FIRST-TIER TRIBUNAL
PROPERTY CHAMBER (RESIDENTIAL PROPERTY)

Case reference	**:**	**LON/00AK/LBC/2024/0010**
Property	**:**	**14a Ferndale Road, Enfield, EN3 6DH**
Applicant	**:**	**Chancery Lane Property Group Ltd**
Representative	**:**	**Mr Paul Simon**
Respondent	**:**	**Ms Harriet Mary Ray**
Representative	**:**	**Mr Rory Turnbull, instructed by Duffield Harrison LLP**
Type of application	**:**	**Determination of an alleged breach of covenant**
Tribunal members	**:**	**Tribunal Judge Niamh O'Brien** **Tribunal Member J Naylor FRICS**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Hearing	**:**	**16 September 2024**
Date of Decision	**:**	**7 October 2024**

DECISION

Decisions of the Tribunal

(1) The respondent has breached Clause 2(8) of her lease as detailed below.

(2) The tribunal makes orders under s20C of the Landlord and Tenant Act 1985 and paragraph 5A of Schedule 11 to the Commonhold and Leasehold Reform Act 2002 preventing the applicant from recouping the costs of these proceedings from the respondent either as a service charge or as an administration charge.

The Application

1. The applicant is the freehold owner of a number of purpose-built maisonettes numbering 4-14a Ferndale Road, Enfield EN3 6DH. The respondent is the leasehold owner of 14A Ferndale Road. By an application dated 23 January 2024 the applicant seeks a determination under section 168(4) of the Commonhold and Leasehold Reform Act 2002 (the 2002 Act) that the respondent has breached specific terms in her lease requiring her to insure the premises. In summary the applicant's case is that the respondent failed to insure the demised premises in the joint names of the parties in accordance with the terms of the lease, and further had failed to comply with an obligation in the lease to re-imburse the applicant's costs of effecting such insurance. As matters raised in these proceedings require this tribunal to consider the effect of a previous tribunal determination in which the respondent in these proceedings was the applicant and the current applicant was the respondent, we will refer to the respondent as Ms Ray and the applicant as the freeholder in the course of this determination.

The Proceedings

2. The tribunal issued directions on 22 May 2024 and the matter was listed for a final hearing on 16 September 2024. The freeholder was represented by Mr Simon and Ms Ray was represented by counsel Mr Turnbull.

The Hearing

3. The tribunal had the benefit of an agreed bundle which had been filed in accordance with the directions. At the start of the hearing we considered an application by Ms Ray to strike out the application. We refused the application for strike out for the reasons set out in paragraph 10 below and proceeded to hear the case. However before we set out our reasons for dismissing the strikeout application it is necessary to first summarise the matters in dispute in these proceedings.

The Background

4. 14A Ferndale Road was initially leased by Jamalson Propery Company Ltd to a Mr Derek Green for a term of 999 years on 25 April 1958. Ms Ray has been the leasehold owner of 14A Ferndale Road since 1999 and the freeholder has owned the freehold of the 4 to 14A Ferndale Road since 2003. Pursuant to Clause 2(8) of the lease the leaseholder covenanted;

> *To keep the demised premises insured at all times throughout the term in the joint names of the lessor and the lessee from loss or*

damage by fire and such other risks as the lessor shall from time to time deem necessary in such insurance offices as the lesser shall time to time direct and through such agency as the lessor may require in a sum equal to the full value thereof and to make all payments necessary for the above purposes within seven days after the same shall be respectively become payable and to produce the lessor or its agent on demand the policy of such insurance and they received for each such payment and to cause all money received by virtue of any such insurance to be forthwith laid out in rebuilding and reinstating the demised premises and to make good any deficiency out of his of monies PROVIDED ALWAYS that if the lessee shall at any time failed keep the premises insured as aforesaid the lessor may do all things necessary to affect or maintain such insurance and any monies expended for it by that purpose shall be repayable by the lessee on demand and be recoverable forthwith

5. It is common ground that on or about 14 January 2024 Ms Ray and the freeholder each purchased a policy of buildings insurance in respect of 14A Ferndale Road. Ms Ray was the sole policy holder named on the buildings insurance purchased by her. The named policyholders on the insurance policy purchased by the freeholder were itself, Ms Ray and Bank of London and the Middle East PLC, who we were told, holds a charge over the freeholder's interest in 4to 14A Ferndale Road pursuant to a mortgage. The freeholder's case is that the policy of insurance purchased by Ms Ray did not comply with the requirements of the lease because it was not in the joint names of both parties. Additionally it maintains that she is in breach of an obligation to place the insurance through an insurance office and/or through an agency approved by the freeholder. Consequently it submits that it was entitled to effect its own insurance and recoup the cost from Ms Ray pursuant to clause 2(8) of the lease. In these proceedings it seeks a declaration pursuant to s.168 of the 2002 Act that Ms Ray has breached the terms of her lease by failing to insure the premises in accordance with Clause 2(8) of the lease and subsequently failing to pay the cost of the insurance policy purchased by the respondent, plus associated costs.

The Respondent's application for Strike-Out

6. Mr Turnbull on behalf of Ms Ray submitted that the application should be struck out for two reasons; firstly he correctly pointed out that the particulars of the lease included in the application are not those of the lease we have to consider and appear to relate to an entirely different property. Secondly he submitted that the application should be struck out under Rule 9(3)d of the Tribunal Procedure (First Tier Tribunal)(Property Chamber) Rules 2013 (The 2013 Rules). This rule provides that the tribunal may strike out the whole or part of proceedings because the proceedings are between the same parties and arise out of facts which are similar or substantially the same as those contained in proceedings or case which has been decided by the Tribunal.

7. As regards the first ground relied on by Ms Ray, namely the error in the application notice regarding the description of the lease, it is not clear what provision of Rule 9(3) is being relied on. In any event we consider that no prejudice has been caused to Ms Ray by this obvious error.

8. The essence of Ms Ray's second ground for strike out is as follows; in 2020 Ms Ray and the leasehold owner of 10 Ferndale Road, applied to this tribunal for a determination under s.27A of the 1985 Act as to their liability to pay sums demanded by the freeholder in respect of the insurance and associated costs in 2020. In 2020 the freeholder sought the following sums from both leaseholders as service charges;

   - Building insurance premium of £325 per flat
   - Insurance valuation survey charge of £120 per flat
   - Late payment fee of £45 per flat.

   Both leaseholders argued that the freeholder was not entitled to recover the cost of building insurance and associated costs from them because the responsibility for insuring lay with each individual leaseholder under the terms of their respective leases. As both leaseholders had purchased their own insurance for their respective properties, they submitted that the right of the freeholder to insure the premises and recoup the cost did not arise.

9. The application was determined on the papers by Judge Korn on 22 December 2020. The freeholder did not respond to that application and played no part in those proceedings.

10. At paragraph 9 of his determination Judge Korn sets out Clause 8(2) of the lease. At paragraph 10 he concluded;

> "*The applicants are therefore under an obligation to insure their flats, and it is only if they fail to do so that the respondent can step in and take out insurance and charge the cost to the applicants. There is no evidence before us that the respondents has been forced to step in to insure the flats as a result of any failure on the part of one or both of the applicants to insure them. If that had been the case it would have been a simple matter for the respondent to raise this objection to the application and to provide some basic evidence such as a copy correspondence in support of that objection. In the absence of any submissions on the part of the respondent my factual finding is at the respondent did not levy this charge as a result of being forced to step in to insure these flats as a result of the applicant having failed to do so.*

11. Mr Turnbull argued that the freeholder is attempting to re-litigate matters which have already been determined by this tribunal, and furthermore attempting to raise an argument which would have been available to it in those proceeding. He submits that the effect of the determination of Judge Korn is that as long as Ms Ray insures the premises she has complied with her insuring obligations under the terms of her lease.

12. Mr Simon disagreed. He submitted that the decision of Judge Korn only applied to the year under consideration in those proceedings. He could not explain why the freeholder had played no part in those proceedings.

13. In our view Judge Korn's determination related to the service charge year 2020 only and was based on the evidence before him. We accept that if he had expressly concluded that a policy of insurance in the leaseholder's sole name was sufficient to fulfil the leaseholder's insuring obligations then a strike out application under Rule 9(3(c) would have some considerable merit. However that was not the basis of his decision or the question he was asked to determine, which was not whether the leaseholder was in breach of her lease but whether the freeholder was entitled to recoup its costs of insurance for the year 2020.

14. For these reasons we refused to strike out the application.

Decision of the Tribunal

15. The tribunal is satisfied that Ms Ray has committed a breach of Clause 8(2) the lease insofar as she has not insured the premises in the joint names of the freeholder and the leaseholder. We are not satisfied that Ms Ray is in breach of an obligation to place insurance in an office directed by the freeholder. We are not satisfied that Ms Ray is in breach of an obligation to place the insurance through an agency required by the freeholder. We are not satisfied that Ms Ray is in breach of an obligation to reimburse the freeholder for the cost of the insurance policy which it purchased in January 2024. Our findings and our reasons for them are set out in the following paragraphs.

16. It is important to note that the Tribunal's role under the 2002 Act is to determine simply whether there has been a breach of covenant on the evidence before it. Whether there are extenuating circumstances which would allow relief from forfeiture or whether the landlord has an alternative remedy is irrelevant at this stage. We are not concerned with whether the freeholder has waived any right it may have to forfeit the lease for breach of covenant.

Determinations of Breach

17. Clause 8(2) requires the leaseholder to insure the premises in the joint names of the freeholder and the leaseholder. It is common ground that Ms Ray did not insure in the joint names of the parties. Ms Ray resists a finding of breach on three grounds. Firstly she submits that the covenant to insure does not touch and concern the land and thus is not binding on her as a successor in title to the original leaseholder. Secondly she says that she relied on the previous decision of this Tribunal when she obtained insurance in her own name. Thirdly at paragraph 3 of her statement she states that she did attempt to arrange insurance in the joint names of the parties but was unable to find an insurer who would offer such a policy.

18. The freeholder does not accept that it is impossible to purchase buildings insurance in the joint names of freeholder and leaseholder and points to the fact that they were able to do so.

19. Mr Simon referred us to the decision of Martin Roger KC Deputy President of the Lands Chamber of the Upper Tribunal in *Atherton v MB Freeholds Ltd [2017] UKUT 0497*. This case is heavily relied on in the legal submissions submitted by the freeholder dated 29 May 2024 and a copy is helpfully attached. That case concerned a similar, though not identical, covenant which required the leaseholders;

> *"to insure and keep insured the demised premises at all times throughout the term hereby created in the joint names of the lessor and the lessee from loss or damage by fire and such other risks as are included in a tariff companies comprehensive policy in the full insurable value their role with the road transport and general insurance company limited in the agency of the lessor or such other office or agency as the less or shall from time to time approve and to make all payments necessary for the above purposes within seven days after the same… PROVIDED ALWAYS that if the lessee shall at any time fail to keep the demised premises insured as aforesaid the lesser or may do all things necessary to effect or maintain such insurance and any monies expended by the less or for that purpose shall be repayable by the lessee on demand and be recoverable forthwith by action.*

20. In that case the leaseholders each purchased policies of insurance in their sole names. The freeholder contended that this was not in accordance with the terms of the lease. It took out a policy of insurance in the sole name of the freeholder and sought to recover the costs of the same from each leaseholder via the service charge provisions of their respective leases. The leaseholders applied to this tribunal under s.27A of the 1985 Act challenging both the payability and reasonableness of the charge. The Upper Tribunal upheld the finding of the FTT that the leaseholders had not complied with their obligation to insure in joint names. The Deputy President observed at paragraph 56

> *"Assuming it is possible, though unusual, to insure in joint names it is clear that the appellants have not complied with their obligation under clause 3(vii). Even if it were not possible to insure in joint names, the appellants would still have failed to comply with their obligation. In either event a proviso to clause 3 (vii) would be satisfied and [the freeholder] would be entitled to insure because the appellants had not kept the demised premises insured as aforesaid i.e. insured in the manner described in the early part of the clause including in joint names.*

21. It followed therefore that the freeholder was in principle entitled to recover the costs of such insurance. However in that case the policy of insurance

which the freeholder had purchased was in its sole name and not in the joint names of the freeholder and the leaseholders. The Upper Tribunal found that just as the insurance obligation required the leaseholders to insure in joint names, the freeholder could only recoup the cost of insurance which also complied with the requirement that it be in joint names.

22. Ms Ray is correct in her submission that a covenant in a lease which predates the coming into force of the Leasehold Covenants Act 1995 will be binding on successors in title to the original parties only so far as the covenant in question touches and concerns the land. However it is long established that a covenant to insure the land is such a covenant (See Woodfall on Landlord and Tenant para 11.62). Consequently Clause 2(8) of the lease is binding on her.

23. This tribunal's previous determination obviously did not alter the requirements of Clause 2(8). The question as to whether or not a policy in the leaseholders sole name was sufficient to fulfil the leaseholders insuring obligation did not arise in that application, which strictly speaking concerned the payability of a service charge rather than breach of a leasehold covenant, although of course both questions are closely linked.

24. We are not satisfied that it is impossible to insure leasehold property in the joint names of the freeholder and the leaseholder. It may be that such products would have to be obtained through a specialist broker rather than through mainstream providers but nevertheless the freeholder has succeeded in obtaining insurance which names both the freeholder and the leaseholder. Furthermore, as the Deputy President observed in *MB Freeholds*, the leaseholder would still be in breach even if he or she could establish that compliance was not practically possible.

Further Determinations

25. The Tribunal is not satisfied that any obligation has as yet arisen to place insurance with an insurer or through a broker which has been approved by the Freeholder. Clause 8(2) requires the lessee to effect insurance *in such insurance offices as the lesser* ***shall from time to time direct*** *and through such agency as the lessor* ***may*** *require*. In our view the language of the clause is such that the obligation is conditional on the freeholder having first required the insurance to be placed through a specific broker or with a specific insurer.

26. Neither party has asked us to consider whether the payability of this charge can be considered in an application brought under s.168 of the 2002 Act, given that this charge is a service charge as defined by s.18 of the Landlord and Tenant Act. The tribunal has jurisdiction to consider the payability of such a charge by virtue of s.27A of the 1985 Act and in our view it is in keeping with the overriding objective of dealing with matters proportionately and without undue formality if we consider whether this charge is payable under the terms of this lease, notwithstanding the fact that this is an application under s.168 of the 2002 Act not an application brought under s.27A of the 1985 Act. We make

no finding as to whether the charge is payable in the sense that it is reasonably incurred or reasonable in amount within the meaning of s19(1) of the 1985 Act.

27. In our view it is not payable by Ms Ray under the terms of hear lease. Clause 8(2) permits the freeholder to recoup the cost of '*such insurance*' if the leaseholder fails '*to keep the premises insured as aforesaid*'. In *MB Freeholds* case the freeholder's claim to recoup the cost of insurance failed because the insurance it had purchased did not mirror the leaseholder's obligations in that it was not in the joint names of the freeholder and the leaseholder. *MB Freeholds* is binding on this tribunal and in our view the same principle applies. The right to recoup the charge is limited to the cost of an insurance policy which satisfies the requirements of the leaseholder's obligations, no more and no less. Clause 2(8) would not permit the freeholder to require the leaseholder to add its mortgage provider as a named policy holder under clause 2(8), or step in to insure and recoup the cost of so doing if the policy purchased by the leaseholder otherwise complied with the requirements of that clause. Further there is a practical difference between a policy which names the freeholder and the leaseholder alone and a policy which names in additional third party. As Mr Simon accepts, any named policy holder can cancel the policy at any time without the consent of the other named policy holders.

28. Mr Simon informed the tribunal that the mortgage company is named on the policy because it is a term of the freeholder's mortgage agreement that the mortgagee be a named policyholder . That is as may be, but the obligation is to pay the cost of an insurance policy in the joint names of the freeholder and the leaseholder, not the names of the freeholder , the leaseholder and a third party. Of course there is nothing to prevent the freeholder from taking out a policy of insurance which names its mortgage company as a policy holder however the cost of so doing is not recoverable from the leaseholder. This was a point which was initially raised by the tribunal in the course of the hearing. It was not raised by the respondent in her written response to the application although Mr Turnbull relied on it in his final submissions. However given that precisely the same point arose in the *MB Freehold* case, and given that it is a question as to the proper construction of the lease, we do not consider that the freeholder has been unduly prejudiced.

Final Matters

29. Ms Ray has applied for an order under s20C of the 1985 Act and paragraph 5A of Schedule 11 to the 2002 Act. It is not clear whether such costs would be recoverable as a service charge but they are recoverable as an administration charge pursuant to clause 2(13) of the lease.

30. Section 20C of the LTA 1985 as amended provides:

(1) A tenant may make an application for an order that all or any of the costs incurred or to be encouraged by the landlord in connection with proceedings before the… first tier tribunal… are not to be regarded as

relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The court or tribunal to which the application is made may make such order in the application as it considers just and equitable in the circumstances.

Paragraph 5A of schedule 11 to the CLRA 2002 provides:

(1) A tenant of a dwelling in England may apply to the relevant court tribunal for an order reducing or extinguishing the tenant's liability to pay a particular administration charge in respect of litigation costs.

(2) The relevant court or tribunal may make whatever order on the application it considers just and equitable.

9. In *The Tenants of Langford Court (Sherbani) v Doren Ltd LRX/37/2000* HH Judge Riche QC set out the principals upon which the s20C discretion should be exercised:

> 31. *In my judgement the primary consideration that the LVT should keep in mind is the power to make an order under section 20C should only be used in order to ensure that the right claim costs as part of service charge is not used in circumstances that make its use unjust. Excessive costs unreasonably incurred will not in any event be recoverable by reason of section 19 of the Landlord and Tenant Act 1985. Section 20C may provide a short route by which a tribunal which is heard the litigation giving rise to the costs can avoid arguments under section 19 but its purpose is to give an opportunity to ensure fair treatment as between landlord and tenant, in circumstances where even although costs have been reasonably and properly incurred by the landlord, it would be unjust that the tenants, or some particular tenant, should have to pay them.*

10. In *Re SCMLLA (Freehold) Ltd [2014]UKUT 58 (LC)* Martin Roger QC sitting in the Upper tribunal observed:

> *An order under section 20C interferes with the parties' contractual rights and obligations and for that reason or not to be made lightly or as a matter of course but only after considering the consequences of the order for all those affected by it and all other relevant circumstances.*

11. We consider that such an order is justified in the circumstances of this case. The application has only been successful in part. Further it is Ms Ray's uncontested evidence following the previous decision of this tribunal was that she informed the freeholder of her intention to insure the premises every year since January 2021. She has exhibited a number of emails to her statement which show that each year she has informed the freeholder of her intention to insure the premises and further has provided details of the policy she had purchased. On each

occasion the insurance purchased was in her sole name. At the freeholder's request she provided a copy of the policy schedule in respect of the insurance purchased in January 2022. She advised the freeholder in October 2022 that she would again be arranging insurance for the year January 2023 to January 2024. She advised the freeholder in November 2023 that she again would be arranging building insurance for the premises for the year 2024-2025. Other than to request a copy of the policy documents in 2022, the freeholder did not respond substantively to any of these emails or object to her proposed course of action. On 14 January 2024 Ms Ray informed the freeholder by email that she had that day insured the premises and forwarded confirmation from her insurer that the premises were insured. On 19 January 2024 the freeholder requested a copy of the insurance policy which was provided by return. The freeholder's response was that it considered that the policy of insurance was not in accordance with the terms of the lease and it would be exercising its right to insure the premises. It did not state why it considered the insurance purchased by the Ms Ray was not in accordance with the lease. The next communication from the freeholder was a demand for payment in the sum of £477.71 which is at page 145 of the bundle.

12. In our view Ms Ray has been entirely open and transparent in her dealings with the Freeholder. In contrast the Freeholder did not engage substantively with any of her emails regarding insurance, despite the fact that it was aware that all policies were in her sole name. It proceeded to purchase this policy without first giving her any opportunity to cancel her policy and purchase a policy in joint names. It did so despite being on notice for some months that she intended to purchase an insurance policy on or about 14 January 2024, being the day on which her previous policy expired. The tribunal considers that the freeholder has behaved unreasonably in this matter and it would be unjust if the costs of these proceedings were to be recouped from Ms Ray either as a service charge, insofar is it is so recoverable, or as an administration charge.

Name : Judge O'Brien Date 7 October 2024

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 perMsion must be made to the First-tier Tribunal at the regional office which has been dealing with the case.

The application for perMsion 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 perMsion to appeal to proceed, despite not being within the time limit.

The application for perMsion 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 perMsion to appeal, a further application for perMsion may be made to the Upper Tribunal (Lands Chamber).