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 ("Octagon")**
Respondent to Rule 20(1)(b) Application	**:**	**Reich Insurance Brokers Limited**
Interested Persons		**(1) Mr Sol Unsdorfer** **(2) Mr Alan Coates**
Type of application	**:**	**Rule 20(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013**
Tribunal	**:**	**Judge Amran Vance** **Judge Nicola Rushton QC**
Date of Decision	**:**	**1 March 2022**

DECISION

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Covid-19 pandemic: description of hearing

This has been a remote video hearing which has been consented to by the parties. The form of remote hearing was V: CVPREMOTE. A face-to-face hearing was not held because it was not practicable and no-one requested the same. The documents that we were referred to were in an electronic bundle prepared by the Applicants. References in square brackets in this decision are to page numbers of that bundle.

Decision

1. The tribunal replaces the order it made on 29 September 2021, under rule 20(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 with the order set out below.

Background

2. This is an application brought by the Applicant leaseholders seeking to vary the terms of an order made by the tribunal under rule 20(1)(b) of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") against Reich Insurance Brokers Limited ("Reich"). The First Respondent is a head lessor in respect of occupational leases of residential flats on the Canary Riverside Estate ("the Estate"). The Second Respondent is the freeholder of the Estate. The Applicants are long leaseholders of residential flats on the Estate.

3. Through their managing agent, Westminster Management Services Limited ("WMS"), the First and Second Respondents engage Reich to help in securing insurance cover for the Estate. The costs of such insurance are, ultimately, paid for by the commercial and residential long leaseholders on the Estate. In their underlying application, brought under s.27A Landlord and Tenant Act 1985, the Applicants seek to challenge the insurance costs incurred by their landlords for the years 2010/11 to 2020/21 inclusive. The final hearing of that s.27A application is listed for 27 and 28 April 2022.

4. Background detail concerning the procedural history of that underlying application is set out in paragraphs 1-11 of an Order I made on 29 September 2021 **[6]**. For the sake of brevity, I will summarise, but not repeat all that detail in this decision. On 28 August 2020, in response to directions issued by the tribunal, the First and Second Respondents submitted a statement of case **[54]** in which they stated that Reich receives a broker's fee for placing insurance on their behalf, but that they did not have access to, and were not aware of, any other insurance related income received by either Reich or WMS.

5. Further directions were issued on 5 October 2020 **[58]**, which led to the First and Second Respondents disclosing documents relating to the placing of insurance on the Estate and the provision of a statement explaining how the insurance premiums were broken down for the years in dispute **[64]**. A footnote to that statement reads as follows:

> "Reich insurance brokers have since confirmed that although they do not receive commissions on a property by property basis, they do receive commissions [sic] 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."

6. The Applicants subsequently made an application for an order under rule 20(1)(b) of the 2013 Rules that Reich produce documents, and provide the Applicants with information, concerning remuneration received by Reich, including any commissions, commission-sharing arrangements, or other remuneration accruing to the First and Second Respondents and/or its agents, in respect of insurance cover placed by Reich in regard to the Canary Riverside Estate for the service charge years 2010/11 to 2020/21 inclusive.

7. In a decision dated 30 June 2021 **[65]**, I refused that application, primarily on the basis that it was premature, as the Applicants had, in my view, been provided with sufficient information and documentation to provide their initial statement of case. After that decision was issued I was informed that the Applicants had, unknown to me, already served (but not filed with the tribunal) their initial statement of case, on 18 December 2020. I therefore directed, on 17 August 2021, that as that that statement of case was not before me when I made my decision, it was open to any party to pursue a late application to set aside the decision under rule 51 of the tribunal's 2013 Rules. No such application was made.

8. On 29 September 2021, following a Case Management Hearing on 27 September 2021, I made an order under rule 20(1)(b), on the tribunal's own initiative **[6]**, requiring Reich to provide a statement detailing and breaking down the commission or remuneration it received in relation the Estate for the years in issue, whether from the First or Second Respondents, or from any party acting on their behalf, together with copies of any relevant letter, emails or other documents concerning receipt of such commission or remuneration.

9. On 1 November 2021, a one-page witness statement from Mr Symes of Reich was provided **[49]** in which it was stated that Reich did not receive any commission or renumeration in relation to the Estate "either from the Respondents or from any party acting on behalf of the Respondents for the years 2013 to 2019 inclusive".

10. The Applicants were unhappy with that response, and by letter dated 8 November 2021 **[187]**, invited Reich to provide the information ordered on 29 September 2021 as if the words "either from the Respondents or from any party acting on their behalf of the

Respondents" were omitted. By this point the Applicants had, it appears, appreciated that commissions paid to Reich were paid by the insurers of the Estate, and not by the First or Second Respondents.

11. In a letter dated 23 November 2021 **[12]**, Judge Powell notified the parties of his view that Reich's response of 1 November 2021 did not comply with my order of 29 September 2021. I agreed in a letter dated 23 December 2021 **[14]**. This was disputed by Reich in a letter from its solicitor dated 17 December 2021 **[191]** in which Reich requested the opportunity to make submissions before the tribunal agreed to widen the scope of the disclosure required from it.

12. On 18 January 2022, the question of whether my rule 20(1)b order of 29 September 2021 should be varied was listed for hearing to take place on 24 February 2022, with directions made as to the provision of an amended form of Order sought by the Applicants, and exchange of submissions and statements of case by all parties **[16]**.

13. The Applicant leaseholders submitted a statement of case in support of their application on 24 January 2022 **[21]**. Paragraph 18 of that statement reads as follows:

    > "The Applicants are concerned that Reich is protecting the interests of the Respondents by preventing leaseholders from seeing what arrangements are in place in respect of fees, commissions and remuneration. This could be, for example, because Reich's business with the Respondents is contingent on mutually beneficial commission-sharing arrangements, which is a common feature of buildings insurance for leasehold buildings."

14. With that statement of case the Applicants provided a revised draft form or order under rule 20(1)(b) seeking an order that Reich provide:

    (a) "a statement detailing and breaking down the commission or remuneration it received in relation to the Canary Riverside Estate for the insurance periods 2013/14 to 2019/20 inclusive, together with copies of any relevant letters, emails or other documents concerning receipt of such commission or remuneration for the periods in question…included within the gross insurance premiums collected by Reich in respect of the Canary Riverside estate."; and

    (b) A statement detailing any commissions, commission-sharing arrangements and/or any other remuneration accruing to the Landlord and/or its agents in respect of the insurance cover placed by Reich in regard to Canary Riverside for the insurance periods 2013/14 to 2019/20 inclusive…."

15. In Reich's statement of case in response dated 4 February 2022 **[30]** it adopts a neutral position as to whether or not an order for disclosure should be made, but argues that the order proposed by the Applicants is too vague, unreasonably wide and onerous, unlikely to be helpful, and unnecessary. In a supporting witness statement, also dated 4 February 2022 **[38]** Mr Symes explains that Reich has an internal system, consisting of contemporaneous Excel spreadsheets, which contain all of the relevant information from which the amount of any commission retained by Reich, and the amount of any fees paid to agents, can be extracted or calculated. Reich's position is that any disclosure order made against it should be limited to disclosing relevant extracts from those Excel spreadsheets. Reich provided a revised draft of the rule 20(1)(b) order proposed by the Applicants **[35]** which referred to provision of copies of the spreadsheets.

16. The First and Second Respondents' position, as set out in their statement of case dated 11 February 2022 **[39]**, is that they oppose this application. They contend that the draft order sought by the Applicants is almost identical to the order they sought in their application for a rule 20(1)(b) order dated 24 November 2020, which was refused in my decision of 30 June 2021, and they should not be allowed to bring the same application twice. Nor, they say, have the Applicants shown why any order is necessary, or how it will support their case.

17. The Applicants served a statement of case in reply on 14 February 2022 **[42]** in which they referred to a letter dated 28 January 2022 from the Financial Conduct Authority ("FCA") to CEOs of relevant firms concerning rising insurance costs for multi-occupancy buildings **[45]**. In that letter reference is made to ensuring that insurance commissions received have a reasonable relationship to the benefits their service provide, and the costs incurred in providing services. Also emphasised, is the need for insurance intermediaries to provide clear information on the nature and type of remuneration they receive, and that if the customer requests further details (such as the amount of commission) this should be provided. These rules, it is stated, apply both to remuneration received, and also to remuneration offered to other firms in the distribution chain, such as property managers.

18. In their reply, the Applicants also refer to letters from brokers Gallagher, and Marsh, said to be in response to leaseholder enquiries for disclosure of commissions charged in relation to three other buildings, unrelated to the Estate. They argue that these straightforward responses contrast with the unhelpful responses they have received from Reich and the Respondents.

Rule 20(1)(b)

19. 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"

Reasons for Decision

20. The hearing of this interim application took place by way of video conferencing (CVP) on 24 February 2022. The Applicants were represented by Ms Jezard. Mr Dray of counsel represented the First and Second Respondents, and Mr Cutress QC represented Reich.

21. At the start of the hearing the tribunal asked Ms Jezard to confirm whether she would be content if the tribunal were to make a rule 20(1)(b) order in the amended form proposed by Reich. Her answer was that she would be, provided that the documents provided by Reich also gave a breakdown of the gross premium paid, the amount retained by the insurers, and any payments made by the insurers to other parties along what she described as the 'distribution chain'.

22. Mr Cutress objected to this late expansion of the order sought by the Applicants, contending that there was nothing to suggest that the insurers had paid sums to any other party, and that even if they had done so, this was a matter not within Reich's knowledge and could not be the subject of a rule 20(1)(b) order.

23. We agree. Any observations the Applicants had on the revised order proposed by Reich should have been made before the start of this hearing. In addition, as stated in paragraphs 28 and 29 of the tribunal's decision of 30 June 2021, 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. In both this application, as in their previous one, the Applicants have not sought an order that Reich answers questions. Their draft order requires Reich to provide a "statement" detailing and breaking down the commission or remuneration it received in relation the Estate, together with copies of any relevant letters, emails or other documents concerning receipt of such commission or remuneration.

24. As was said at paragraph 29 of the 30 June decision, what the second limb of rule 20(1)(b) envisages is the production of existing documents rather than the creation of new documents. Reich have made clear that it is prepared to provide the Applicants with copies of the existing Excel spreadsheets referred to by Mr Symes in his witness statement which, he says, detail the amount of any commission retained by Reich, and from which the amounts of any sums paid to the Respondents, or to their agents, can be extracted or calculated. We agree with Reich's position that any disclosure order under rule 20(1)(b) should be limited to disclosing relevant extracts from those Excel spreadsheets, rather than the creation of new 'statements'.

25. At paragraphs 31 and 32 of the 30 June decision, I said that given the lack of higher authority on the operation of rule 20(1)(b), that it is useful for the tribunal to have regard to the authorities on the use of similar powers in general civil litigation (CPR 31.17 and CPR 31.12) before making any order under r.20(1)(b) against a non-party. Three principles emerge from the cases referred to in paragraph 31 of that decision:

> (a) that a court must be satisfied that production of the document is necessary for disposing of the case or saving costs:
>
> (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: and
>
> (c) the court should remember that ordering disclosure against non-parties is the exception rather than the rule and the jurisdiction should be exercised with caution

26. Mr Dray argued that the Applicants had not shown that disclosure of the documents they seek was likely to support their case, or adversely affect the First or Second Respondents' case. In his submission, this was simply a fishing exercise by the Applicants who were seeking to construct a case, having convinced themselves, as asserted at paragraph 18 of their 24 January 2022 statement of case, that Reich is protecting the interests of the First and Second Respondents by preventing leaseholders from seeing what arrangements are in place regarding commissions and remuneration, because Reich's business with them was contingent on mutually beneficial commission-sharing arrangements. This, said Mr Dray, was pure speculation, unsupported by any evidence.

27. At paragraph 13(a) of my rule 20(1)(b) order dated 29 September 2021 **[6]** I said that in their statement of case dated 18 December 2020, the Applicants had asserted that the insurance costs in issue in their s.27A application included unreasonable, undisclosed, insurance commissions. It is not in dispute that commissions and fees have been paid to Reich for the placing of insurance over properties owned by the Yianis Group of companies, which includes the Estate, and that those commissions are incorporated within the premiums paid by leaseholders. Reich has said that for the years 2013 to 2019, the commission and fees received amounted to £201,077 across all of the CREM policies.

28. What the Applicants do not yet know, is what fees or remuneration that sum of £201,077 is made up of, or how it is divided between the relevant years - assuming that it is all attributable to the insurance of the Estate. Mr Symes states at paragraph 8 of his witness statement that once terms are agreed for the Yiannis Group global insurance policy, Reich then apportions the sums payable, and commission received, between the various parts of the Group's estate, which includes producing a figure relating to the Applicants' properties at the Estate. He says that the extant Excel spreadsheets contain the relevant information from which the amount of commission retained by Reich, and the amounts of any fees paid, can be extracted or calculated.

29. In our determination, disclosure of those spreadsheets by Reich is relevant to one aspect of the Applicant's case, namely that the sums paid by them towards the costs of insurance included unreasonable and undisclosed insurance commissions. The First and Second Respondents stated at paragraph 8 of their statement of case dated 28 August 2020 that they "do not have access to, and neither are they aware of, any other insurance related income that is received by either Reich or WMS". They subsequently confirmed that Reich did, in fact receive insurance commissions and fees. In order to properly advance their case, it is not enough for the Applicants to know the total of all the commission and fees paid to Reich across all of the CREM policies for the whole period 2013 to 2019. They need to know what insurance commissions attributable to the Estate have been paid to or via Reich, and recharged through the gross premiums, in relation to each of those

years. This includes any commissions to the First or Second Respondents, their agents, or any other person, but only insofar as those commissions were paid to or via Reich, so Reich has a record of them.

30. We do not consider it a necessary precondition to the making of a rule 20(1)(b) order that the tribunal needs to be satisfied that disclosure of the spreadsheets will support the Applicant's case, or adversely affect the First or Second Respondent's case. Although we agree, as Judge Vance stated in his decision of 30 June, that it is useful for the tribunal to have regard to the authorities on the use of similar powers in the CPR it appears to Judge Vance, on reflection, and also to Judge Rushton, that rule 20(1)(b) is not as procedurally rigid as the CPR provisions. CPR 31.17 specifies that the Court can only make an order for disclosure against a non-party where :

    (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and

    (b) disclosure is necessary in order to dispose fairly of the claim or to save costs.

31. There are no equivalent, or similar, provisions in rule 20. All rule 20(1)(b) requires is that the documents in the third party's possession or control must relate to an issue in the proceedings, which is a more general test. These spreadsheets clearly do relate to an issue in the s.27A proceedings, and we do not consider we should import the strict requirements of CPR 31.17 into the more flexible wording of rule 20.

32. It would appear that these spreadsheets are not in possession of the First or Second Respondents. Reich do not object to providing disclosure of relevant extracts of its spreadsheets, but emphasise that any order for disclosure must not be wider than is necessary, and must clearly identify the documents to be produced. Reich has expressed the concern, which the tribunal agrees is reasonable, that it should be precisely clear to Reich what documents it is being required to provide, and that the disclosure exercise should not be costly or onerous given that Reich is a non-party and the Applicants are not offering to meet its costs of providing it.

33. We agree that the rule 20(1)(b) order must be confined to disclosure of the existing spreadsheets. We also consider that the spreadsheets should be redacted, as requested by Mr Dray, to protect the confidentiality of information that does not concern the Estate. It would, we agree, be inappropriate for the Applicants to be provided with extracts of the spreadsheets that concern other properties in the Yiannis Group.

34. We should address the submissions made by Mr Dray that this application is an abuse of process and that it is defective on its face. He

argued that this application is a blatant attempt to rerun the Applicant's original rule 20(1)(b) application that was refused on 30 June 2021, a decision that the Applicants had not sought to appeal. Nothing, he said had changed since that decision, and the application was therefore an abuse of process. It was also defective, in his submission, because the Applicants were seeking the creation of a "statement" which is not disclosure of an extant document.

35. We do not consider this application to be abusive. Firstly, the 30 June decision was made on the incorrect understanding by the tribunal that the Applicants' had not served their initial statement of case in the s.27A application. It is true that the Applicants did not subsequently apply to set aside that decision, but that does not render this new application an abuse. Secondly, this is not re-litigation by the Applicants' of their original rule 20(1)(b) application. What is before the tribunal is an application to clarify or vary the terms of the rule 20(1)(b) order that the tribunal made, on its own initiative, on 27 September 2021. Subsequent directions issued on 18 January 2022 included provision for the Applicants to provide an amended form of order sought, together with any submissions in support. It was open to the Applicants to submit a form of order that was wider in scope to that ordered by the tribunal.

36. As to Mr Dray's suggestion that the application is defective, we agree that the Applicants are only entitled to disclosure of extant documents and not the creation of new documents. However, the Applicants' suggestion that 'statements' be produced does not render their request for a variation of the tribunal's order defective, especially since they have in fact also asked for Reich to disclose documents. In any event, their draft order was produced in accordance with the tribunal's directions. It is a matter for the tribunal to decide whether and, if so, how, its original rule 20(1)(b) order should be varied.

37. Finally, it is our view that neither the letter from the FCA, nor the letters from Marsh and Gallagher are relevant to the matter before us, namely whether an order for disclosure should be made against Reich. In this case, neither Reich nor the Applicants are the "customer" referred to in the letter from the FCA. The customers are the First and Second Respondents. As to the letters from Marsh and Gallagher, these relate to commission charged in respect of other properties, and are not of use in considering the scope of a rule 20(1)(b) order which concerns disclosure of existing documents in Reich's possession or control. In any event, the First and Second Respondents opposed Reich providing disclosure of any documents, so it would have been necessary for Reich to have the protection of an order requiring it to do so before disclosing such documents to the Applicants and the tribunal.

38. For the above reasons we replace the rule 20(1)(b) order made on 29 September 2021, with the order set out below. This provides for disclosure by Reich of its extant spreadsheets which, we understand will show any commissions or remunerations received by Reich, or paid

through Reich to the First or Second Respondents, their agents, or any other persons. The First and Second Respondents' position is, of course, that no such commissions have been received, in which case this should be evident from the extracts disclosed.

Order under rule 20(1)(b)

IT IS ORDERED that:

1. by **10 March 2022** Reich Insurance Brokers Limited must provide to the tribunal, the Applicants, and to the Respondents and Interested Persons a copy of its electronic spreadsheet(s) which sets out and breaks down, by annual insurance period, the amount of any commission or remuneration which either:

    (a) it has received; or

    (b) it has paid, or which has been paid through it, to the First or Second Respondents, or their agents; and/or to any third party;

    in either case in relation to the insurance of the Canary Riverside Estate for the insurance periods 2013/14 to 2019/20 inclusive.

2. For the avoidance of doubt this includes any details on the spreadsheet(s) concerning:

    (a) fees;

    (b) brokerage/commission, whether a fixed amount or a percentage of the total annual insurance premium paid by the Landlord;

    (c) administration charges, in addition to any insurance premiums, for administration of the policies;

    (d) additional payments such as a profit share or profit commission from insurers, or income earned from arranging premium finance;

    included within the gross insurance premiums collected by Reich in respect of the Canary Riverside estate.

3. The spreadsheet(s) should be redacted to protect information that does not concern the Canary Riverside Estate.

Name: Judge Amran Vance **Date:** 1 March 2022

Rights of appeal

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

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

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

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

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

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