UPPER TRIBUNAL (LANDS CHAMBER)

[2023] UKUT 207 (LC)

UTLC No: LC-2022-541

**Royal Courts of Justice, Strand,
London WC2A**

22 August 2023

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

**AN APPEAL AGAINST A DECISION OF THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)**

LANDLORD AND TENANT – SERVICE CHARGES – application struck out as having no prospect of success – insurance – tripartite lease – tenant-controlled management company required to procure insurance from insurer nominated by landlord – reasonableness of charge payable by leaseholders – sections 18, 19, 27A and 30, Landlord and Tenant Act 1985 – appeal allowed

BETWEEN

**JOSEPH DARRYL DOUGLAS
and others**

Appellants

-and-

**RMB 102 LIMITED (1)
EYRE & JOHNSON LIMITED
(TRADING AS E & J ESTATES) (2)**

Respondents

**Re: Boswell Court and Hitherwood Court,
Charcot Road,
London NW9**

Martin Rodger KC, Deputy Chamber President

25 July 2023

Joseph Douglas and *Deborah Cole*, in person, for the appellants
Simon Allison, instructed by J B Leitch Solicitors, for the respondents

The following cases are referred to in this decision:

Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd [1997] 1 EGLR 47

Cinnamon Ltd v Morgan [2001] EWCA Civ 1616

Williams v Aviva Investors' Ground Rents GP Ltd [2023] 2 WLR 484

Oakfern v Ruddy [2006] EWCA Civ 1389

Gateway Holdings (NWB) Ltd v McKenzie [2018] UKUT 371 (LC)

Bandar Property Holdings Ltd v J S Darwen (Successors) Ltd [1968] 2 All ER 305

Havenridge Ltd v Boston Dyers Ltd [1994] 2 EGLR 73

Introduction

1. Boswell Court and Hitherwood Court are two adjacent blocks of flats in north London containing a combined total of 157 flats or apartments let on long leases. Each of the leases is made between the landlord, the leaseholder, and a management company which is now under the control of the leaseholders of the two blocks. The leases oblige the management company to procure buildings insurance from an insurance company nominated by the landlord. The leaseholders are required to pay a service charge to the management company including a contribution towards the cost of insurance. The issue in this appeal is whether the First-Tier Tribunal (Property Chamber) (FTT) was right to strike out an application brought by a group of leaseholders under section 27A, Landlord and Tenant Act 1985, for a determination of the amount of the service charge payable by them for that insurance.

2. The appellants are Mr Douglas, the leaseholder of Flat 30, Boswell Court, and the leaseholders of a further 48 flats in the two blocks.

3. The first respondent, RMB 102 Ltd (RMB), is the owner of the freehold of the two blocks and the reversion to the leases of the individual flats. The second respondent, Ayre & Johnson Ltd, is RMB's insurance agent. I was told that both respondents are members of the same group of companies, the E & J Estates Group.

4. On 2 December 2021 the leaseholders applied to the FTT for a determination of the reasonableness of the service charges for buildings insurance policy in the year 2021-22, and of their liability to pay those charges. They explained in their application that the cost of insurance for their buildings had increased by more than 180% compared to the previous year, whereas the average increase experienced by six immediately neighbouring blocks of similar size was 17%.

5. The respondents applied to strike out the application and, for reasons explained in a decision of 15 August 2022, the FTT acceded to that request and the application was struck out.

6. The FTT gave permission to appeal, remarking that the law on the ability of leaseholders to challenge insurance charges was complex and that the issues were potentially of wider significance. It might be thought that those were both good reasons why the application ought not to have been struck out and which would have allowed any complex issues which do arise to be considered on the basis of established facts.

7. At the hearing of the appeal the leaseholders were represented by Mr Douglas and by Ms Deborah Cole, and the respondents by Mr Allison. I am grateful to them all for their submissions.

The lease

8. Boswell Court and Hitherwood Court form part of a much larger residential development on the site of the former Colindale Hospital. All of the buildings on what is now referred to as the "Pulse" estate were built by the same developer, Fairview New Homes (Colindale) Ltd. After each building was completed the flats in it were sold off on long leases. The

freehold reversions in the individual buildings were then sold to different investors, with Boswell Court and Hitherwood Court being acquired by RMB.

9. The leases of the flats in the two blocks (and quite possibly the leases of flats in the other blocks in the Pulse development) are in a standard form. I was shown Mr Douglas' lease of Flat 30, Boswell Court, which was granted to him on 5 November 2015 for a term of 250 years (the Lease).

10. The Lease was made between Fairview as Lessor, Mr Douglas as Lessee and Colindale Hospital Management Company Ltd which is referred to in the lease as "the Company". It begins by reciting that the two blocks formed part of a larger estate, and that the Company had been incorporated to provide services for the lessees of the blocks and the owners of other parts of the estate.

11. The Lessee's covenants are in clause 3 of the Lease and are made with the Lessor, the Company, and the lessees of the other flats in the block. By clause 3(5)(a) the Lessee covenanted to pay on demand an agreed proportion of the costs incurred by the Company in carrying out obligations under Part IV of the Schedule to the Lease. It was also provided that if the Lessor performed any of the obligations of the Company the Lessee was to pay the agreed proportion to the Lessor.

12. The Lessor's covenants with the Lessee and the Company are in clause 4 of the Lease. They include, at clause 4(6), an obligation that if the Company fails or neglects to perform its obligations or goes into liquidation, the Lessor will undertake those obligations, and will be entitled to recover a due proportion of all its costs of doing so from the Lessee.

13. The Lease includes, at clause 5(2), a conventional right of forfeiture in the event that the rent is unpaid, or any other breach of covenant is committed by the Lessee.

14. By clauses 7 and the Company covenants with the Lessee and the Lessor respectively to perform the obligations in Part IV of the Schedule. In the event of its failure to perform its obligations it authorised the Lessor to do so and to recover the Lessee's contribution as agent for the Company.

15. The Company's obligations listed in Part IV of the Schedule to the Lease include, at paragraph 7, the following concerning insurance:

> "The Company will at all times during the said term (unless such insurance shall be vitiated by any act or default of the Lessee) insure and keep insured the Block (including lifts if any) and the contents of the Common Parts in the names of the Lessor the Lessee their mortgagees (according to the respective estates and interests) and the Company against comprehensive risks with an insurance company of repute nominated by the Lessor and through the agency of the Lessor …"

16. The general structure of the Lease was, therefore, that services (including insurance) would be provided by the Company which, in turn, would receive the service charge contributions

from the Lessee. The Lessor's role was to nominate the insurer and act as agent of the Company in connection with the insurance, and to step-in to provide the services in the event of a default by the Company.

The proceedings in the FTT

17. When the application commenced the leaseholders named "E & J Estates", described as the freeholder, as the sole respondent. After further investigation they applied to the FTT on 26 April 2022 to change the name of the respondent to "E & J Estates (trading style of Eyre & Johnson Ltd)" and to add both RMB and Penult Capital Partners Ltd (another company in the E&J Estates group) as additional respondents, in the mistaken belief that the FTT could only direct the disclosure of information from those involved in procuring the buildings insurance if they were parties to the application. In fact, the FTT has power under rule 20 of its procedural rules, on the application of a party or on its own initiative, to require any person to attend as a witness at a hearing or to order any person to answer any question or produce any documents in their possession or control relating to any issue in the proceedings.

18. The FTT added RMB alone. The apparent complexity of the case and disagreement over disclosure of documents sought by the leaseholders then caused it to direct on 20 June that the final hearing due to take place on 27 July would instead be a case management hearing to consider disclosure and further directions. That would have provided an opportunity for the leaseholders to explain what documents they believed that they needed to see, and in whose possession they believed them to be, and for the FTT to consider the most convenient procedure to ensure that it had all the information it required to determine the application fairly.

19. In the event, however, a week before the case management hearing the respondents issued an application to strike the proceedings out, on the grounds that the leaseholders did not have "legal standing to bring a section 27A application" against RMB in respect of insurance which is the responsibility of the management company under the terms of the lease.

20. In a skeleton argument prepared for the hearing by counsel instructed on behalf of the respondents (not Mr Allison) the FTT was invited to strike the application out under rule 9(2)(e) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, on the basis that there was no reasonable prospect of the leaseholders' case succeeding. Reference was made to the Court of Appeal's decision in *Berrycroft Management Co Ltd v Sinclair Gardens Investments (Kensington) Ltd* [1997] 1 EGLR 47 in support of that proposition.

21. The case put to the FTT by the respondents' counsel was that the building insurance costs were not "relevant costs" within the meaning of section 18, 1985 Act on the grounds that they were not incurred on behalf of the landlord. On that basis it was said that the leaseholders had no standing to bring the application. The FTT accepted that proposition and at paragraph 39 it held that "it was bound by the decision of the Court of Appeal in *Berrycroft* to find that although the insurance charges were payable by the leaseholders as part of the service charges, they were not to be regarded as having been incurred by or on

behalf of the landlord and were therefore not relevant costs. It struck out the leaseholders' application and made no costs protection order under section 20C, 1985 Act. Its order also removed E&J Estates as a respondent and declined an application by the leaseholders to add the landlord's insurance broker, A J Gallagher, as a further respondent.

The appeal

22. The FTT granted permission to appeal on the broad ground that it was arguable that it had been wrong to determine that the application had no reasonable prospect of success and ought to be struck out.

23. It refused permission to appeal on three other grounds. The leaseholders renewed their application for permission on those additional grounds when they filed their notice of appeal and I directed that whether permission to appeal should be granted would be considered at the hearing of the appeal.

The relevant statutory provisions

24. Sections 18 to 30 of the 1985 Act contain a series of rights and protections relating to service charges. For the purpose of those provisions section 18(1) defines a service charge as "an amount payable by a tenant of a dwelling … (a) which is payable, directly, or indirectly, for services, repairs, maintenance, 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 costs." Section 18(2) then defines "relevant costs" as "the costs or estimated costs incurred or to be incurred by or on behalf of the landlord … in connection with the matters for which the service charge is payable."

25. Section 19(1)(a) provides that relevant costs are to be taken into account in determining the amount of a service charge payable for a period only to the extent that they are reasonably incurred, and the amount payable is to be limited accordingly.

26. Under section 27A(1), an application may be made to the FTT "for a determination whether a service charge is payable" and, if it is, as to the person by whom it is payable, the amount which is payable, the date at which it is payable and other such details.

27. Section 30 provides that in the provisions of the 1985 Act relating to service charges the expression "landlord" includes "any person who has a right to enforce payment of a service charge".

28. Section 30A then introduces a Schedule to the 1985 Act conferring rights with respect to insurance on tenants. Those rights include the right under paragraph 2 for a tenant by whom a service charge for insurance is payable to require the landlord to supply a written summary of the insurance effected for the time being. The information which the landlord is required to provide is limited and comprises only the insured amount, the name of the insurer and the risks in respect of the dwelling or building containing it is insured (paragraph 2(4)). The tenant is given a further right by paragraph 3(1) to require the landlord to afford reasonable facilities for the tenant to inspect any relevant policy or "associated documents" and to

obtain copies. The "associated documents" which the tenant is entitled to see are narrowly defined by paragraph 3(7) as "accounts, receipts or other documents which provide evidence of payment of any premiums due under the relevant policy in respect of the period of insurance which is current when the notice is served or the period of insurance immediately preceding that period." That definition does not appear to me to be wide enough to cover documents relating to commission paid to any person by the insurer. The main purpose of the provision is to provide a means by which a tenant can obtain evidence that payment of the insurance premium has been made.

29. Paragraph 8 of the Schedule to the 1985 Act provides a right of a different type. It applies only where a tenancy of a dwelling requires the tenant to insure the dwelling with an insurer nominated or approved by the landlord. In such a case either the tenant or the landlord may apply to the County Court or the appropriate tribunal (the FTT) for a determination whether the insurance which is available from the nominated or approved insurer is "unsatisfactory in any respect" or the premiums are excessive.

Berrycroft

30. The FTT was persuaded by the respondents that the decision of the Court of Appeal in *Berrycroft* meant that the leaseholder's application had no realistic chance of success. The decision in *Berrycroft* predated the introduction of section 27A, 1985 Act by the Commonhold and Leasehold Reform Act 2002. It concerned a tripartite arrangement similar to the Lease in this case under which the leaseholders of a block of flats were obliged to pay a service charge to a management company which, in turn, was required to procure insurance from an insurer nominated by the landlord. Following a change of landlord the management company was instructed by the new landlord to insure with a nominated insurer through an exclusive agent for that insurer. The cover offered by the new insurer was based on the same valuation as the previous policy but the premium was considerably higher. The management company resisted the instruction and asserted that there was no justification for changing insurers, so the landlord exercised a step-in right to procure the insurance itself, from its nominated insurance company at the higher premium. Representative leaseholders and the management company brought court proceedings against the landlord claiming a declaration that the premium was excessive and irrecoverable. Alternatively, they sought a determination under sections 19 and 30A, and paragraph 8 of the Schedule to the 1985 Act that the landlord was not entitled to recover its expenditure on insurance and that the premium was not reasonably incurred and should not be taken into account in determining the amount of the service charge.

31. The trial judge dismissed the claims and held that the landlord was entitled to require the management company to insure through the insurer's exclusive agent. He held that no term could be implied that the landlord would only require the management company to pay a reasonable premium, but that in any event the premium was not unreasonable or excessive in the circumstances. Notwithstanding that the premium was substantially higher than was available from other insurers, the costs had not been unreasonably incurred.

32. The leaseholders appealed to the Court of Appeal, which considered two issues. The first was whether a term was to be implied that the nominated insurer's premium should not be unreasonable. The Court of Appeal upheld the decision of the trial Judge that no such term could be implied. The second issue was whether the rights and liability of the landlord and

the tenant under the leases were affected by the provisions of the 1985 Act. It was this part of the Court of Appeal's decision which the FTT was persuaded to treat as determinative of the leaseholders' section 27A application.

33. Beldam LJ, with whom the other members of the Court of Appeal agreed, began by pointing out that, in view of the conclusion in relation to the first question, it was perhaps unnecessary to consider the second question. Chadwick LJ later pointed out in *Cinnamon Ltd v Morgan* [2001] EWCA Civ 1616, that the Court of Appeal's observations in *Berrycroft* about the effect of the 1985 Act were therefore *obiter*, that is, they were unnecessary for the decision and do not form part of the binding ratio of the case. Nevertheless Beldam LJ referred to the definition of "landlord" in section 30, which includes any person which has a right to enforce payment of a service charge, and explained that although the service charge was payable to the management company, and not to the landlord, because the tenant had covenanted directly with the landlord to pay the service charges to the company, the landlord still had the right to enforce payment of the service charge, and was therefore still a landlord for the purposes of the provisions of the 1985 Act. He nevertheless held that in so far as the insurance charges were incurred by the tenant as part of the service charge they were not incurred "by or on behalf of" the landlord and, since under section 18 a service charge meant an amount payable which might vary according to the relevant costs which in turn were defined as costs incurred or to be incurred "by or on behalf of the landlord", the sums payable by the tenant in respect of the insurance were not a "relevant cost".

34. The decision in *Berrycroft* was considered by Chadwick LJ in *Cinnamon*. In that case both the landlord and a management company sought to recover service charges from a leaseholder. When the leaseholder sought to rely on sections 18 and 19, 1985 Act, the management company referred to *Berrycroft* and persuaded the trial judge that the provisions of the Act did not apply where the service charges were incurred by a management company rather than by a landlord.

35. By the time *Cinnamon* reached the Court of Appeal, the management company had had second thoughts and applied jointly with the leaseholder for the appeal to be allowed and for a determination that the management company was a landlord for the purpose of section 18(2), 1985 Act and that the section applied to the service charges claimed in the proceedings. Before accepting that concession Chadwick LJ first satisfied himself that the judge had been wrong about the effect of *Berrycroft*. He explained at [15] that, having regard to sections 18 and 30 of the Act, a person who has a right under a lease to enforce a charge for services which varies according to the cost incurred by that person in providing that service is a "landlord" for the purposes of the Act. He explained *Berrycroft* at [23], saying that there was no reason why, in the context of service charges, there should not be two persons answering the description of landlord. In relation to insurance charges the person entitled to the reversion on the lease was plainly a landlord, but the management company also satisfied the description in section 30 in relation to the charges which it was entitled to recover.

Discussion

36. The contractual structure in this case requires the leaseholders to pay the service charge for insurance to the management company. The management company uses those funds to pay the insurer. The payments made by the management company to the insurer are not service

charges within the meaning of section 18 because they are not an amount payable by a tenant as part of or in addition to the rent. They are amounts payable by the management company, which is not a tenant.

37. The contributions by the leaseholders to the management company are a service charge within the meaning of section 18. As Chadwick LJ explained in *Cinnamon*, the management company is a "landlord" for the purposes of the service charge provisions of the 1985 Act because it falls within the expanded definition in section 30 as a "person who has a right to enforce payment of a service charge."

38. The charge payable by the leaseholders for insurance varies according to the costs incurred by the management company in procuring the insurance. The cost is therefore a relevant cost within the meaning of section 18(2) and the charge is a service charge. It is immaterial that the charges are not incurred on behalf of RMB. In *Berrycroft*, Beldam LJ's suggestion that the insurance charges would not be regarded as having been incurred on behalf of the landlord and could not therefore be "relevant costs" overlooked the fact that the costs were incurred on behalf of the management company which was also a "landlord" by virtue of section 30. The Court of Appeal had already decided that the costs in question were reasonable, so the treatment of the effect of section 18 in a tripartite arrangement was *obiter*, and I am satisfied that it did not require the FTT to strike out the application in this case.

39. The unusual feature of this case, and the principal ground on which Mr Allison, on behalf of the respondents, sought to uphold the FTT's decision, is that the leaseholders' application under section 27A did not identify the person to whom the service charge is payable, i.e. the management company, as a respondent. Mr Allison submitted that the leaseholders' case depended on a fundamental misunderstanding of the extent of the FTT's jurisdiction under section 27A. He suggested that the FTT did not have a general jurisdiction to "fact find" and to unpick the relationships between the various entities involved in placing insurance (the insurer, the broker, the landlord's agent, the landlord, the management company and the managing agents). The FTT's jurisdiction was, as it has recently been put by Lord Briggs JSC in giving the judgment of the Supreme Court in *Williams v Aviva Investors' Ground Rents GP Ltd* [2023] 2WLR 484, at [19]:

> "A jurisdiction to review a proposed or demanded service charge for contractual and statutory legitimacy."

In this case, Mr Allison submitted, the contractual and statutory legitimacy of the service charge was an issue between the management company and the leaseholders, and not between the leaseholders and the landlord.

40. I have already explained that the payment by the management company to the insurer is not a service charge. No payment has yet been made by the leaseholders to the landlord which could be the subject of scrutiny by the FTT under section 27A. Nevertheless, in my judgment, that does not mean that that the application should be struck out or there is nothing for the FTT to consider under section 27A.

41. There is no doubt who is liable to pay the service charge (the leaseholders) or, to whom it is payable (the management company) but the amount which is payable is a matter on which the leaseholders are keen to obtain a determination. Making that determination will involve

considering whether the costs incurred by the management company (or on its behalf, as in the year in question it would appear that the insurance was procured by E&J Estates rather than by the management company) was reasonably incurred within the meaning of section 18(1)(a). If it was not (and the tenants say that multiple layers of commission which they suspect inflate the policy mean that the cost was not reasonably incurred) the service charge payable by the leaseholders to the management company will be limited accordingly.

42. It is important not to lose sight of the breadth of section 27A. In *Gateway Holdings (NWB) Ltd v McKenzie* [2018] UKUT 371 (LC) the Tribunal rejected a submission that a section 27A application could only be brought by a party legally obliged to pay or entitled to collect a service charge. The Tribunal referred to the decision of the Court of Appeal in *Oakfern v Ruddy* [2006] EWCA Civ 1389 in which it was suggested that a sub-tenant who was required to pay a service charge to an intermediate tenant which in turn was obliged to pay a head landlord for services which it provided could not make an application under section 27A. The Court of Appeal dismissed that argument, for reasons given by Parker LJ at [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 some 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 this will inevitably be the case … As to possible abuses of process the Leaseholder Valuation Tribunal has ample powers to regulate its own procedures, including power to strike out vexatious or abusive applications."

43. *Oakfern v Ruddy* and *Gateway v McKenzie* were both concerned with a question who could bring an application under section 27A. The Tribunal in *Gateway* held that, as an exercise in proper case management, the FTT had been entitled to strike out a claim brought by a tenant in respect of years before she had acquired her tenancy, because she had no legitimate interest in what had been payable for those early years, but not on the grounds that it had no jurisdiction. Neither case was concerned with who may properly be made a respondent to an application under section 27A. The section itself provides no guidance but unlike its predecessor, section 19(2)(a), 1985 Act, it is drafted in deliberately wide terms. In *Gateway*, the Tribunal suggested it must have been drafted in that way in a deliberate attempt to minimise opportunities for jurisdictional disputes.

44. On behalf of the leaseholders Mr Douglas submitted that no purpose would be served by bringing a claim against the management company (of which he and other leaseholders were directors). In practice the management company had not placed the insurance but had received an invoice from E&J Estates for insurance that it had arranged which it had reluctantly paid before passing on the charges to the leaseholders. The management company therefore had none of the answers to the leaseholders' questions. The person with knowledge of the process by which the insurance was procured and of any commissions which were paid was the landlord (which Mr Douglas described as a shelf company within the E&J Estates' Group) and E&J Estates itself.

45. Mr Allison submitted that no purpose would be served by a determination under section 27A in proceedings which the landlord and not the management company is a respondent. Since the charges were not payable to the landlord no purpose would be served by its involvement. I do not agree. The question whether the sums payable to the management company by the leaseholders are reasonably incurred is a question in which the landlord has an interest for a number of reasons.

46. First, by clause 3(5)(a) of the Lease the leaseholder covenants with the landlord to pay the service charge to the management company. Any determination that the sums payable to the management company were restricted by section 19(1)(a) would only bind the landlord if it was party to the application in which that determination was made. It would be unsatisfactory for there to be any uncertainty whether the leaseholder would be in breach of his obligation to the landlord to make payment of the service charge to the management company; to achieve that certainty it is necessary for the landlord to be a respondent to the application.

47. Secondly, the landlord has a right to forfeit the Lease (subject to the usual statutory controls) if the leaseholder is in breach of his covenants with the landlord or the management company. The forfeiture clause, clause 5(2), refers to "any breach of any covenants or agreements on the part of the Lessee herein contained". The leaseholders therefore have an interest in binding the landlord to a determination that they are not liable to pay the full amount of the service charge to the management company if they can demonstrate that it was unreasonably incurred.

48. Thirdly, there are other remedies available to leaseholders who consider they are being overcharged for services. The statutory right to manage available under Part 2 of the Commonhold and Leasehold Reform Act 2002 is a no-fault entitlement, but a determination by the FTT that service charges are being unreasonably incurred through the current contractual management structure may enable the required majority of leaseholders to participate. In contrast, the regime in Part 2 of the Landlord and Tenant Act 1987 is fault based. It entitles leaseholders to ask the FTT to appoint a manager to carry out functions in connection with the management of the premises. It is arguable that the function of nominating the insurer for the purpose of paragraph 7 of Part IV of the Schedule to the Lease is a function in connection with the management of the building which could be taken over by a manager appointed by the FTT. One of the grounds on which such an appointment can be made is where the FTT is satisfied that unreasonable service charges have been made, or are proposed or likely to be made, and that it is just and convenient to make the order in all the circumstances of the case (section 24(2)(ab)). A determination under section 27A that a service charge is limited by section 19(1)(a) because the charge was unreasonably incurred is not a determination for the purpose of section 24, Landlord and Tenant Act 1987. But a determination under section 27A in proceedings to which the landlord was a party is likely to be persuasive if the same question arises in an application under section 24.

49. It therefore seems to me significantly to overstate the case to assert, as the respondents did before the FTT, that the leaseholders' prospects of obtaining a determination under section 27A had no realistic prospect of success. On the contrary, there seems to me to be no reason in principle why such a determination should not be available in proceedings to which the landlord is a party even where the service charge is not payable to the landlord. Nor is it an

abuse of process for the leaseholders to bring the application against the landlord. For the reasons I have given, the landlord is an appropriate party to the proceedings.

50. As for the question whether the management company should also be a party to the proceedings, I agree with Mr Allison that it would be an unusual application under section 27A where the person to whom the service charge was payable was not also to be bound by the FTT's decision. Where, as in this case, there appears to be no divergence of interest between the individual leaseholders and the management company of which they are all shareholders and some are directors, the management company could either be made a respondent to the application or it could be added as an additional claimant. The management company has not so far been involved in the proceedings, and without giving it an opportunity to consider its position it would not be appropriate for this Tribunal to make any direction joining it. Whether it is to participate, and if so in what capacity, is a matter which can be considered by the FTT when the proceedings are remitted to it for determination.

51. I should emphasise, as I did during the hearing, that nothing I have said should give the leaseholders any comfort as to their prospects of establishing that the service charges payable by them to the management company have been unreasonably incurred. The authorities demonstrate that where a landlord is entitled to nominate an insurer it is not required to show that the premium charged by its nominee is the cheapest that could be found in the market. In this case the landlord is obliged to nominate an insurance company "of repute" and the management company must then place the policy with that insurer "through the agency of the Lessor" (quite what that expression means and whether, for example, it entitles the landlord to include the building in a block policy with other buildings in its portfolio, were not questions raised in the appeal).

52. In *Bandar Property Holdings Ltd v J S Darwen (Successors) Ltd* [1968] 2 All ER 305 a landlord covenanted to insure premises "in some insurance office of repute or at Lloyds". After the landlord had obtained cover the tenant obtained a quote for similar cover at a lower cost but the court dismissed the tenant's argument that the landlord's entitlement should be capped at the lower cost. There was no implied term requiring the landlord to act reasonably in placing insurance and not to impose an unnecessarily heavy burden on the tenant.

53. In *Havenridge Ltd v Boston Dyers Ltd* [1994] 2EGLR 73, the covenant required the tenant to pay such sum as the landlord should "properly expend" in insuring the premises. Evans LJ explained that:

> "The limitation, in my judgment, can best be expressed by saying the landlord cannot recover in excess of the premium that he has paid and agreed to pay in the ordinary course of business as between the insurer and himself. If the transactions arranged otherwise than in the normal course of business, for whatever reason, then it can be said that the premium was not properly paid, having regard to the commercial nature of the leases in question, or, equally, it can be supposed that both parties would have agreed with the officious by-stander that the tenants should not be liable for a premium which had not been arranged in that way.

> If that is the correct test, as in my judgment it is, then the fact that the landlord might have obtained a lower premium elsewhere does not prevent him from recovering the premium which he has paid. Nor does it permit the tenant to defend the claim by showing what other insurers might have charged. Nor is it necessary for the landlord to approach more than one insurer, or to "shop around". If he approaches only one insurer, being one insurer of "repute", and a premium is negotiated and paid in the normal course of business as between them, reflecting the insurers usual rate for business of that kind then, in my judgment, the landlord is entitled to succeed. The safeguard for the tenant is that, if the rate appears to be high in comparison with other rates that are available in the insurance markets at the time, then the landlord can be called upon to prove that there were no special features of the transaction which took it outside the normal course of business."

Disposal

54. There is no doubt that the comparison which the leaseholders are able to make in this case between the rate of increase of their insurance premiums since 2019, and the rate of increase in premiums payable by leaseholders of similar properties on the same estate in blocks owned by different freeholders, is striking and calls for an explanation. In my judgment the FTT was wrong to strike the application out, and I remit the matter to it for determination.

55. As for the grounds of appeal for which permission was refused by the FTT, it is not necessary to consider these in any detail. No purpose would be served by joining any party other than the landlord and the management company to the proceedings. I refuse permission to appeal against the FTT's decision to remove E&J Estates as a respondent and to refuse the leaseholders' application to add the landlord's insurance broker, A J Gallagher, as a further respondent.

Martin Rodger KC

Deputy Chamber President

22 August 2023

Right of appeal

Any party has a right of appeal to the Court of Appeal on any point of law arising from this decision. The right of appeal may be exercised only with permission. An application for permission to appeal to the Court of Appeal must be sent or delivered to the Tribunal so that it is received within 1 month after the date on which this decision is sent to the parties (unless an application for costs is made within 14 days of the decision being sent to the parties, in which case an application for permission to appeal must be made within 1 month of the date on which the Tribunal's decision on costs is sent to the parties). An application for permission to appeal must identify the decision of the Tribunal to which it relates, identify the alleged error or errors of law in the decision, and state the result the party making the application is seeking. If the Tribunal refuses permission to appeal a further application may then be made to the Court of Appeal for permission.