FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case references	**:**	**LON/00BG/LSC/2019/0277**
Property	**:**	**Canary Riverside Estate, Westferry Circus, London E14**
Applicants	**:**	**Various leaseholders represented by the Residents Association of Canary Riverside**
Respondents	**:**	**(1) Canary Riverside Estate Management Limited ("CREM")** **(2) Octagon Overseas Limited** **(3) Reich Insurance Brokers Limited (respondent to Rule 20(1)(b) application)**
Type of application	**:**	**Liability to pay service charges**
Tribunal	**:**	**Judge Amran Vance**
Venue	**:**	**10 Alfred Place, London WC1E 7LR**
Date of Directions	**:**	**30 June 2021**

DECISION

Decision

1. The Applicants' application for an order under rule 20(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 is dismissed.

Background

2. This is an application made by the Applicant leaseholders for an order under rule 20(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules"). It is made within ongoing proceedings brought by the Applicants under s.27A Landlord and Tenant Act 1985, in which they dispute payability of costs incurred by the First and Second Respondents for insuring the Canary Riverside Estate ("the Estate").

Directions made in the underlying s.27A application

3. Directions were issued in the underlying s.27A application on 1 October 2019 (amended on 16 October 2019), in which the First and Second Respondents were directed to provide the Applicants, by way of disclosure, with copies of the following documents in respect of each period of insurance cover for the years 2016/17 to 2019/20 inclusive:

    (a) a copy of the invoice(s);

    (b) a copy of the insurance certificate giving details of the:

        (i) insured parties;

        (ii) items insured;

        (iii) period of cover;

        (iv) sums insured, including declared value;

        (v) premium; and

        (vi) Excesses.

    (c) all other policy documents, including any schedule(s) showing other properties covered by the policy.

    (d) a breakdown of the total sum payable, including:

        (i) gross premium;

        (ii) IPT;

        (iii) policy fee;

(iv) any and all commissions or other benefits in kind whatsoever paid by or on behalf of the insurer or any broker to either of them or to the Landlord or any agent, company, or person connected with the Landlord or its officers or directors in any way whatsoever, showing both the amount paid and the recipient(s);

(v) interest;

(vi) other (please state); and

(vii) net premium to insurer

4. Strictly speaking, (d) was wrongly characterised in the directions as being a matter of disclosure. What the First and Second Respondents were being directed to do was to provide a breakdown as to of the insurance premium said to be payable by the Applicants. This was clarified in further directions issued on 9 July 2020, in which I directed that by 7 August 2020, the First and Second Respondents was to send to the Applicants a written statement setting out, and breaking down:

   (a) any remuneration, commission, or other sources of income or benefits, relating to the placing or managing of insurance, received by either of the respondents, or any agent, broker, company, or person connected with the Landlord or its officers or directors;

   (b) any other sources of income and related income or other benefits including commissions arising from the provision of insurance; and

   (c) what services, if any, provided for the income received;

5. On 28 August 2020, in response to directions issued by the tribunal on 9 July 2020, the First and Second Respondents provided a written statement of case. In that statement they set out their position on commissions and income received in respect of the insurance of the Estate. They stated that their managing agent, Westminster Management Services Limited ("WMS"), engaged Reich to assist with placing the insurance for the Estate, for which Reich received broker's fees. The fees received are specified in the statement, and amount to approximately £6,000 per annum. WMS were also paid management fees for their services.

6. At paragraph 8 of the 28 August 2020 statement, the First and Second Respondents stated that they do not have access to, and are unaware of any other insurance related income received by either Reich or WMS. In addition, at paragraph 9 they said that they did not themselves receive any insurance related income, other than the recharge of insurance premiums, which effectively contra's the insurance premiums paid.

7. The Applicants were unsatisfied with the First and Second Respondents response and sought further extensive disclosure of documents. The First and Second Respondents, in a letter from their solicitors dated 11 September 2020, objected to the Applicant's request, stating that

disclosure of this extent should only follow after the Applicants have put forward their statement of case, and only where documents are relevant. In my decision and further directions of 5 October 2020, I broadly agreed with the First and Second Respondents on this point, stating, at paragraph 2, that in a service charge dispute, where leaseholders are contesting the payability of costs incurred by their landlord, it is for the tenants to first advance an initial positive case, and for the landlord to then rebut it. However, as I considered the Applicants needed to have some key information to prepare their statement of case, I directed that by 13 November 2020, the First and Second Respondents were to provide to the Applicants a schedule in respect of each period of insurance cover for the years 2010/11 to 2019/20 inclusive showing:

(a) a breakdown of the gross premium payable as stated on the policy certificate required to be disclosed pursuant to direction 1(b)(v) above, detailing:

    i. IPT

    ii. policy fee

    iii. any remuneration, commission, or other sources of income or benefits, relating to the placing or managing of insurance, received by either of the respondents, or any agent, broker, company, or person connected with the Landlord or its officers or directors;

    iv. any other sources of income and related income or other benefits including commissions arising from the provision of insurance; and

    v. what services, if any, provided for the income received;

    vi. interest; and

    vii. net premium paid to Insurer.

(b) the apportionment of the gross premium in respect of:

    i. the residential and commercial premises at Canary Riverside (including the allocation to Estate, Residential, Residential Car Park, Commercial Car Park, the Hotel, Commercial in Residential, the Club and WF1);

    ii. the Landlord's contents at Canary Riverside (including the allocation to Estate, Residential, Residential Car Park, Commercial Car Park, the Hotel, Commercial in Residential, the Club and WF1); and

    iii. insured risks such as loss of rent and/or interruption to any business (including the allocation to Estate, Residential,

Residential Car Park, Commercial Car Park, the Hotel, Commercial in Residential, the Club and WF1).

(c) details of all claims made against the policy of insurance, giving details of:

i. incident type

ii. description

iii. incident date

iv. value of incident

v. status

vi. paid (settled) amount

8. On 13 November 2020, the First and Second Respondents provided the Applicants with a Schedule giving a breakdown of the insurance premiums and brokers fees paid to Reich for the 2013/2014, 2014/15, and 2015/16 service charge years. That schedule contained the following footnote regarding commissions received by Reich:

> *"Reich insurance brokers have since confirmed that although they do not receive commissions on a property by property basis, they do receive commissions on the global insurance policies that they place on behalf of the Yianis Group of companies. They do however estimate that from 2013 - 2019 (7 years) they have earned total revenues across all of the CREM policies (inclusive of broker fees) of £201,077, which equates to an average of £28,725.38 per year. All such commissions are incorporated within the premiums."*

9. The Applicants remained dissatisfied with the information and disclosure provided by the First and Second Respondents and, on 25 November 2020, issued this application for order under rule 20(1)(b) of the 2013 Rules.

The Applicants' rule 20(1)(b) application

10. In their application form the Applicants state that they seek an order for "any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings". The draft order accompanying their application seeks an order that Reich Insurance Brokers Limited ("Reich") "provide the information referred to at Schedule 1". Schedule 1 is entitled "The Documents" and refers to documents detailing:

(a) all remuneration received by Reich for services provided to the First and Second Respondents in respect of insurance cover for

the Canary Riverside Estate ("the Estate"), for the service charge years 2010/11 to 2020/21 inclusive; and

(b) all commissions, commission-sharing arrangements and/or any other remuneration accruing to the First and Second Respondents, and/or their agents, in respect of the insurance cover placed by Reich for those years.

11. I issued directions in respect of the application on 14 December 2020. On 4 February 2021, I directed that Reich Insurance Brokers Limited ("Reich") be substituted as the Respondent to the Applicants' Rule 20(1)(b) application (the application previously being erroneously pursued against Reich Insurance Group) and issued further directions. The Applicants submitted an amended application on 10 February 2021. Statements of case in response have been received from the Respondents, opposing the application and the Applicants have provided a statement of case in reply.

Rule 20(1)(b)

12. Rule 20(1)(b) of the 2013 Rules provides as follows:

"20 (1) On the application of a party or on its own initiative, the Tribunal may-

(a) by summons require any person to attend as a witness at a hearing at the time and place specified in the summons; or

(b) order any person to answer any questions or produce any documents in that person's possession or control which relate to any issue in the proceedings.

(2) A summons under paragraph (1)(a) must—

(a) give the person required to attend not less than 14 days' notice of the hearing or such shorter period as the Tribunal may direct; and

(b) where the person is not a party, make provision for the person's necessary expenses of attendance to be paid, and state who is to pay them.

(3) No person may be compelled to give any evidence or produce any document that the person could not be compelled to give or produce on a trial of an action in a court of law.

(4) A summons or order under this rule must—

(a) state that the person on whom the requirement is imposed may apply to the Tribunal to vary or set aside the summons or order, if they have not had an opportunity to object to it; and

(b) state the consequences of failure to comply with the summons or order"

The Applicants' Case

13. In their amended rule 20(1)(b) application the Applicants contend that what was said at paragraph 8 of the 28 August 2020 statement contradicts the oral evidence given by Mr Simon Taylor, Reich's chief executive officer at a tribunal hearing on 2 March 2017 in application LON/00BG/LVM/2016/0020. At that hearing the tribunal considered the question of whether the tribunal-appointed manager, Mr Coates, should be responsible for securing insurance for the Estate, or whether this was the First Respondent's responsibility. The question was answered, on appeal, by the Upper Tribunal, with the Deputy President deciding that CREM is the appropriate party to be responsible for obtaining insurance cover (see *Octagon Overseas Ltd & Ors v Coates* [2017] UKUT 190 (LC).

14. In her witness statement in support of the rule 20(1)(b) application, Ms Angela Jezard, the Applicants' representative says that at the 2 March 2017 hearing, at which she was present, Mr Taylor's oral evidence was that Reich received commission payments of approximately £50,000 per annum for placing the insurance policy for the Estate.

15. The Applicants also assert that if Reich has not previously provided the information they seek to CREM, then CREM can request that it does so, as Reich has a regulatory duty to record and disclose to its customer, any insurance premiums received, or any remuneration or commissions relating to the placing of a contract of insurance (Financial Services Authority's Insurance: Conduct of Business Sourcebook ("ICBOS"), section 4.3).

16. In their statement in reply to the Respondents' statements of case in this rule 20(1)(b) application, the Applicants refined their position. They complain that the only information provided in respect of commissions is that contained in the footnote to the 13 November 2020 schedule. They submit that an order for third party disclosure against Reich is required because "the Respondents have failed to comply with the direction regarding disclosure – the clear inference being that they have something to hide." They assert that the Respondents failure to set out details of commission paid was deliberate and that an order against Reich is necessary in order for the Applicants to establish that commissions have been paid.

17. The Applicants also clarify that they are not asking for documents to be created by Reich. They are asking for disclosure of copies of documents already in existence that Reich would have to have provided to the First and Second Respondents under its ICBOS obligations.

The First and Second Respondents' position

18. The First and Second Respondents' position is that they have provided the Applicants with details of the sums paid to Reich in respect of brokers fees, and also provided them with details of the commission received by Reich on 13 November 2020. What was said in the footnote to the 13 November 2020 is, they say, verified by the contents of an email from Nick Symes, a Property Director at the Reich Group of Companies, to Mr Paul Curtis at the Yiannis Group (of which the First and Second Respondents are subsidiary companies), sent on 13 November 2020. That email reads as follows:

> *"As discussed, our earnings are calculated at policy level which includes all your assets and not for each individual building.*
>
> *However, I can confirm the total commission and fees retained by Reich on CREM for the period 2013 to 2019 amounted to £201,077.65 which equates to an average of £28,725.38 per annum."*

19. Mr Bates, counsel for the First and Second Respondents submits that what the Applicants are really complaining about is that they do not like that information, or the answers provided, and that they are searching for a "smoking gun" which makes their case for them.

20. He argues that the Applicants have failed to specify a class of documents, or even an individual document, that is the subject of their application. He says that by (initially) asking for information to be produced, the Applicants were asking for a document or documents to be created, and then provided to the Applicants. That, he says, is not "disclosure" for the purposes of rule 20(1)(b) which concerns disclosure of existing documents. In his submission, the application should be dismissed for that reason. Alternatively, he argues that no evidential basis is advanced to show why this unusual and exceptional order is necessary.

21. Mr Bates also makes the point that the draft order provided by the Applicants purports to cover the 2020/21 year, which is not part of the present application.

The Third Respondents' position

22. Reich agrees with the First and Second Respondents that the reference to "documents in that person's possession or control" in rule 20(1)(b) can only refer to documents that already exist and an order cannot be made under that rule for new documents to be created.

23. It suggests that in the absence of any Upper Tribunal or higher authority regarding the operation of rule 20(1)(b) it is best seen as a hybrid of a court's powers under CPR 34.2(1)(b) to require a witness to produce documents, and under CPR 31.17 to make an order for disclosure against a party who is not a party to the proceedings.

24. As to CPR 34.2(1)(b) Reich submits that a court should only make an order where the documents required to be provided have been clearly identified in a witness summons so that a witness knows what needs to be produced. With regard to the CPR 31.17 power, it contends that an order for disclosure against a non-party can only be exercised where the documents sought are likely to support or adversely affect the case of one party or the other, or if disclosure is necessary to dispose fairly of the claim or to save costs. Reich argues that such an order is exceptional and not the routine, and if made, must specify the documents or classes of documents which are to be disclosed.

25. A broadly similar approach should, it says, be taken to an application made under rule 20(1)(b). With regard to the present application, Reich's position is that the Applicants have not shown that an order is *necessary* for fairly disposing of the case between the parties and nor have they identified the documents that the non-party is to produce, or asked any questions that Reich is being asked to answer. As such, Reich submits that there is no power to make an order under rule 20(1)(b).

26. Reich also argues that if, as appears to be the case, the Applicants' concern is that the First Respondent has not provided information that it ought to have provided in the underlying application, then that is an issue they need to resolve with the First Respondent rather that Reich.

Reasons for Decision

27. The tribunal's appointment of a manager for the Canary Riverside Estate has generated extensive litigation. For much of that litigation the Applicant leaseholders have had the benefit of legal representation from counsel. It appears to me that they have probably not had professional legal advice in respect of this rule 20(1)(b) application because it is not a particularly well considered or targeted application. The application evidences a misunderstanding of the scope and purpose of the rule.

28. Rule 20(1)(b) has two limbs. Firstly, the summoning of a witness to attend a hearing (which is not relevant to this application) and, secondly, the making of an order for a person to answer questions or to produce documents in that person's possession or control which relate to any issue in the proceedings.

29. The Applicants have not sought an order that Reich answers questions. Their draft order requires Reich to "provide information" rather than to produce documents in its possession or control. They suggested that if Reich had not previously provided this information to CREM, then CREM could request that it does so. That is not what the second limb of rule 20(1)(b) envisages. What is envisaged is the production of existing documents rather than the creation of new documents.

30. When the Respondents pointed this out in their statements of case, the Applicants then sought to clarify they what they were, in fact, seeking

was the production of existing documents in Reich's possession concerning: (a) remuneration received by Reich for services provided to the First and Second Respondents in insuring the Estate and; (b) commissions, commission-sharing arrangements and any other remuneration enjoyed by the First and Second Respondents, and/or their agents, in respect of the insurance cover placed by Reich for those years.

31. As the Respondents point out there is no direct legal authority on the operation of rule 20(1)(b). Mr Bates has referred me to comments made by Upper Tribunal Judge Jacobs in *Tribunal Practice and Procedure* (Legal Action Group, 5th Edn 2019, where attention is drawn to case-law in respect of the similar powers in general civil litigation (CPR 31.17 and CPR 31.12). Mr Bates agrees with that approach and submits that before making any order under r.20(1)(b) against a non-party:

    (a) the Tribunal must be satisfied that production of the document is necessary for disposing of the case or saving costs: *MacMillan Inc v Bishopsgate Investment Management Plc (No.1)* [1993] 1 WLR 837;

    (b) the application must carefully identify the documents or the class of documents to be disclosed, which means that the Tribunal must be satisfied that the documents were (not might be) documents which would support the case of the applicant or adversely affect the case of another party: *Re Howglen Ltd* [2001] 1 All E.R. 376; and,

    (c) the Tribunal should remember that ordering disclosure against non-parties is the exception rather than the rule (*Frankson v Home Office* [2003] EWCA Civ 655) and the jurisdiction should be exercised with caution (*Re Howglen Ltd*, above).

32. I agree that given the lack of higher authority regarding the operation of rule 20(1)(b), it is useful for me to have regard to these authorities when considering the exercise of my discretion under the rule. Although rule 20(1)(b) is self-contained, the powers available to the tribunal can rightly be seen as a hybrid of the courts powers under CPR 34.2(1)(b) to require a witness to produce documents and CPR 31.17, to make an order for disclosure against a party who is not a party to proceedings. The power of a court under CPR 31.12 to make an order for specific disclosure or specific inspection is reflected in the similar power available to the tribunal under rule 18 of the 2013 Rules.

33. As far as I can ascertain, this rule 20(1)(b) application has been made before the Applicants have set out their initial positive case as to why the insurance costs in issue are not payable by them. The tribunal's previous directions sought to ensure that they have sufficient information for them to prepare their initial statement of case. In my view the First and Second Respondents have complied with those directions.

34. They were directed to provide details of remuneration, commission, or other sources of income or benefits, relating, or arising from the placing or managing of insurance, received by either of them, or any agent, broker, company, or person connected with the Landlord or its officers or directors.

35. In response, on 28 August 2020, they stated that Reich received broker's fees of approximately £6,000 per annum, and that WMS were paid management fees. Further, on 13 November 2020, they stated that Reich received commissions on the global insurance policies placed on behalf of the Yianis Group of companies, that reduced the premiums payable by the First and Second Respondents. For the period 2013 - 2019 Reich are said to have earned total revenues across all of the CREM policies (inclusive of broker fees) of £201,077, equating to an average of £28,725.38 per year.

36. Now that the Applicants have received this information, I see no reason why they cannot put forward their initial statement of case. The Applicants complain at point 4 of their statement of case in reply that the First and Second Respondents did not disclose the underlying documents supporting Reich's "estimate" of £201,077. There was no obligation on them, to do so. All the Respondents were directed to do was to provide a breakdown and this they have done. They also suggest that disclosure is necessary to establish that commissions have been paid. However, the fact that commissions have been paid is not in dispute. It was acknowledged in the footnote to the 13 November 2020 schedule, and details of the amounts received by Reich have been provided.

37. It appears that the Applicants do not believe the answers provided by the Respondents in response to the tribunal's directions. They suggest that the First and Second Respondents are deliberately hiding information and that what has now been said contradicts Mr Taylor's evidence at the 2 March 2017 hearing. If that is their position, then they can set it out in their initial statement of case. Until they have done so it is, in my view, premature, to pursue a rule 20(1)(b) application for either third party disclosure or an application for specific disclosure under rule 18. This is because they first need to demonstrate how any disclosure sought would support their "case". That cannot be demonstrated until after their case has been first presented.

38. I also accept that the jurisdiction to make an order against a non-party must be exercised with caution, especially where a party seeks disclosure of a class of documents as opposed to specific documents. In the present application not only have the Applicants not identified any specific documents for which third party disclosure is sought, they have not identified any "class" of documents. They have simply asked for disclosure by Reich of *any* documents relating to remuneration, commission etc. That does not constitute identification of a class of documents.

39. Such an application is far too wide and, at this stage of proceedings, may rightly be described as a fishing expedition. On the application, as presented, I cannot be satisfied that there are documents that are potentially disclosable under the rule, and nor can I be satisfied that disclosure will support the Applicants' case, or adversely affect the First and Second Respondent's case, as the Applicants have not yet set out their case.

40. If, once the Applicants have done so, they still wish to seek an order for specific disclosure by the First and Second Respondents under rule 18, or make a properly formulated rule 20(1)(b) application against Reich then that is a matter for them. I would suggest, however, that they seek legal advice before doing so. As far as the current application is concerned, it is dismissed for the reasons stated above.

ANNEX - RIGHTS OF APPEAL

Appealing against the tribunal's decisions above

1. A written application for permission must be made to the First-tier Tribunal at the Regional office which has been dealing with the case.

2. The application for permission to appeal must arrive at the Regional office within 28 days after the date this decision is sent to the parties.

3. 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.

4. The application for permission to appeal must state the grounds of appeal, and state the result the party making the application is seeking.