2) Ms Kol drew attention to the legal status of a manager appointed by the Tribunal and she referred to *Maunder Taylor v Blaquiere* [2003] 1 WLR 379.

(3) Ms Kol submitted that it appeared Ms Bowring believed she was acting on behalf of the landlord; that she was not impartial; and that some of her actions were unfair to the appellants.

33. As regards arguments concerning insurance premiums Ms Kol advanced the following arguments:

(1) She observed that the F-tT had failed to consider the LVT decision in *Ralphs v Peachey* (BRI/39/UF/LSC/2009/0018) which had been included in the appellants' bundle to the F-tT. Further the F-tT had failed to consider a case cited to the F-tT by the appellants, namely *Green v 180 Archway Road Management Co Limited* [2012] UKUT 245(LC).

(2) As regards the property owners liability she submitted first that, having regard to the terms of the lease, this was not permitted to be placed or charged for; secondly that it was for the appellants themselves to decide whether they wished to insure against such liability (and if so how and where to place such cover); and thirdly that in any event the property

owners liability cover taken out by Ms Bowring only covered the landlord and did not cover the appellants.

(3) Ms Kol made reference to various authorities which it is not necessary here to record regarding the adoption of the contra proferentem rule of construction.

(4) As regards the premium loading for the commercial unit Ms Kol submitted that the construction of the lease required each appellant to pay one third of the total expenditure incurred in relation to the entire "upper residential part" of the building. The F-tT had failed to give proper weight to this. Also to charge some proportion of the commercial loading part of the premium to the appellants would not involve the appellants paying a "fair proportion" (as per clause 1 of the lease) nor would it be reasonable within section 19 of the Act.

(5) Ms Kol submitted that the recoverability of the insurance premium should be tested through the service charge provisions rather than as some self-standing provision for payment by way of the reservation of the additional rent.

(6) Ms Kol submitted that it seemed grossly unjust that the residential tenants should suffer risk of varying increased insurance premiums depending upon the type and range of commercial activities conducted in the building – she expressed the hope that "the premises are not rented out for explosives or arms manufacturing."

(7) Ms Kol pointed out that there was evidence as to how much of the premium was attributable to loading to reflect the presence of the commercial unit on the ground floor.

34. As far as concerns the 2013 insurance, where two policies were taken out, Ms Kol pointed out that the F-tT had misunderstood the position of the appellants. They have never submitted that terrorism cover was not permitted within the lease. They had no objection to terrorism cover being maintained. Their objection was effectively as summarised in paragraph 18(5) above. They were in particular concerned regarding the £5,000 excess and regarding the real prospect of difficulties for the appellants, if an insurance claim had to be made, from the potential for two separate insurance companies to argue as to who (if anyone) had to bear the loss. She made reference to *Forcelux Limited v Sweetman* [2001] 2 EGLR 1973. She submitted that the question is whether the cost of this second separate terrorism insurance policy with a £5,000 excess was reasonably incurred.

35. As regards the commission received by Ms Bowring, Ms Kol submitted that the F-tT had erred in its approach. Once it was established that a commission had in fact been received (which she submitted was clear bearing in mind Ms Bowring's acknowledgement, see paragraph 30 above) then unless for some particular reason Ms Bowring could justify this commission the only proper conclusion was that the commission must be treated as held for the benefit of the tenants, such that credit must

be given for it when calculating the amount of the insurance premium recoverable through the service charge. Ms Kol made reference to paragraph 15 of the earlier LVT decision. She pointed out that the F-tT had referred to the LVT's analysis upon the question of commissions and she submitted that the F-tT had misunderstood what the proper analysis was. She made reference to paragraph 2.6 of the RICS code which provides:

> "2.6 Insurance commissions and all other sources of income to the managing agent arising out of the management should be declared to the client and to tenants."

She also made reference to *Wilson* v *Hurstanger Limited* [2007] EWCA Civ 299 regarding secret commissions.

36. On the question of the £300 charge for the preparation of the section 20 notices, Ms Kol pointed out that the F-tT had misunderstood the provisions of paragraph 2.5 of the RICS code. The terms of paragraph 2.5 coupled with the terms of the appointment of Ms Bowring made clear she was not entitled to charge for this work.

Discussion

37. As regards the charge for preparing the section 20 consultation document I accept the appellants' argument. The terms of the management order whereby Ms Bowring was appointed made provision for her remuneration. The basic fee was for performing the duties set out in paragraph 2.5 of the Service Charge Residential Management Code. Paragraph 2.5 included, in the lettered subparagraphs, a long list of duties which included preparing statutory notices and dealing with consultations where qualifying works etc were proposed. These remuneration provisions contemplated that Ms Bowring would have been entitled to a further fee of 10% of the contract sum in respect of any works in due course carried out. However as far as concerns the preparation of the section 20 document no further fee was payable. The £300 for this item should not be included in the service charge calculations.

38. As regards the points raised by the appellants regarding property owners liability and regarding the commercial weighting element of the insurance premium, I have considered the LVT decision in *Ralph* v *Peachey* upon which the appellants relied and a copy of which they provided to the F-tT in the present case. The decision is instructive, although not of course binding either on the F-tT or the Upper Tribunal. Various points were raised in that case including two points which also arise here, namely the question of payment for property owners liability and the question of how to deal with commercial weighting of the premium where residential flats are contained within a mixed use building. Upon the wording of the insurance provisions in that case the LVT drew attention to the covenant to insure as being limited to those risks that cause loss or damage to the property and that insurance against personal losses by way of liability to third parties was not within the words of the covenant. The LVT also observed that the lessees' interest had not been noted on the policy in respect of this aspect of the insurance.

39. In the present case the extent of the landlord's obligation to insure in clause 3(2) should in my view be read together with the wording in clause 1 which reserves the further rent in respect of insurance. I agree with the appellants' argument that the wording of both provisions is concerned with the insurance of the building against various risks. I conclude, as did the LVT in *Ralphs v Peachey*, that this does not include placing an insurance in respect of personal liability as an occupier or owner of the building. However clause 3(5)(f) (see paragraph 13 above) is widely drafted and enables the landlord to do other acts matters and things as in its absolute discretion may be necessary or advisable for the proper maintenance safety and administration of the building. A decision to extend the insurance cover on the building so as to include property owners liability in my view falls within this paragraph. However the appellants' case is that this insurance was placed in such a manner as it only covered the landlord (or possibly the landlord and Ms Bowring) and that in particular it did not cover the appellants themselves. The F-tT appears to have proceeded on the basis that the insurance did cover the appellants – and the LVT in the 2011 decision appears also to have proceeded upon this basis. The F-tT has not made a specific finding upon the terms of the policy that the policy did indeed cover the appellants. There is some material in the documents before me to suggest that it did not do so. However in the absence of the full documents and in particular the evidence submitted to the F-tT on behalf of Ms Bowring I cannot properly make a finding on this point. Accordingly I conclude that the part of the insurance premium which is properly attributable to property owners liability was reasonably incurred and would form part of the costs, upon which the service charge should be calculated, provided that the property owners liability extended to cover the appellants. If it did not do so then in my view that part of the premium was not reasonably incurred and should not be included as part of the service costs. This matter will have to be decided by the F-tT pursuant to the remission which it is necessary for me to make, as explained further below.

40. The next question is whether that part of the insurance premium as is properly attributable to the commercial weighting (i.e. to the presence of the commercial unit on the ground floor) can properly form part of the service costs payable through the service charge by the appellants. The amount of the insurance premium properly payable by the appellants is provided for in two places in the lease namely in the reservation of the additional rent, where it is provided that the appellants should pay a "fair proportion" of the insurance premium, and also in schedule 2 paragraph 1(b) where the service charge is stated to mean a proportion of one third of the total expenditure incurred "in relation to the entire upper residential part" of the building and the reserved parts. I was told that the division that has been adopted of one third to the commercial unit and two thirds to the residential units is simply based upon their relative floor areas. Accordingly no adjustment in the premium has been made so as to load the commercial use element of the premium onto the commercial unit alone.

41. The building is a mixed use building. It may well be that insurance on a similar building would be cheaper if the building was entirely in residential use. However I do not accept that the tenants of flats in a mixed use building are entitled to demand that they only pay an insurance premium calculated as if the building was something that it is not, namely as if it was a 100% residential building rather than a mixed use building. The appellants before me argued that the insurance premium should be allocated to the residential parts such that they had only to pay in respect of the upper parts as if the

entire building had been solely residential. I reject that argument. They have flats in a mixed use building. They cannot complain that the insurance premium to which they are required to contribute is an insurance premium appropriate to a mixed use building.

42. Once again the case of *Ralphs v Peachey* is instructive on this point. In that case the LVT approved the landlord's method for arriving at the charge for the subject property namely by having regard to the higher risk posed by the fish & chip shop and also to the internal floor areas of the respective units. What the landlord had done in that case was to obtain a quotation for the building insurance as if the fish & chip shop was occupied as normal risk commercial premises, such as a gift shop. With that information the broker had calculated that part of the premium which represented the high risk posed by the fish & chip shop. In the present case the commercial user is a dry cleaners. I do not have before me all the evidence that was before the F-tT. I am unable to decide whether the insurance premium would have been less (and if less, then how much less) if the commercial use had been a normal commercial risk rather than a dry cleaner. I do not accept the appellants' argument that the entirety of the loading for a commercial use should be attributed solely to the commercial unit, such that the appellants pay a premium as if the entire building had been residential. I do however accept the appellants' argument to this extent, namely that in order to ascertain within clause 1 the "fair proportion" of the insurance premium which should be payable and in order to determine within schedule 2 paragraph 1(b) what is the expenditure incurred upon the insurance premium in relation to the "entire upper residential part" of the building, I consider that the appellants should be required to pay two thirds (on the basis of floor areas) of the premium which would be payable if the ground floor unit at the building was a normal risk commercial occupier. If the premium would be £xp.a. for the building if there was a normal risk ground floor commercial occupier and was £(x+y) for the actual occupier, then £y should be removed from the premium and only £x should be attributed as to two thirds to the appellants for charging through the service charge.

43. I consider that the F-tT was in error in failing to consider the points raised by the appellants based upon the decision in *Ralphs v Peachey*, which the appellants drew to the F-tT's attention, and in omitting to decide whether there was some addition to the insurance premium which represented a high risk use rather than a normal commercial risk use of the ground floor. Once again on this point the matter must be remitted for further consideration by the F-tT.

44. These points regarding property owners liability and regarding commercial weighting apply to both 2012 and 2013.

45. As regards 2013 and the placing of the separate policy to cover terrorism, no question arose suggesting that the overall premium payable was unreasonably high. The F-tT did not find that taking out a separate policy to cover terrorism was in itself unreasonable. In my judgment the F-tT was entitled so to conclude. The F-tT does not appear to have given separate analysis to the argument based upon the presence of the £5,000 excess, which the appellants said meant that Ms Bowring had not done what the lease required, namely to insure in the full reinstatement value. I would accept that, taking merely by way of an example an extreme case, if a landlord placed an insurance

in an appropriate sum so far as full reinstatement value was concerned, but included in it an unreasonably large excess, for instance £100,000, then it could properly be said that the landlord had failed to insure in the full reinstatement value, alternatively that money spent on such a policy was not reasonably incurred within section 19. £5,000 is a large excess and it seems from the material placed before the F-tT that this was a significantly larger excess than had been included in earlier policies so far as concerns terrorism risk. However I conclude that this is not so large an excess as to justify the conclusion that expenditure upon this terrorism policy was not reasonably incurred. I am also unable to accept the argument that the taking out of this policy involved an act which was outside the terms of the lease, such that in taking it out Ms Bowring was performing an act which fell outside acts for which she could charge through the service charge. There is a difference between (a) performing an act within the terms of the lease, but performing it in an arguably inadequate way, and (b) performing an act which is outside what is contemplated by the lease at all. If there had been an incident which had given rise to a claim under the terrorism policy and if the appellants had been prejudiced by the fact that there was this £5,000 excess, then it may be they would have had some claim against the landlord for having failed to comply with the covenant in the lease to insure the building in the full reinstatement value. Happily that did not occur. I conclude that the placing of this separate terrorism insurance, being insurance that included a £5,000 excess, was an act by Ms Bowring within the insurance provisions in the lease and involved the payment of a premium which can properly be charged through the service charge to the appellants.

46. I now turn to the question of the commission. This involves only £184.90, but it is understandable why the appellants are so concerned upon this point bearing in mind what had happened over several years prior to the appointment of Ms Bowring as manager. It is not entirely clear from the wording of the F-tT's decision that the F-tT accepted that Ms Bowring had received this commission but I proceed on the basis that they are to be taken so to be found – and indeed there was a document before them in which Ms Bowring herself had confirmed that her firm had received this commission (see paragraph 30 above).

47. I am conscious of the fact that there is no representation or written submissions from Ms Bowring or the first respondent and no legal representation on the part of the appellants. The point concerning commissions is of potential importance. I consider that in this case it would be wrong to seek to lay down any general principles concerning commission. I am aware of the discussion in Service Charges and Management, Third Edition, Tanfield Chambers at paragraph 6-005 on the topic of commissions or discounts which starts with the text:

> "This is a thorny subject and an area ripe for dispute in the residential sector."

In these circumstances I limit myself to saying the following.

48. On the basis that Ms Bowring did receive this commission in 2013, I consider that the F-tT erred in saying that the onus was upon the appellants to prove that Ms Bowring was liable to account for the commission. In my judgment the situation was the reverse, it was for Ms Bowring to prove that although £1029.98 was apparently retained by the

insurers as premium for the building insurance, the larger sum of £1029.98 + £184.90 should be treated as the cost reasonably incurred for insuring the building, where the sum of £184.90 was required by the insurers as part of the insurance premium but was then handed back to Ms Bowring as commission. The F-tT gave consideration to whether Ms Bowring was taking on obligations in return for this commission (see paragraph 62 of the decision) but observed that there was no evidence supporting this contention. The F-tT having found that there was no evidence from Ms Bowring justifying the retention of the commission, I conclude that the F-tT erred in omitting to find that this £184.90 did not form part of the insurance premium properly chargeable to the appellants through the service charge.

49. I now turn to the topic of the management fee. I have already observed (see paragraph 23 above) that this was a sum chargeable through the service charge and that therefore it was necessary for the F-tT to consider, having regard to the terms of section 19, whether the management had been provided to a reasonable standard.

50. This was a case in which the LVT in 2011 had decided that it was appropriate to appoint a manager, but had appointed a manager other than the one favoured by the appellants. Ms Bowring, having been appointed as manager and receiver of the building, was an officer of the LVT and subsequently the F-tT, being the tribunal which appointed her see *Maunder Taylor v Blaquiere*. Against that background the appellants in the present case made serious criticisms about the conduct of Ms Bowring as manager. It is true that the appellants did not attend the hearing before the F-tT, which is unfortunate. However they had made their criticisms in writing and they claimed that their criticisms were made out in extensive documentation which they placed before the F-tT.

51. I consider that where tenants make serious criticisms to the F-tT about the conduct of a manager appointed by the F-tT then the tenants can expect the F-tT to examine these allegations with care. The manager is an officer of the F-tT. The criticisms are being made against the manager as officer of the F-tT.

52. In the present case the criticisms of Ms Bowring included complaints as summarised at some length in paragraph 17 above. The totality of the F-tT's reasons, which led it to reject these criticisms and to conclude that the management fee of £1750 plus VAT p.a. was payable in full, are set out in paragraph 24 above. In my judgment these reasons are not proper and adequate reasons. They do not deal with the substantial points which have been raised. They do not make clear to the appellants why their arguments have been rejected. The F-tT's decision upon this point cannot stand. While the amount of money at stake is small, a serious issue has been raised by way of complaints against a tribunal appointed manager and receiver. These complaints require proper consideration and a reasoned decision. It is necessary that the matter is remitted for consideration, upon evidence, at a further hearing before the F-tT.

53. This is a case where the management provided by a manager appointed by a leasehold valuation tribunal is criticised by the appellants and where a challenge is

brought regarding the standard of the management services provided by this manager and regarding the amount of management fees properly chargeable through the service charge for such management services. It is a case where the Upper Tribunal has granted permission to appeal to the appellants so that they can argue their case before the Upper Tribunal regarding, inter alia, these criticisms of this manager appointed by the leasehold valuation tribunal. It is regrettable that the manager so appointed has not appeared or been represented before the Upper Tribunal and has not participated in any way in the appeal.

Disposal

54. The appellants' appeal is allowed to the following extent:

(1) I allow their appeal regarding the £300 costs of preparing the section 20 consultation notice. This £300 should be excluded from the service costs for the purpose of calculating the service charge payable for the relevant year.

(2) I allow the appellants' appeal in respect of the commission of £184.90 payable to Ringley Chartered Surveyors. This sum should be deducted from the relevant insurance premium before that premium is dealt with under the service charge provisions.

(3) I remit the case for a fresh hearing before the F-tT upon the following points:

(a) The question of the management charges and the complaints made by the appellants against Ms Bowring as manager and receiver;

(b) The amount of the insurance premiums properly chargeable through the service charge so far as concerns the arguments based upon property owners liability and upon commercial weighting (these points should be decided upon the basis set out in paragraphs 39 and 42 above)

(4) I direct that these papers be referred to the Senior Judge of the F-tT for the London Region so that he may give directions as to the constitution of the F-tT which is to re-hear the present case.

His Honour Judge Huskinson

17 August 2015

Supplemental decision on costs

55. By her letter dated 24 September 2015 Ms Kol on behalf of the appellants has made an application for costs. The application attached a summary of costs which included costs under three heads, namely filing fees (both in the F-tT and in the Upper Tribunal) in the sum of £1040; time costs (hours) in the sum of £1530; and out of pocket expenses in the sum of £312. Curiously the grand total claimed is stated to be £1842 which is not the total of these three figures.

56. The letter stated that the request for an order for costs was made under Rule 13. In fact it is Rule 10 of the Tribunal Procedure (Upper Tribunal) (Lands Chamber) Rules 2010 as amended which is the relevant provision for an application for costs in the Upper Tribunal.

57. By an e-mail dated 2 October 2015 to Ms Kol the Tribunal asked her to confirm that she agreed that any entitlement to an order for costs must be justified within the provisions of the amended Rule 10 and to explain how she contended that she was entitled to succeed upon her application for costs having regard to the provisions of the amended Rule 10.

58. By a letter dated 19 October 2015 to the Tribunal Ms Kol made further observations regarding her application for costs but did not specifically address the provisions of Rule 10 as amended.

59. Rule 10(2) provides that an order for costs may only be made in accordance with the conditions or in the circumstances referred to in paragraphs (3) to (6). Paragraphs (4) to (6) can have no application to the appellants' request for an order for costs. Accordingly, if the appellants are to be entitled to an order for costs in the present case, it is necessary that the Tribunal considers that a respondent or their representative has acted unreasonably in bringing, defending or conducting the proceedings, see Rule 10 (3).

60. So far as concerns the proceedings before the Upper Tribunal, neither of the respondents participated in any way in those proceedings. Accordingly I do not consider that it can be said that either respondent acted unreasonably in bringing, defending or conducting those proceedings. I therefore make no order for costs in respect of the proceedings before the Upper Tribunal.

61. As regards the fees incurred by the appellants in relation to the present proceedings before the Upper Tribunal, there is a separate provision regarding such fees in Rule 10(14). However in my judgement it would be wrong to order the respondents, or either of them, to pay any portion of those fees. They have not participated in any way in the proceedings before the Upper Tribunal. Also I consider that the fact that there has been an appeal to the Upper Tribunal is substantially attributable to the fact that the appellants did not appear before the F-tT with the consequence that the F-tT did not have any oral

representations from them and, in particular, there was no ability for the respondents to cross examine the appellants upon the written evidence which they had placed before the F-tT (this is a point which the F-tT specifically referred to in paragraph 82 of its decision). I therefore make no order for the payment by either respondent of the fees (or any part of such fees) incurred by the appellants in relation to the proceedings before the Upper Tribunal.

62. As regards the costs in relation to the proceedings before the F-tT, there was a decision by the F-tT that: "Neither party shall reimburse the other party with the application and hearing costs", see decision (9) in the introductory part of the F-tT's decision. The appellants were not granted permission to challenge this decision. I cannot interfere with this decision and, separately, I would not in any event have thought it right upon the merits to do so.

His Honour Judge Huskinson

16 November 2015