FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	**:**	**CAM/11UF/LC1/2022/0001**
HMCTS code (audio, video, paper)	**:**	**A: BTMMREMOTE**
Property	**:**	**1-12 Balmoral Court, 1-6 Blenheim Court, 1-8 Glamis Court, 1-6 Clarence Court and 1-6 Sandringham Court High Wycombe Buckinghamshire**
Applicants	**:**	**1. Paul Critchley (No. 2 Balmoral Court) 2. Firstgate Residents Management Limited**
Respondent	**:**	**Sinclair Gardens Investments (Kensington) Limited**
Type of application	**:**	**Challenge landlord's choice of insurers**
Tribunal	**:**	**Judge David Wyatt**
Date of decision	**:**	**6 May 2022**

NOTICE OF DECISION TO STRIKE OUT A CASE

Decision

(1) The application under paragraph 8 of the Schedule to the Landlord and Tenant Act 1985 (the "**1985 Act**") is hereby struck out under rule 9(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 (the "**Rules**").

(2) The tribunal makes no order under section 20C of the 1985 Act or paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 (the "**2002 Act**").

Reasons

Application

1. On 25 January 2022, the tribunal received this application under paragraph 8 of the Schedule to the 1985 Act to determine whether the insurance available from the insurer nominated by the Respondent landlord is unsatisfactory or the premiums are excessive and, if so, order the Respondent landlord to nominate another insurer. The Applicants also sought cost protection orders under section 20C of the 1985 Act and paragraph 5A of Schedule 11 to the 2002 Act in relation to these proceedings.

2. The Property accommodates 38 leasehold flats, held on leases made between: (1) the Respondent landlord, which owns the freehold; (2) the second Applicant, which is the management company under the leases; and (3), the leaseholders. The leaseholders are the only shareholders of the second Applicant. The first Applicant, Mr Critchley, is a leaseholder of one of the flats and a director of the second Applicant.

Previous service charge proceedings

3. The second Applicant (the management company) previously applied to the tribunal under section 27A of the 1985 Act to determine payability of service charges, challenging insurance costs for 2020/21 (case number CAM/11UF/LSC/2021/0033). The Respondent was the respondent to those proceedings and applied to strike them out. They contended the tribunal had no jurisdiction under section 27A because under the relevant covenant the insurance premium is not payable to the Respondent and is recoverable by the second Applicant by way of service charge from the leaseholders.

4. On 17 August 2021, after considering written representations from those parties, I declined to strike out that application. The information provided did not justify preventing the second Applicant from developing and arguing their case in full. I directed the Respondent to disclose specified documents in relation to their nominated insurers and costs/commissions. However, I observed there was a real risk that the tribunal might ultimately be unable to make any meaningful determination, so it might be appropriate to withdraw the application. The second Applicant was encouraged to take independent legal advice and referred to the decision in Berrycroft Management Co. Ltd v Sinclair Gardens Investments (Kensington) Ltd [1997] 29 H.L.R. 444.

5. Following production of case documents and a substantive hearing, the tribunal which heard the service charge application (Judge Shepherd and Mr Barnden FRICS) came reluctantly to the view that (in essence) they could not make a meaningful determination, for the reasons explained in their decision dated 6 December 2021. They decided that the tribunal could only make a determination of the service charges payable by the leaseholders to the second Applicant and (obviously) that was not what they wanted. The Respondent could still nominate

the insurers/agents and the second Applicant would be obliged to insure with/through them.

6. That tribunal also referred to paragraph 8 of the Schedule to the 1985 Act. They recorded in their decision [at 7] that Mr Bottomley (the Respondent's representative at the hearing of those proceedings) had: "*…accepted that paragraph 8 must also apply in the present circumstances to the management company as well as the tenant*". Accordingly, that tribunal commented that an application under paragraph 8 might provide the answer to the question of how the second Applicant might challenge what they perceived to be excessive insurance costs. That tribunal does not appear to have been referred to the decision in Berrycroft, or the subsequent decision in Cinnamon Ltd v Morgan [2001] EWCA Civ 1616 referred to below.

Procedural history

7. After initial review of the application under paragraph 8, the tribunal wrote to the parties on 28 March 2022, noting the background and enclosing a copy of the decision in Berrycroft. The letter warned that, if the application was not withdrawn beforehand, it might be appropriate to strike it out under Rule 9(2) or (3)(e). It directed that the tribunal would consider at a telephone hearing whether to strike out the application or, if allowing it to proceed, what directions to give.

8. The Respondent produced an electronic bundle of documents for the hearing, including a copy of the decision in Cinnamon and their written submissions from the service charge application. The Applicants produced written submissions in response to the proposed strike-out, enclosing copy PDF documents. On 26 April 2022, a skeleton argument was produced by Mr Asela Wijeyaratne, counsel for the Respondent. At the hearing on 28 April 2022, the Applicants were represented by Mr Critchley and the Respondent was represented by Mr Wijeyaratne.

Lease provisions

9. In clause 3(5)(d) of the leases, the leaseholder covenanted to pay a specified proportion of the: "*…costs charges and expenses from time to time incurred by the Company in performing and carrying out the obligations … set out in Part 4 of the Schedule … PROVIDED ALWAYS that if the Lessor shall under the provisions of clause 6(iii) hereof perform or carry out all or any of the obligations of the Company hereunder the Lessee shall contribute and pay to the Lessor on demand the due proportion of all costs charges and expenses as more particularly hereinbefore mentioned*".

10. Clause 6(iii) of the leases provides: "*If during the term hereby granted the Company shall fail or neglect to perform and observe its obligations or any of them hereunder or shall go into liquidation the Lessor shall be entitled to undertake (or by action or otherwise compel the Company to undertake) the obligations or any of them hereby*

agreed to be undertaken by the Company and shall be entitled to recover from the Lessee a due proportion of all monies costs charges and expenses incurred by the Lessor in connection herewith".

11. In clause 8(i) of the leases, the second Applicant covenanted with the Lessor to: "*…perform and observe the obligations … set out in Part 4 of the Schedule hereto and in the event of the Company failing to perform and observe the obligations … as set out in Part 4 of the Schedule aforesaid the Company hereby authorises the Lessor and its agent to perform and observe the said obligations or any of them and to recover from the Lessee the due proportion of the costs charges and expenses so incurred by the Lessor as agent for the Company…*".

12. By paragraph C4 of Part 4 of the Schedule to the leases, the second Applicant covenanted to: "*…insure and keep insured the Flats in the names of the Lessor and the Lessee his mortgagees … and the Company against the usual comprehensive risks with some insurance Company of repute nominated by the Lessor and through the agency of the Lessor including loss or damage by fire and loss or damage or liability to any persons arising from the ownership or occupation or user of the Flats and all other risks usually prescribed as property owners liability and such other risks (if any) as the Lessor or its agents may think fit in the full replacement value thereof.*"

13. Under these provisions, the Respondent had nominated Ecclesiastical as insurer and Cullenglow Ltd trading as Princess Insurance Agencies, using a portfolio policy. The Applicants said they had obtained quotations ranging up to £6,172 for the 2020/21 service charge year and £5,454 for the 2021/22 service charge year, compared to premiums from Ecclesiastical of £10,843 and £11,923 respectively.

Jurisdiction

14. Paragraph 8 of the Schedule to the 1985 Act: "*…applies where a tenancy of a dwelling requires the tenant to insure the dwelling with an insurer nominated or approved by the landlord.*" (para. 8(1)). Mr Wijeyaratne said this was not met, because the leases did not require the tenant to insure. When I asked about the matters recorded in the decision of 6 December 2021, it was explained that Mr Bottomley had been counsel for the Respondent at the hearing of the service charge proceedings. Mr Wijeyaratne had spoken to Mr Bottomley, whose recollection was that he made no concessions and had suggested caution. However, Mr Wijeyaratne agreed the Respondent had not requested correction or revision of the wording of the decision of 6 December 2021.

15. In Berrycroft, as in this case, the relevant leases required the management company to insure with an insurer nominated by the landlord. The first-instance judge in Berrycroft said [noted by the Court of Appeal at p.454] that: "*…None of the leases of the flats with which I am concerned require the tenant to insure at all much less to*

insure with a nominated insurer. On the contrary it is the management company which covenants … to insure … It is true that the management company is owned by all the tenants in a block but that in my judgment is insufficient to bring the leases either individually or collectively within the scope of para. 8".

16. In Cinnamon, considering the application of the decision in Berrycroft to a related issue, Chadwick LJ said [at 21] that: "*If the judge were correct in his view that the lease did not require the tenant to insure at all - as, plainly, he was - then the question whether the insurer was nominated by "the landlord" for the purposes of paragraph 8(1) did not arise. Paragraph 8 of the Schedule only applies to a tenancy which requires the tenant to insure; and this was a tenancy which did not require the tenant to insure. It was the management company which had to insure.*"

17. Mr Wijeyaratne rightly accepted that these observations were obiter (comments made in passing, rather than part of the binding reasons for the decision which the parties and court will have been focussing on). However, he submitted that they address the point in this case, are clear, and should be followed.

18. The Applicants said the tribunal did have jurisdiction to consider their application under paragraph 8 because they had refused to insure through the insurer and agent nominated by the Respondent for 2020/21 and 2021/22, making alternative insurance arrangements. They referred to clause 6(iii) of the leases and pointed out that the Respondent had in correspondence threatened several times to enforce this clause. They said the Respondent had indicated (in effect) that the matter could be resolved by application to the tribunal and referred to the comments in the decision of 6 December 2021 about this. They argued that clauses 6(iii) and 8(i) in effect excluded the Company and required the leaseholders to insure directly with the nominated insurer through the nominated broker. At the hearing, Mr Critchley submitted that in this context the obligation to insure and the obligation to pay for the insurance were the same thing. He said the nominated insurance agent and the Respondent (who, he said, had the same holding company) would not discuss insurance matters with the second Applicant, simply producing policy documents and submitting an invoice following the Respondent's requirements.

Conclusion

19. In my view, unfortunately, paragraph 8 of the Schedule to the 1985 Act does not apply because the leases do not require the tenant to insure. They only require the second Applicant to insure. Being required to contribute towards the costs is not enough. Nor is the fact that the second Applicant is held and controlled by the tenants. This follows the comments in the authorities mentioned above. The potential under the terms of the leases for the Respondent to insure itself or as agent for the second Applicant and claim the costs directly from tenants does not

change this, whether or not it might enable an effective determination to be made in a future application under s.27A. I recognise the leaseholders' frustrations, since they are expected to pay the full insurance costs and the second Applicant appears to have little control over the insurance arrangements specified by the Respondent. That might bear on the question of whether the second Applicant and/or the Respondent are the "landlord" for the purposes of paragraph 8, but it does not have the effect of requiring the tenants to insure.

20. Since I am satisfied that paragraph 8 of the Schedule to the 1985 Act does not apply, the tribunal does not have jurisdiction and I must strike out this application under Rule 9(2).

Section 20C/Paragraph 5A

21. Neither Mr Critchley nor Mr Wijeyaratne could point me to any provisions of the leases which would allow the Respondent to claim any costs incurred in connection with these proceedings from the Applicants through the service charge or as an administration charge. Although Mr Wijeyaratne had no instructions to concede this, he could see no obligations under the lease to pay, although he said I should not determine that question, but should decide not to make the orders sought on the ground that the Applicants had been unsuccessful. He submitted that, whatever was said in the decision of 6 December 2021, it was for the Applicant to ensure they made a proper application for which the tribunal would have jurisdiction.

22. It seems to me that if there were any apparent likelihood of the costs of these proceedings being claimed under the terms of the leases, it might be just and equitable to make the orders sought. The Applicants have been unsuccessful. However, the decision of 6 December 2021 was sent to the parties by the tribunal office on 7 December 2021, recording an apparent agreement that paragraph 8 would apply, and there was no application from the Respondent to correct/revise that or apparently even to challenge it in correspondence with the Applicants. This application was not made until 22 January 2022 and the question of jurisdiction was raised by the tribunal of its own initiative when the application documents were first sent to the Respondent. However, in the circumstances, I do not make the orders sought because it appears there would be nothing for them to bite on. As requested, I make no finding about this. Accordingly, this decision does not preclude a new application to the tribunal under section 20C and section 27A of the 1985 Act if in future the Respondent does seek to recover the costs of these proceedings under the terms of the lease.

23. Finally, Mr Wijeyaratne warned that the Respondent intended to make an application under Rule 13 for an order in respect of costs. As mentioned, such application would need to be made within 28 days as set out in Rule 13 and the tribunal would then give directions for the determination of such application. The Respondent is neither encouraged to nor discouraged from doing so, but the parties are

reminded that this has a high bar, as explained in the decision in Willow Court Management Company 1985 Ltd v Alexander [2016] UKUT 0290.

Observations

24. As mentioned at the hearing, while this is not part of my decision and the tribunal cannot give advice, there may be real risks of refusing to insure with the landlord's nominated insurer as set out in the leases, even if the second Applicant has paid for other insurance policies obtained directly by them. The parties may wish to take independent specialist legal advice as a matter of urgency on their position (and perhaps on the question of whether the leaseholders can claim the no-fault right to manage under the 2002 Act, as appears previously to have been suggested by the Respondent, whether separate RTM companies/claims might be needed in respect of each block and whether this might enable the leaseholders to take control of the relevant insurance functions entirely).

Judge David Wyatt **6 May 2022**

Rights of appeal

By rule 36(2) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, the tribunal is required to notify the parties about any right of appeal they may have.

If a party wishes to appeal this decision to the Upper Tribunal (Lands Chamber), then a written application for permission must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for permission to appeal must arrive at the regional office within 28 days after the tribunal sends written reasons for the decision to the person making the application.

If the application is not made within the 28-day time limit, such application must include a request for an extension of time and the reason for not complying with the 28-day time limit; the tribunal will then look at such reason(s) and decide whether to allow the application for permission to appeal to proceed, despite not being within the time limit.

The application for permission to appeal must identify the decision of the tribunal to which it relates (i.e. give the date, the property and the case number), state the grounds of appeal and state the result the party making the application is seeking.

If the tribunal refuses to grant permission to appeal, a further application for permission may be made to the Upper Tribunal (Lands Chamber).