FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/LVM/2016/0020**
Property	:	**Canary Riverside Estate**
Applicant(s)	:	**Octagon Overseas Limited Canary Riverside Estate Management Limited (1) ("CREM") Palace 3 Limited (2) YSCR Limited (3)**
Respondent(s)	:	**Mr. A. Coates – tribunal appointed manager.**
Interested persons	:	**Various leaseholders as per the original application.**
Type of application	:	**Variation of order for appointment of a manager**
Tribunal	:	**Ms. A. Hamilton-Farey Mr. L. Jarero BSc FRICS**
Venue	:	**10 Alfred Place, London WC1E 7LR**
Date of Decision:	:	**6 March 2017.**

DECISION

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1. **The tribunal confirms that Mr. Alan Coates ("The Manager") of Messrs HML Andertons shall insure the estate on the following conditions: -**

2. **The Manager shall comply with all of the requirements in respect to the insurance, contained within the loan agreement and debenture entered into by the first and second applicants in relation to the premises and which will include, but not be limited to:-**

a. **Ensure that at all times the estate is insured with an insurance company or companies that is/are approved by the lender under the loan agreements and debenture provided by the applicants as part of these proceedings;**

b. **Enter onto the policy(ies) the names of the lender and borrowers;**

c. **Agree the insurance cover, and sum insured with the lender, and for the avoidance of doubt ensure that the estate is insured for the amount required by the lender;**

d. **Process any claims in accordance with the respective leasehold agreements;**

e. **At all times ensure that he complies with the policy and insurance requirements contained within Clause 23.11 of the Loan Agreement dated 23 March 2015 between the first and second applicants and the Agent/Security Agent and Hedge Counterparty named in that agreement. Especially in regard to sum insured, cover, loss of rent, public liability insurances and any other insurances that may be required;**

f. **Provide a copy of the policy, schedule and premium receipt to the applicants each year.**

g. **Provide a copy of the policy, schedule and premium receipt to any of the leaseholders (commercial or residential) within one month of the written request.**

h. **Take out such loan as is required to secure that the premium is paid in full before the due date.**

3. **It is this tribunals view that it would be prudent for the manager to work together with the first and second applicants so that the same insurances as currently exist can be adopted for the coming year.**

REASONS FOR THE DECISION:

BACKGROUND:

1. By an application dated 27 October 2016, the applicants sought a variation of the Management Order ("the Order"). Various variations were sought by that application and following a case management conference, it was agreed by all parties that the matter of the buildings

insurance for the estate should be dealt with as a discreet item due to the fact that the renewal of that insurance was due by 31 March 2017. The tribunal listed that discreet matter for hearing on 2 March 2017.

2. At that hearing the applicants CREM were represented by Mr. J. Bates of Counsel and Palace 3 by Mr. Yeo. The manager was represented by Ms. Gourlay of Counsel. The residents took no part in the application.

SUBMISSIONS ON THE PART OF THE APPLICANTS:

3. Mr. Bates confirmed to the tribunal that there was no argument concerning the powers of the tribunal to transfer the insurance obligations to the manager, but that the tribunal would be wrong to do so for two reasons:

- Firstly, that there was a risk that such a transfer would put the landlord in breach of the loan agreements, which was the crux of the matter, and
- Secondly that there had been no actual criticisms of the insurance in the Order.

4. Mr. Bates said that he would not be dealing with the manager's statement regarding the insurance because there was nothing that the tribunal could do to give protection to the landlord.

5. Mr. Bates called Mr. Simon Taylor of Reich, insurance brokers to the landlord. Mr. Taylor had produced a witness statement located at pages 243 – 255 of the applicants' bundle. Mr. Taylor amplified on his statement and informed the tribunal that he constantly checked the insurance market throughout the year, and that after the six months' from the start of the financial year stage, he would commence discussions, not negotiations, with insurers. He confirmed that Canary Riverside was unusual because insurers were not interested in insuring it. He would therefore be speaking to major insurers to see if their stance had changed.

6. Mr. Taylor said that although insurance companies were substantial organisations, any major insurer when dealing with claims of up to £500,000,000 would have to be substantial and that he was very hard pressed to find an insurer that would take on that risk. He said that originally there were two insurers, but these refused to continue to take on the business because of the bad claims history on the estate. He said that from 2010 – 2013 a total of £260,000 worth of claims were made, 90% of which emanated from the residential blocks and were due to 'attritional water claims'. He said that following these claims, both Alliance and Allianz came off cover.

6. Mr. Taylor then said that from 2010 – 2016 the total claims amounted to £400,000, 90% of which again related to residential claims. He explained that because of the problems with water leaks in

residential property various insurers had come out of the residential market, refusing to insure the risks.

7. With respect to the insurance valuation, Mr. Taylor said that this had been carried out by IPS and that he had known the MD of that company for several years, having worked with him during his period as a loss adjuster. Mr. Taylor confirmed that he was a director of IPS but had no involvement in the running of the company.

8. Mr. Taylor explained that the majority of insurance brokers had to have an agency with a company to trade with them, and that the brokers used by the manager did not have an agency with Tokyo Marine, which insured 65% of the estate. He said that Alexander Bonhill ("AB") (the managers' broker) could therefore not place the business with Tokyo Marine unless they used a third party broker. He understood that AB had appointed Centor to act as its third party broker, and that they were able to trade with Tokyo Marine.

9. Mr. Taylor confirmed that he had no shared directorships with CREM or any other clients. CREM was an important client for them providing business that equated to 1.5% of their annual revenue, but were a relatively small client. He said that his largest client's business equated to roughly 10% of annual revenue.

10. Mr. Taylor then confirmed the arrangements that had been made between Reich and CREM regarding the insurance premiums. He accepted that the arrangement was unusual and that due to the fact that Reich were not a bank or lender that they had to fund the premium for CREM from their office account. They agreed the arrangement because the premium was high and that there was a 60 day period in which the client could make payments, but that the client did not want to pay by direct debit, whereas insurance companies and finance companies would insist that they did so. Reich agreed to fund the premium for CREM because they knew the landlord (Octagon) would eventually pay and that there was no risk of default.

11. Mr. Yeo then asked Mr. Taylor which of the insurance premiums had been paid by CREM and which by the manager. Mr. Taylor confirmed that the payments for October, November and December 2016 had not been paid on time by the manager, and that it had been necessary to extend the credit arrangements to facilitate payments. He said that the manager had suggested that he would not pay the final payment for March 2017. He confirmed when asked by Mr. Yeo, that he had not invoked the interest clauses in the insurance loan agreement because he wanted to have a good relationship with the manager and HML Andertons.

12. Ms. Gourlay asked Mr. Taylor to explain why Reich would wish to insure the estate given that CREM's only asset was the estate and that it did not have any liquid assets. Mr. Taylor explained that Reich insured the whole of the Yiannis Group which represented 1.5% of his

business, and that he knew that if the premium was not paid by CREM it would be paid by Yiannis, that it was simply a matter of trust because no contract was in place.

13. When asked why he had come to the hearing instead of Mr. Sproule who had had all of the conversations, meetings and exchanged e-mails with the manager, Mr. Taylor said that he wanted to correct a statement that the manager had made in his witness statement to the effect that he thought the brokers would do anything that the client wanted. Mr. Taylor confirmed that Reich is a professional broker, they cannot do what the client wants and that they often disagreed with their clients. He confirmed that there had been a lot of correspondence between the manager and the Reich offices, and that following a meeting between the manager and Mr. Sproulle, it appeared that although the manager had said that a decision on insurance brokerage had yet to be made, letters confirming that the matter had been placed elsewhere had already been written and sent.

14. Mr. Bates then called Mr. Curtis, whose statement appeared at pages 167 – 242 in the applicants' bundle. Mr. Curtis confirmed that he was actually employed by Westminster Management Services and that he was the financial controller for the Canary Riverside Estate. He confirmed that the loan was for a period of five years from March 2015 with quarterly interest payment dates. He also confirmed that although the loan and debenture documents referred to a guarantor, none existed in relation to these loans. He said that the loan was the joint and several liability of CREM and Palace 3.

15. When questioned Mr. Curtis said that he thought that the bank (Santander) had been informed of the Order around the time of the appointment and that the response had been to allow the loan to continue as it stands; that no detailed discussions regarding the appointment had been held with the bank and that they, the bank, were content for the loan to continue on the present basis.

16. Mr. Curtis said that the bank was interested in the commercial properties not the residential, that they have not said that there were any problems with the insurance. He confirmed that he did not know if the Order was sent to the bank and that although he is most the senior financial person in CREM and would be the person responsible for informing the bank he was not sure when they had been notified of the Order. Mr. Curtis said that he spoke to the assistant director of the bank, who he thought was a Mr. Jasper Godfrey and who had not at any time, said there was a problem with the insurance. Mr. Curtis' view was that the bank knew that a manager had been appointed, they had seen the order which said that the insurance would be under the control of the manager and no issues had been raised. Mr. Curtis said that 'it may not have crossed the banks' mind'.

17. When asked in detail about his witness statement Mr. Curtis would only say that he was aware of the various problems that had

occurred since the manager had been appointed. He did not consider the manager to be impartial and thought that he was under the control of the residents and that the manager's was always discrediting CREM so that, if the residents made an application for enfranchisement, they would be able to use evidence to say that CREM had not been co-operative during the management.

18. Finally, Mr. Curtis said that he was afraid that, if the manager carries out the insurance they, CREM, would be in breach of their bank loans. That he had relied heavily on the advice of their QC, but was unaware of the specific clauses within the loan agreement that required CREM to insure.

19. Mr. Coates the manager was then called. He was asked by Mr. Bates whether or not he was going to pay the last instalment of the insurance loan and confirmed that he would. He also confirmed that Reich was wholly independent of CREM and the AB has a joint-venture business with Centor so that any large insurance (such as that with Tokyo Marine) would be dealt with by Centor and smaller insurances through AB.

20. Mr. Coates said that he had had an insurance valuation prepared by an RICS member, and accepted that they were members of the HML Anderton Group and therefore not wholly independent. He criticised the report of IPS because the surveyor preparing it had not declared his professional qualifications and had not signed it as a Chartered Surveyor. It was not disputed by Mr. Coates that the statement was however made by an RICS qualified surveyor.

21. Mr. Coates informed the tribunal that it was impossible to obtain public indemnity/liability insurance where one did not insure the building and that he could not see any reason why he could not put the correct processes into place in accordance with the loan agreements so that they all 'balanced up'. He suggested that he would be able to insure with two companies, not the current three, but confirmed the statement of Mr. Taylor, that there were few insurance companies who would insure in E14, and that Canary Wharf was 'maxed-out' in terms of insurance. He confirmed that it might be that the current arrangements would be what he ended up with given the problems of insurance.

22. Mr. Coates also confirmed that so far he had not had discussions with brokers on the final details of the insurance requirements, but that it was not possible to finalise the insurance until the parties were ready to commit.

23. With respect to the problems of insurance premium payments, he confirmed that he had about £450,000 cash in hand at the moment, but that the hotel had substantial arrears which, if paid, would assist in the matter. He said that he was in a position to arrange funding for the premium and that finance houses were lending money for insurance

premiums all the time. He also said that he was being told that there were potential savings on insurance, but higher costs, and it was not entirely clear therefore until the insurance was arranged whether he would be insuring at a higher cost than CREM.

24. Mr. Coates confirmed that there would be problems if the landlord failed to include him within any public liability insurance and that if they failed to insure then he would be liable for claims against him, which might, make him consider after due consultation with his directors, decide whether he would wish to continue with the appointment.

Mr. Yeo:

25. Mr. Yeo informed the tribunal that Palace 3 had not been subject to any criticisms of this tribunal and it is only taking part in these proceedings due to the fact that it is a co-borrower under the loan agreement which is secured against its principal property, The Palace Hotel in Southend-on-Sea.

26. Mr. Yeo confirmed that Palace had executed a debenture as a fixed and floating charge over the Hotel, which gave the lender, Santander, comprehensive security. He said that the risk the management order created was an extremely serious matter and should be decisive whether the power to insure was left with the manager or returned to the landlord.

27. Mr. Yeo said that what was relevant was that there was a sufficient possibility of the lender calling-in the loans and that that would be catastrophic, and that CREM had spoken to Mr. Godfrey at the bank and for the present purposes the tribunal could not put any weight on any goodwill that CREM might have over whether or not the bank would take any action. If the order left the power to insure with the manager then the bank could exercise its powers independent of the disputes. He relied on the advice of their QC.

28. Mr. Yeo said that a bank does not owe any fiduciary duties to its customers save in very peculiar circumstances such as offering advice and that a bank can exercise its rights and discretions under a loan or mortgage documents under its own interests. If a bank wrongly purports that a breach has occurred and accelerates a loan, then it does not give the borrower any right in damages. Mr. Yeo referred to Pagets Law of Banking (page 174 8.6 notice of default ..) from which he confirmed that banks really do have the sort of wide ranging discretion and don't bear much of the risk when they get it wrong. He said that this only emphasised the exposure of his client to potential events of default. He said that due to the joint and several liability either client could be asked to repay the loan this posed difficulties to Palace because it was not a party to the original dispute and not a party in Canary Riverside.

29. Mr. Yeo also said that it was possible that the security granted by CREM had already been over-written by the management order and that this could only affect CREM's debenture, but in the event that that debenture became ineffective, that would be a default under the loan, and then the bank could seize the hotel. He said that at each quarter date when interest payments were due, if CREM were unable to comply with their insurance obligations, then there would be a default situation on each date.

30. Mr. Yeo then took the tribunal through the loans, including the conditions, the interest payments, and the insurance undertakings. He said that the Order fundamentally conflicted with the insurance clauses that prevented CREM from insuring. And that the procurement of insurance could not occur if CREM were prevented from dealing with insurances.

31. It was his case that the statutory assignment of the Order rendered the debenture unenforceable, and if it became unlawful for CREM to insure as the Order suggested then there was a serious risk that the lender would consider the action to be a breach of the loan agreement. He said that there were three problems;

- That the order over-rode Santander's rights;
- That is would be unlawful for CREM to perform its insurance obligations;
- And it was not a question of the substance, just the mere fact that his clients are prohibited from exercising their rights in elation to insurance is the problem;
- Finally he said that the risk of default occurred each quarter when the interest was payable, and that it was not up to us (the tribunal) to second guess what the bank might do.

32. Mr. Bates agreed with everything Mr. Yeo said. He said that if the tribunal took the view that the landlord should keep the insurance but over-insured as is suggested by the manager. He reinforced the catastrophic event that would occur if the bank considered the insurance by the manager to be a default. He also stressed that nowhere in the loan agreement did there have to be any proof there had been a default, and there was no provision for arbitration in the event of default. He also reiterated that the FtT could not give any safeguard to the landlord if it goes wrong; that there was no way in which CREM could be protected against these disasters if they occurred.

33. Mr. Bates went on to say that CREM has explained why they need the power to place the insurance because of the loan. The manager had not suggested that it would make his life easier, and he could do his job without needing this power, they potentially loose everything if we give him the power. He went on to say that the manager was much more vague, he had not got insurers lined up and there was less than a month in which the insurance had to be placed. If

we leave it to the manager then he should be directed to get the banks' authority, and dipping his toes into a market where he wants less coverage for more money cannot be in anyone's' interest.

34. Mr. Bates against said that the tribunal had not criticised the insurance provisions in the original decision and that the tribunal cannot therefore vary the Order accordingly.

35. Mr. Bates referred us to the various banking texts handed up during the hearing and finally said that id did not matter what the position was under the lease, but what did matter was how the loan agreement interacted with the insurance policy, and that the lease was a red herring.

36. Ms. Gourlay on behalf of the manager said that he was in an invidious position, he may walk away from the management and that the five days' spent at the hearing in 2016 and the hours and hours spent would all be water under the bridge. She reminded us that the S.22 Notice had been served in 2014 nearly a year before the loan agreement was entered into, and that the failures of the landlord previously to maintain, enter into a proper PPM in relation to the estate would be 'just too bad'. She also said that the landlord was on notice that an application under S.24 would be made and that if the manager walked away, the tribunal would effectively be endorsing breaches of the lease and S.42 of the Landlord & Tenant Act 1987 because the landlord had not put service charge monies into a separate account.

37. Ms. Gourlay conceded that neither she nor Mr. Bates were banking specialists and that the very grant of the management Order appeared to be an event of default and that it is a worry on the part of the landlord that the lender would become aware of the appointment. She however said that for such catastrophic results there was nothing in writing from the bank, and that at best the bank has had the Order alluded to in a conversation and at worst has not been made aware of the Order at all. That the bank appears to be relaxed about the management Order and would any lender of £40,000,000 of security behave in such a relaxed way. The strongest evidence that CREM could have produced would be a letter to say that they, the bank, consider it to be an event. Nothing has been provided to say that the bank would call in the loan.

38. Ms. Gourlay said that much had been made of the risk to CREM and the LL, but it is also a matter for the lessees that the development is properly managed. To date very little has supported the lessees' interests.

39. Ms. Gourlay drew our attention to the loan agreement again. The various clauses under 23.11 contained the word 'must' and that it was not possible to comply with them. She said that the most applicable clause was 23.11(j) (page 67), which applied in these circumstances because CREM was a tenant under a lease. In such

circumstances the loan agreement required that the landlord insured the buildings on the basis that the interest of the agent is endorsed on every relevant policy; that every relevant policy contained certain clauses and that a full copy of the policy be given to the agent each year, with a copy of the premium receipt, *'then such insurance will be deemed to have been accepted by the Agent in satisfaction of the obligation of that Borrower or Guarantor to insure the relevant buildings'*. Ms. Gourlay said that it was not clear whether this clause had been shown to Counsel when asked to give his opinion on the matter.

40. Ms. Gourlay also responded to the allegation that insurance had not formed part of the original decision to appoint a manager and said that this was correct. She also said that the tribunal had heard suggestions that the excess on the policy was demanded up front in order that a claim could be instigated; that insurance was not raised during the hearing, nor in January 2016 or when the draft order was amended. No reference was made to the catastrophic consequences that could result with the manager continuing with the insurance.

41. Ms. Gourlay said that management was part of the management functions of the estate, and that the tribunal should give protection and support to the manager.

42. In response Mr. Yeo said that if it was right that the page 23.11(j) of the loan agreement was correct, it still placed a direct procurement obligation on CREM. He said that other provisions prior to (j) were relevant, for example (d) 'reasonable endeavours, to ensure.....shall not permit anything to be done', and this might create further risk.

43. He confirmed that his client was an innocent third party in this matter, the position of CREM should be ignored and the insurance should be kept with the landlord.

44. Mr. Bates said that the interests of the lessees and manager were aligned and it was no wonder that his clients were worried. That the leaseholders chose not to be represented or appear, and that the criticism that his clients did not deal with the management Order earlier did not preclude them from making an application for variation.

45. He also said that living in the real world, it was no wonder that anyone is remotely surprised that they are not keen for the bank to exercise a default. The in any event it was no open to this tribunal to find that the bank are content with the arrangements; that there was no protection for his client which could be catastrophic.

OUR REASONS:

46. We find that it is a management function for the manager to insure the development, and that it would be difficult for him to procure public liability/indemnity insurance in relation to accidents in

the communal parts over which he has control. In such circumstances the manager would be at the risk of suit without the protection of insurance and this cannot be correct, a manager must have the right to protect himself against claims made in relation to his appointment.

47. We find that it is possible for the manager to undertake insurance on the estate that would meet all of the requirements of the loan agreement and debenture and by amending the management Order to direct that the manager does so, should give sufficient comfort to the applicants that their interests are properly registered and secured in the building.

48. We also take the statement of Mr. Curtis into account. As he said the lender is only interested in the commercial property; that is correct because the rental stream from the commercial property at Canary Riverside pays the capital and interest payments against the loan. There are no payments from the residential property, because there is no ground rent income, which could be used by the lender. We heard Mr. Curtis say that he thought that the Order had been circulated to the lender, but they had said nothing. This surprises us. If as the applicants say the lender could call in the loan if the insurance were undertaken by someone other by CREM, then we believe that the lender would have said so in no uncertain terms, and would have asked to be joined in these proceedings to put their case forward.

49. Had the lender sent a letter to the applicants to say that, having heard there was a management Order on the estate, they were concerned about the situation of insurance and would consider calling-in the loan then that would have been good evidence to support the applicants' case. But this has not been provided. The tribunal has only been provided with a 'what-if' scenario. What if the bank considered the Order to be a breach of the loan agreements, and what if they decided to call the loan in – what would happen.

50. We concur with Ms. Gourlay that, if the applicants considered the consequences of the insurance staying with the manager to be so catastrophic, they would have contacted their lenders to see what the situation was. Mr. Curtis told us that he spoke to the bank regularly, but had not had a meaningful conversation regarding the insurance. We find this to be extraordinary, given the alleged possible catastrophic events that would follow.

51. We consider that Mr. Yeo and Palace 3 are as they say an innocent third party in this matter, but that does not detract from the fact that their interest is purely the joint and several liability under the loan. The policy(ies) in question do not relate to the Palace Hotel, but only to the Canary Riverside Estate. We were told that 90% of the claims made relate to the residential properties and therefore it seems to us, appropriate that the insurance should stay with the manager who has been appointed to look after the services in the residential blocks and the shared services on the estate. These services include the

making and settlement of insurance claims where appropriate. We find that it would be impossible for the manager to process claims where the policy was held by the landlord, and we have no guarantee, from the original hearing of this matter, that the landlord would deal with insurance on a fair basis.

52. We consider that we have put sufficient safeguards into place, including a recommendation that the manager renews the insurance with the current providers on the same basis as currently, at the end of March so that there is continuity.

53. We also find it unlikely, on the evidence provided to us, that the lender would call-in the loan where the manager was complying with all of the requirements identified in the loan and debenture documentation.

54. We also take into consideration the fact that S.24 of the Act is curative. The tribunal would not wish to see the management of the Canary Riverside Estate return to the situation that existed prior to the making of the Order in relation to the insurance claim complaints received from residents.

55. For these reasons we confirm that the liability for insurance should remain with the manager on the conditions noted at the start of this decision.

Tribunal:

Ms. A. Hamilton-Farey
Mr. L. Jarero BSc, FRICS

6 March 2017.