



**FIRST-TIER Tribunal
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

:

Case Reference : **MAN/00BM/LSC/2021/0045**

Property : **Apartments 20-38 Bolton Road, Bury
BL8 2PB**

Applicant : **Dearden Street Flat Management
Limited**

Representative : **Howards In-House Property
Management (Northern) Limited**

Respondent : **Blackthorn Corporation Limited**

Representative : **PDC Law**

Type of Application : **Landlord and Tenant Act 1985 – s 27A
Landlord and Tenant Act 1985 – s 20C
Commonhold and Leasehold Reform Act
2002 – Schedule 11 (5)(a)**

Tribunal Member : **Judge L Bennett and Judge R Watkin**

Date of Determination : **14 June 2022**

DECISION OF the Tribunal

14 JUNE 2022

1. This is the decision of the First Tier Property Tribunal (“the Tribunal”) in relation to the Respondent’s Application (the “Application to Strike Out”) dated 25 January 2022.
2. The Application to Strike Out is made pursuant to Rule 9(3)(e) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 which provides:

9(3) The Tribunal may strike out the whole or a part of the proceedings or case if—

....

(e) the Tribunal considers there is no reasonable prospect of the applicant’s proceedings or case, or part of it, succeeding.

3. The Respondent seeks to strike out the application made by the Applicant dated 17 June 2021. The application is for a determination of the reasonableness of service charge pursuant to 27A of the Landlord and Tenant Act 1985 (the “s.27A Application”).

The S.27A Application

4. The s.27A Application is an application for the determination of the reasonableness of the building insurance costs of £5,401.20 charged for the period 25 December 2020 to 24 December 2021 pursuant to s.27A of the Landlord and Tenant Act 1985.
5. The total value of the dispute is £1,917.43.
6. The Applicant states that it would like the Tribunal to decide:

“That the insurance costs are unreasonable when like for like cover can be obtained at a lower premium. (£3483.77) – Quote obtained by Residential Managing (sic) Agents.

“That the commission payable to the freeholders broker £2223.52 (44.3%) impacts on the premium and theses (sic) costs are unreasonable”.

7. The Applicant also comments:

“Whereby we appreciate it is the right of the freeholder to insure premises the cost of the cover they arrange is higher than cover attainable elsewhere.

The cost of this premium is passed onto the shareholders impacts the balance of service charge funds necessary to sufficiently maintain the premises and cover other legal/safety requirements.

We have communicated this information to the freeholders asking them to consider alternative insurance providers but this has been rejected.”

Background to the Application

8. On 23 June 2021 the Tribunal received the s.27A Application for a determination as to whether the service charge in respect of Apartments 20-38 Bolton Road, Bury BL8 2PB (**the “Apartments”**) is payable and/or reasonable.
9. The s.27A Application concerns the 2021 – 2022 service charge year and is limited to buildings insurance costs.
10. The following applications are also included:
- a. An application for an order preventing the costs incurred in connection with these proceedings from being recovered as part of the service charge; and
 - b. An application for an order reducing or extinguishing the Applicant’s liability to pay a particular administration charge in respect of costs incurred in connection with these proceedings.
11. The Tribunal issued directions to the parties on 15 December 2021.
12. On 19 January 2022 PDC Law advised the Tribunal that they had been instructed to act for the Respondent and, on 25 January 2022, the Respondent made the Application to Strike Out.
13. On 27 January 2022 the Applicant made a brief reply to that application.
14. The Tribunal considered it appropriate for the Application to Strike Out to be determined as a preliminary matter on the papers. The parties were provided with an opportunity to attend. However, neither has done so and the Application for Strike Out was listed for determination today.
15. The Apartments have not been inspected for the purpose of the determination.

Documentation

- 16.** The Tribunal has had the opportunity to consider the following documents:
- a. The Respondent's Statement of Case dated 14 April 2022 and attached 129 page bundle.
 - b. The Applicant's Reply dated 19 April 2022 and attached 11 page bundle.

The Parties

- 17.** The parties are:
- a. The Respondent (Applicant in relation to the Application to Strike Out) – Blackthorne Corp Limited; and represented by PDC Law.
 - b. The Applicant (Respondent in the Application to Strike Out) – Dearden Street Flat Management Limited, represented by Howards In-House Property Management Ltd.
- 18.** The Applicant is the private limited company which was set up for the purposes of providing property management services to the Apartments.

The Apartments

- 19.** The Apartments are 19 leasehold dwellings described as 'Apartments 2 to 38 (evens) Church Mews, Dearden Street, Bury BL8 2PB' and consist of two self-contained, purpose-built blocks of flats with one containing 'Apartments 2 to 18' (evens) and the other containing 'Apartments 20 to 38' (evens).
- 20.** The Respondent is the owner of the freehold reversionary interest in Church Mews, registered at H.M. Land Registry under title number MAN239029.

The Leases

- 21.** The Apartments are each let to leaseholder on leases of substantially similar terms. There are three parties to each lease – the Applicant, as the management company, the Respondent, as lessor or landlord, and each leaseholder or lessee.
- 22.** The Tribunal has been provided with copies of the following sample leases:
- a. A lease of Flat 8 dated 4 August 2004 between Mr David William Briggs (1), the Applicant and Mr Raymond Bolger; and
 - b. A lease of Flat 32 dated 17 November 2004 between Richmond Residential and Commercial PLC (1), the Applicant (2) and Mr John Patrick Clarke (3)

The Relevant Terms of the Leases

23. The leases provide:

- a. The Service Charge is defined at clause 1.10 as *“The contributions equal to the Lessee’s Property of the expenditure described in sub-clause 7.1 and in the Second Schedule.”*
- b. At clause 4.4 to the recitals that: *“The Management company has agreed to join in this Lease with responsibility for the services repair maintenance insurance and management of the Estate”*
- c. That the Lessee shall pay the rent of £75 in equal half yearly amounts to the Lessor. It is noted that no other sums are included within the definition of “rent”.
- d. Clause 7.1 provides that the lessee covenants with the lessor and the Management Company as follows: *“to pay contributions by way of Service Charge to the Management Company equal to the Lessee’s Proportion of the amount which the Management Company may from time to time expend and as may reasonably be required on account of anticipated expenditure on rates services repairs maintenance or insurance being and including expenditure described in the Second Schedule....”*.
- e. At paragraph 1 of the Second Schedule, the Service Charge Expenditure is defined to include expenditure:

“1.1 *in the performance and observance of the covenants obligations and powers on the part of the Management Company and contained in this Lease or with obligations relating to the Estate or its occupation and imposed by operation of law”*
- f. Clause 8 of the leases state that provided that the lessee complies with obligations under the lease, the Management Company (the Applicant) has covenanted with the lessee and the Lessor (Respondent) as follows:

“8.5(a) *to keep the Estate (including the Lessor’s fixtures fittings and furnishings) insured with an insurance office or underwriters of a good repute and through any reputable agency including the Lessor’s as decided from time to time by the Lessor or in default by the Management Company providing for the interests of the Lessee the other Lessees in the building and their mortgagees or charges to be automatically including therein (unless the insurance is rendered void by any act or omission of the Lessee or persons claiming under the Lessee) in the sole names of the Lessor and of the Management Company against loss or damage by fire storm tempest explosion and other risks (subject to excess exclusions or limitations as the insurers may require) as the Lessor or the Management Company thinks fit for amounts which the Lessor or failing the Lessor the Management*

Company thinks expedient and for additional risks and for greater amounts as the Lessee or the Lessee of any other flat in the Building may reasonably require for the cost of reinstatement (including all professional fees debris removal and site clearance and the cost of the work which may be necessary by or by virtue of any Act of Parliament) and for three years' loss of rent". (underlining added)

24. In brief, therefore, provided that the lessee complies with the terms of the lease, the Applicant is to insure the Estate through any reputable agency decided by the Respondent. In turn, the lessee has an obligation to pay a proportion of the cost of that insurance to the Applicant management Company.
25. For the avoidance of doubt, the Respondent does not obtain the insurance and neither does it pass on those charges to either the lessees or to the Applicant management company. Equally, there is no obligation upon the lessees or the Applicant management company to make any payment for insurance to the Respondent.

The Respondent's Case

26. The Respondent states that the Applicant is, in effect, asking the Tribunal to decide whether the service charge in the amount identified is payable and states that issues arise in relation "to whom the service is payable" and "by whom" and whether the service charge in dispute can be classed as "*relevant costs*" and thus "*service charge*" for the purposes of s.18 LTA 1985.
27. The Respondent raises the question of whether the Tribunal has jurisdiction under S.27A. It states:

"the Applicant has erred in law in making the Application. ...the necessary pre-requisites for an application to the Tribunal to fall within its jurisdiction under Section 27A LTA 1985 have not been met; there is no relevant cost incurred by the Respondent and it has not demanded from the Applicant any contribution to the cost of insurance by way of service charge (nor is the Applicant the payer of service charge). The Respondent submits that it has therefore been incorrectly named in these proceedings as the 'Respondent' and the Tribunal would not have the jurisdiction to determine this matter between the parties, as Section 27A LTA 1985 does not apply to the relationship between the Applicant and Respondent in these circumstances."

- 28.** The Respondent relies upon the case of **Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd [1996] 7 WLUK 446 (“Berrycroft”)**.

The Applicant’s Case

- 29.** In response, the Applicant avers that:
- a. *“The Respondent remains a Promiser on the insurance premium”* and *“The Respondent has a duty to ensure that the renewal of an insurance policy and its premium is “reasonably incurred” for the purpose of s.19(1) of the LTA 1985.”*
 - b. No transparency has been provided by the Respondent in respect of remuneration/commission for their part in nominating the insurance provider. They state that payment of such indicates the Respondent “being otherwise involved”.
 - c. It is within the rights of the leaseholders to challenge the reasonableness of costs for a service.
 - d. *“the responsibility of the insurance costs has been taken out of the Management Company’s hands by the Freeholder....and as a result the Premiums have escalated year on year.”*
- 30.** In this regard, it is presumed that the Applicant intends to aver that that Landlord is a *“relevant landlord”* for the purposes of the Act as it is a party to the policy and as the charges are, at least to some extent, within the control of the Respondent

The Determination

- 31.** The Application was considered on paper by Judge L Bennett and Judge R Watkin who determine that the Application be dismissed.

The Reasons

Jurisdiction

- 32.** The Respondent avers that the Tribunal has no jurisdiction under s.27A
- 33.** However, the wording of section 27A is unqualified in relation to whom may bring a claim states:

“An application may be made to [F2the appropriate tribunal] for a determination whether a service charge is payable ...”

- 34.** S.27A does not state who may make an application to the tribunal and it does not say who such an application may be brought against. Thus, the right to bring

the claim is entirely unqualified and the Respondent provides no authority that supports its contention that any limitation should be read into that provision.

35. Whilst the background to the decision of the Court of Appeal in **Oakfern Properties Ltd v Ruddy [2006] EWCA Civ 1389** was different in that the case relates to the question of whether a subtenant can bring a claim under s.27A, the words of Parker LJ are of assistance:

“82. In my judgment there is no justification for implying any restriction into the entirely general words of section 27A of the 1985 Act. In most cases, one may suppose, the applicant for a determination under that section as to the proper amount of service charge payable will be the party who is liable to pay the service charge the subject of the challenge, and the respondent to the application will be the party who is seeking to levy it on the applicant; but there is no reason why that should inevitably be the case. In the instant case, for example, PPM, as the mesne landlord, may have its own good reasons for not wishing to undertake such a challenge as against Oakfern if one of its subtenants (e.g. Mr Ruddy) is ready and willing to do so.

83. As to possible abuses of process, the Leasehold Valuation Tribunal has ample powers to regulate its own procedures, including power to strike out vexatious or abusive applications.”

36. Thus, the Tribunal does not accept that the s.27A Application should be struck out simply because the claim is not brought by the paying party against the party seeking to recover the sums claimed by way of service charges. That said, it is accepted that the Respondent would need to have some control over the service charges for such a claim to succeed as against it.

Implied Reasonableness

37. Whilst the present proceedings before the Tribunal are not for a decision on the interpretation of the lease or as to the question of whether any terms could reasonably be implied, the Respondent’s relies on the case of **Berrycroft** in which the Court of Appeal held that it was not appropriate for a term of reasonableness to be implied into the lease.

38. The Respondents aver that *Berrycroft* “involved in an almost identical set of circumstances” and the Court of Appeal held that, in that case:

“Even if the landlord directs that the insurance should be effected through a company or agency nominated by the landlord, the management company will have paid in accordance with its obligations contained in a contract to which the tenant is a party and there would be no basis for reducing the sum recoverable from the tenant.

39. The wording of the covenant to insure within the lease in **Berrycroft** was as follows:

“(3) To insure at all times of the term and to keep insured the building and such other areas as the landlord decides to insure for such sum as the landlord thinks fit against loss or damage by fire and such other normal household risks in some insurance office of repute and if directed by the landlord through a company nominated by the landlord and if required through any agency of the landlord in that company (such insurance to be effected in the joint names of the landlord, the company and the tenant for their respective interests).”

40. Thus, in **Berrycroft**, as the landlord had a right to nominate the company through which insurance was to be provided, the management company was found to have no power in which to reduce the sum payable or, therefore, recoverable from the tenant. It was held that, in those circumstances, there was no reason to imply a term of reasonableness into the lease as the provisions that stipulate an “insurance office of repute” provide the lessees with sufficient protection.
41. Whilst the Respondent refers to **Berrycroft** as being “almost identical” to the present case, there is clear difference between the two. The difference is that in the present case, the Respondent is only permitted to nominate an “agency” and not the insurance “company”.
42. There is a clear difference between the use of a broker or an agent who may be able to provide a range of quotes from different insurance companies and an insurance company that is only able to offer one product. In the latter case, it is less likely that there is any flexibility as to the price of the policy and, therefore, no basis for an implied term as to reasonableness to be of any effect.
43. In the event that “agency” is taken to mean “broker”, rather than “insurance company”, this could result in the Tribunal finding that, even with the landlord nominating the “agency”, that there was still scope for negotiation which could mean that there remained some flexibility in the price charged by the “agency” and, therefore, that it wasn’t as clear as the management company simply paying in accordance with obligations, some flexibility remained.
44. In any event, the question of whether a term of reasonableness should be implied into the leases is not a matter to which the S.27A Application relates. However, if the present case can be distinguished from **Berrycroft**, which this Tribunal considers to be an argument which is not without prospects of success, the result may be that the management company does have some flexibility in relation to the insurance premium as, there might still be scope for encouraging an “agent” (“broker”) to recommend a more reasonably priced product. However, the complicating factor here is that it is the Applicant, as management

company, may be the body responsible for those negotiations to ensure that such a reasonable price is achieved on behalf of the lessees.

45. Irrespective of the foregoing, for it to be appropriate for the case to proceed, there must be some basis for the claim to succeed as against the Respondent. Thus, the Respondent may also need to be a “*landlord*” for the purpose of the Act and the insurance premiums must be a sum which may vary. Thus, the landlord must have some level of control over the insurance premium without its contractual rights under the lease being fettered.
46. In relation to the question of whether the Respondent is considered to be a “*landlord*”, for the purpose of the Act. The term landlord is defined at s.30 of the Act as:

““landlord” includes any person who has a right to enforce payment of a service charge;”

47. In **Berrycroft**, Beldam LJ considered the status of the landlord. He stated:

“I do not think it is possible in the circumstances of this case and having regard to the terms of the Act to regard the company as the tenants’ landlord to the exclusion of the landlord as defined in the lease.

In the first place the definition in section 30 includes any person who has a right to enforce payment of a service charge. As the tenant has covenanted directly with the landlord and his assignees under the provisions of clause 5 of the lease to pay the service charge to the company, it seems to me the landlord does have the right to enforce payment of the service charge and so is a landlord for the purpose of the provisions of the Act.”

In the present case, the lessees also covenanted with the landlord that it would pay the service charges to the landlord. Therefore, it must be that the Respondent is also a landlord for the purposes of the Act.

48. In relation to the question of whether the insurance premiums are a “service charge” for the purposes of the Act, s.18 needs to be considered:

“s.18(1) In the following provisions of this Act “service charge” means an amount payable by a tenant of a [F1dwelling] as part of or in addition to the rent—

- (a) *which is payable, directly or indirectly, for services, repairs, maintenance [F2, improvements] or insurance or the landlord’s costs of management, and*
- (b) *the whole or part of which varies or may vary according to the relevant cost*

49. In **Berrycroft**, Beldam LJ takes the point further:

“Although the management company effects insurance in the joint names of the landlord and the tenant, insofar as the insurance charges are incurred by the tenant as part of the service charge, they would not in my view be regarded as incurred by or on behalf of the landlord and not therefore “relevant costs”. Even if the landlord directs that the insurance should be effected through a company or agency nominated by the landlord, the management company will have paid in accordance with its obligations contained in a contract to which the tenant is a party and there would be no basis for reducing the sum recoverable from the tenant.”

50. However, in the present case, the situation is quite different as it would there may be scope for reducing the policy premiums in this matter in two ways:

- a. if the management company is not bound to use a particular insurance company but only a particular broker then this provides scope for alternative policies to be considered, thereby providing scope for the overall cost to be reduced by the Applicant; and
- b. as it is accepted that that landlord receives commission in relation to the purchase of insurance, that is also an element in respect of which there is a basis for reducing the sum recoverable. On this occasion, it would be the landlord who would be in control for the variation.

51. Thus, the contention that the landlord is the relevant landlord has more than reasonable prospects of success, as does the contention that the insurance premium is an amount that could be varied – either through negotiation by the Applicant or by a reduction of commission by the landlord.

52. Finally, for clarity, paragraph 8 of the schedule to the Act has not been considered by the Tribunal. Whilst it concerns the rights of tenants in relation to insurance, it is not of relevance as it applies only where the lessees themselves are obliged to insure the dwellings with a nominated insurer. As this does not apply in this case, it has not been considered further.

53. On balance, having considered the submissions of the parties and the case of **Berrycroft** in detail, and without predetermining the matter, the Tribunal finds that the s.27A Application does have a reasonable prospect of succeeding and, on that basis, the application is dismissed.