IN THE FIRST-TIER TRIBUNAL (PROPERTY CHAMBER)

Case ref: LON/00BG/LVM/2016/0020

IN THE MATTER OF S.24 OF THE LANDLORD & TENANT ACT 1987

BETWEEN

Appellants

Octagon Overseas Ltd (1)
CREM Ltd (2)
Palace Church 3 Ltd (3)
YFSCR Ltd (4)
Yianis Hotels Ltd (5)

-and-

Respondent

Mr A Coates – Tribunal-appointed manager

Interested Persons
s.24 Applicant Leaseholders at Canary Riverside

APPLICATION FOR PERMISSION TO APPEAL AND FOR A STAY ON BEHALF OF THE INTERESTED PERSONS, VARIOUS LEASEHOLDERS AS PER ORIGINAL S.24 APPLICATION

References to the "1987 Act" are to the Landlord and Tenant Act 1987

Preliminary

1. The leaseholders as interested persons:

    a) seek permission to appeal the Decision of the Tribunal dated 25 May 2018 (the "Decision"); and

    b) a stay on the Decision in respect of responsibility for dealing with lease assignments and sales packs.

2. In accordance with paragraphs 4(1)(a) and (c) of the Practice Directions for the Lands Chamber of the Upper Tribunal, the application is made on the basis that the Tribunal's Decision shows that it:

    a) Wrongly interpreted or wrongly applied the relevant law;

    b) There was a substantial procedural defect; and/or

    c) The point or points at issue are of potentially wide implication.

3. The full text of s.24 of the 1987 Act is annexed to this application.

Grounds of appeal

4. In its Decision, the Tribunal determined that it is the landlord who is responsible for (a) dealing with requests to assign residential leases, including the giving of notices to assign and the preparation of sales packs; and (b) dealing with applications for consents under the lease.

5. The leaseholders contend that this Decision has been reached erroneously for the reasons set out below. Of greater concern to leaseholders is the consequence of this Decision in respect of what constitutes the 'management' functions conferred on the manager and what functions could be claimed as reserved to the landlord. In essence, it goes to the heart of the effective management of the estate and delivering the remedies that leaseholders set out to achieve through their original s.24 application.

    Landlord interest in residential leases

6. The 280 residential leases, together with the lease for the 45 apartments known as Circus Apartments, are held on 999-year leases that carry a peppercorn rental. The landlord's value in the residential blocks (known as 'commercial in residential') represents 1.01% of the estate. The residential leases are essentially valueless to the landlord: the chance of reversion is remote and there is no ground rent payable. The majority of the value is held by residential leaseholders.

7. It follows that the landlord's role in respect of the residential blocks is principally one of ensuring that they are managed in accordance with the lease, legislation and relevant codes of practice. Residential leaseholders bear the majority of service charge costs and are disproportionately affected by poor property management. They bear the costs of major works, not the landlord, and it is their homes and investments that are impacted by high service charges and failures to maintain -

which diminishes the value of their properties, rental yields and quality of their home environment.

8. It has been stated in a previous decision relating to this s.24 appointment that the purpose of a s.24 order is 'not to punish the landlord'. The lengthy proceedings that have followed on from the original s.24 hearing, all of which focused on the landlord's (and associated companies) circumstances, may have deflected the Tribunal's attention from what the order was originally intended to achieve: addressing the poor maintenance of the estate, unreasonable service charges and the opaque financial management that leaseholders endured for years under the landlord and its management company.

9. Despite the s.24 appointment coming into effect on 1st October 2016, some 20 months ago, there is yet to be an agreed and effective 'scheme of management' in place. The disagreements relating to the interpretation of the management order and considerable delays encountered by the parties in gaining clarification/determinations from the Tribunal has severely affected the management of the estate and undermined the s.24's intended objective.

Ground 1: the Tribunal has wrongly interpreted or wrongly applied the relevant law

10. The matters in contention go to the heart of the original leaseholders' s.24 application. The management order has always stated that the manager:

> "*is given for the duration of his/her appointment all such powers and rights as may be necessary and convenient and in accordance with the Leases to carry out the management functions of the Landlord under the Leases"…no other party shall be entitled to exercise a management function in respect of the Premises where the same is the responsibility of the Manager under this Order*".

11. This clause reflected the leaseholders' understanding that the Tribunal (and, therefore, the manager) was entitled to adopt a wide interpretation of the term 'management', which incorporates all of the functions relating to the management of residential leases and extends beyond the duties of a managing agent.

The Act

12. The Act does not provide a definition of 'Management'. It states that a tribunal may appoint a manager to carry out '*such functions in connection with the management of the premises… as the tribunal sees fit'* [24(1)(a)], and '*References*

in this part to the management of any premises include references to the repair, maintenance, improvement[1] *or insurance of those premises*' [24(11)].

13. It is the leaseholders' submission that the Act intended to enable a tribunal to confer upon a manager any function necessary that will enable him to manage in accordance with the lease, legislation and the RICS Code of Practice, serving the interests of all stakeholders.

14. By removing the responsibility for consents to alter, sales packs and lease assignments, the Tribunal's Decision has not exercised the powers conferred on it by the Act, as upheld in *Maunder Taylor v Blaquiere* [2003] 1 EGLR 52.

Maunder Taylor v Blaquiere

15. In §29 of its Decision the Tribunal states:

> *"We consider that the suggestion made by the previous tribunal chair in her letter of 13th October 2017 that the manager had "stepped into the shoes of the landlord" was incorrect. As was made clear at paragraph 41 of the decision in Blaquiere he carries out his functions as a tribunal-appointed official and not as the manager of the landlord or the landlord's obligations under the lease. His powers derive exclusively from the management order.*"

16. The Tribunal's Decision appears to have applied *Blaquiere* as the basis for restricting the powers of the manager by taking a narrow interpretation of management.

17. The leaseholders contend that *Blaquiere* empowers the Tribunal, per the Act, to grant management responsibilities to the manager that go beyond the landlord's responsibilities per the terms of the lease in order to provide the necessary (and effective) scheme of management.

18. In Blaquiere, Aldous LJ held:

> [38] '*There is no limitation as to the management functions of the manager; in particular the functions are not limited to carrying out the terms of the leases*'.

[1] As amended by the Commonhold and Leasehold Reform Act 2002

[39] '*the tribunal is concerned to provide a scheme of management not just a manager of the landlord's obligations'*.

[42] *'The manager acts in a capacity independent of the landlord. In this case the duties and liabilities laid down in the order are defined by reference to the lease*'.

[43] '*That conclusion reflects the practicalities.'*

19. The Tribunal is not restricted in law as to what management obligations, as defined in the management order by reference to the lease, can be conferred upon the manager. Per *Blaquiere,* 'Management' is to be given a wide interpretation, as the Tribunal sees fit, and practicality should also be a concern.

RICS Code of Practice; Service charge residential management code and additional advice to landlords, leaseholders and agents

20. The RICS Code, approved by the Secretary of State, represents the accepted best practice in respect of the management of residential property. Landlords and property management professionals are responsible for adhering to the Code.

21. The Code assumes the majority of management responsibilities will be delegated by a landlord to a managing agent, such functions including: dealing with applications for consents (4.4); approvals (7.15); breaches of the lease (7.15); and the provision of information or documents (7.15).

22. The Code is the most comprehensive guide to a landlord's management obligations available to the Tribunal for evidential purposes. The Tribunal has erred by failing to take the Code into consideration in its deliberations.

Evidence at the original s.24 hearing (2016)

23. At §30 in its Decision, the Tribunal states "*No such evidence [re. assignments and applications for consents] appears to have been before the original tribunal who made the decision on 29 September 2017"…We see no evidential basis on which it would be appropriate to divest the landlord of these functions, even if it were permissible in law*".

24. This evidence in respect of these functions formed part of the evidence submitted at the original s.24 application hearing that took place in May 2016.

25. It is unreasonable to assume, and nor seemingly does the Act require it, that every breach by the landlord must be heard in evidence and referenced in the accompanying decision in order for the associated management function to form part of an s.24 order. It would be impracticable, and most likely result in a tribunal criticising lessees for not focusing on the larger issues and wasting valuable court time.

26. A significant part of the original s.24 application was concerned with the lack of transparency and the failure by the landlord to comply with statutory duties regarding the provision and inspection of documents. The leaseholders cannot raise with the Tribunal breaches that they have not been given sight of.

27. The leaseholders' s.24 application, draft management order and Mr Coates's management plan were all submitted on the basis that a manager, if appointed, would be responsible for managing all aspects of the estate and the service charge. The stated exceptions in the management order were collection of commercial rents and granting consents in respect of Circus Apartments.

28. At previous s.24 hearings (pre-2016) the tribunal had agreed with the landlord that the estate was built and intended to be 'managed as one': this was the leaseholders' position in 2016.

29. It would be a breach of natural justice for the Tribunal to now restrict the scope of the s.24 order and effectively split the management of the estate into two. That is the inevitable consequence of this Decision, and the cost consequences will have a significant, detrimental effect on leaseholders.

Evidence at the application to vary hearings (2017)

30. The lessees submitted to the Tribunal a 20-page closing submission which set out in paragraphs 91 to 104 the reasons why they believed administrative functions including issuing sales packs and licenses to alter should form part of the responsibilities of the manager. The Tribunal's September 2017 decision did not indicate whether this submission had been taken into consideration.

31. The leaseholders did not have the benefit of seeing the hearing bundle that formed the evidence for the September 2017 decision. They heard only the arguments put forward orally at the hearing, which centered on the alleged risks posed to the Santander loan held by the landlord's companies.

Proprietary interest

32. The Tribunal's Decision refers to the landlord's 'proprietary interest' in the properties in question. The leaseholders remind the Tribunal that the 999-year residential leases hold no financial value to the landlord, and that they have considerable financial value to the residential leaseholders.

33. The Tribunal has determined that responsibility for consents etc. in respect of the residential leases are derived from the landlord's proprietary interest in the properties in question. The leaseholders submit that the landlord's 'proprietary interest' is the responsibility for the proper management of the properties in accordance with the lease, legislation etc. It is not derived from the value of the asset.

34. There are no practical nor financial consequences to the landlord if it, for example, fails to secure payment of service charge arrears prior to granting the reassignment of a lease.

35. The implications for leaseholders, however, are significant, as would be the potential management consequences, eg.:

    a) Shortfalls in funding caused by a failure to collect service charge arrears prior to sale would impact residential service charges and service levels.

    b) The cost of repairing structural damage caused by mismanaged alterations would potentially be a cost to the service charge.

    c) Lessees' entitlement to 'quiet enjoyment' could be threatened by a failure to enforce lease regulations.

36. It is the leaseholders' submission that the Tribunal was wrong to apply the Upper Tribunal's findings in respect of 'proprietary interest' to matters that affect either entirely or in the main the residential blocks (save for the potential impact on the 1.01% of 'commercial in residential', or the remote risk of affecting the commercial buildings).

Benefits and risks of the Tribunal's Decision

37. The Tribunal has erred by not considering the practicalities of its Decision. There is nothing in its Decision to indicate that it explicitly considered the benefits and risks to the leaseholders, or the management of the estate, that might arise by conferring these responsibilities on the landlord.

Ground 2: there was a substantial procedural defect

38. At §30 in its Decision, the Tribunal states "No such evidence [re. assignments and applications for consents] appears to have been before the original tribunal who made the decision on 29 September 2017"…We see no evidential basis on which it would be appropriate to divest the landlord of these functions, even if it were permissible in law".

39. The leaseholders respectfully disagree with the accuracy of this statement. In the first instance, this evidence formed part of the substantive s.24 (2016) hearing that resulted in the manager's appointment. Secondly, in respect of the landlord's application to vary the order, the leaseholders submitted a closing submission for consideration by the Tribunal.

The original s.24 hearing (2016)

40. The leaseholders' evidence to the Tribunal in support of their s.24 application included concerns regarding the landlord's management of various administrative functions. Two such items were listed in the Scott Schedule, and witness statements and exhibits referred.

41. Ms Berwin's (for the landlord) evidence, in responding to issues raised in the Scott Schedule, included a copy of the management contract and associated schedule of charges for Crabtree Property Management (managing agent). This set out fees for functions such as providing pre-sale packs, license for alterations, issuing pet licences [pages 2215-2245 -Bundle 7 section 202].

42. This indicates that the landlord considered these functions could be carried out by a managing agent in the course of their management duties.

43. Mr Coates's management proposals to the Tribunal included a schedule of fees for services provided that included issuing licences to alter, sales packs, lease assignments and pet licences.

Lessees' closing submission for the application to vary (2017)

44. The lessees submitted to the Tribunal a 20-page closing submission which set out in paragraph 91 to 104 the reasons why they believed administrative functions including issuing sales packs and licenses to alter should form part of the responsibilities of the manager. The Tribunal's Decision did not indicate whether this submission had been taken into consideration.

Ground 3: the point or points at issue is or are of a potentially wide implication

45. This Decision has significant implications for subsequent s.24 decisions. The Tribunal has effectively not accepted that the wording in the management order:

> " *is given for the duration of his/her appointment all such powers and rights as may be necessary and convenient and in accordance with the Leases to carry out the management functions of the Landlord under the Leases"…no other party shall be entitled to exercise a management function in respect of the Premises where the same is the responsibility of the Manager under this Order*".

should be taken as a wide interpretation of management, eg., as per the scope of management responsibilities for residential properties set out in the RICS Code.

46. The potential financial and management implications of the Decision are not limited to consents and assignments/sales packs. By rejecting a broad and practical definition of management responsibilities, any function in the lease is open to the possibility of the landlord claiming it retains responsibility if it is not explicitly listed in the order or accompanying decision.

47. This appears to already be happening: lessees are aware that the landlord disputes the manager's right to maintain, repair or improve the exterior of the residential blocks - despite the original s.24 decision finding the landlord to be in breach of its maintenance obligations, externally and internally.

48. Issues that have a wider implication include:

    a) What responsibilities should be considered as 'management', and what, if any, can by law be vested only in a landlord.

    b) Having determined the potential scope of management per (a), must lessees put to the Tribunal evidence of breaches to match every management responsibility that they wish to be included in the order.

    c) Is the split management of an estate an inevitable consequence of (b). For example, if:

        i. No breaches are put forward in respect of producing annual accounts, should responsibility for their production be retained by a landlord?

ii. No breaches are put forward in respect of approval to keep a pet, Airbnb lettings, disputes between neighbours etc. should responsibility for such matters be retained by the landlord.

d) Should a management order, for the avoidance of doubt, set out in detail (eg, similar to format of the RICS Code) each management responsibility (albeit even that would not deal with disputes re. responsibility for exterior vs interior building maintenance).

49. The potential financial and management impact of on-going disputes between a landlord and a s.24 manager is immense, as this s.24 case has proved. This Decision relates to a variation application made 20 months ago. A further variation hearing remains outstanding. The dispute as to who is responsible for what is taking significant financial and management resources, and the leaseholders are bearing significant legal fees – monies that could be spent on the much-needed maintenance and improvement to the estate.

50. The Tribunal's focus has been diverted on to legal arguments, principally involving matters not raised at the original s.24 hearing. This has resulted in it losing sight of what the order was intended to achieve. Few of the remedies sought by leaseholders through the s.24 application have been able to be realised, some 21 months in to a 36-month appointment.

Stay

51. The leaseholders ask for a stay of the Decision in respect of responsibility for assignments and sales packs so that they remain with the manager, Mr Coates, with responsibility on Mr Coates to liaise with the landlord as per the requirements in the Decision.

52. The leaseholders ask that the stay be imposed until such time that the Upper Tribunal has the capacity to deal with this application.

53. The leaseholders make this request in order to ensure that:

a) The possibility of shortfalls in the residential service charge funds due to potential mis-communications between the landlord and manager regarding settlement of arrears are minimised.

b) Lessees are protected from the possibility of having to pay two fees for the sales pack. HML would otherwise need to supply the landlord with up-to-date copies of the vast majority of documents that form the sales pack. In

common with other managing agents, HML charge an additional fee to cover the cost of producing sales packs. In the unlikely situation of an agreement between the landlord and HML to split a single fee, there is a risk that leaseholders will be required to pay both the landlord and HML's administration charges.

Conclusion

54. The Tribunal is respectfully invited to grant the lessees permission to appeal on the three grounds set out above, and to grant a stay per the above application.

Statement of Truth

I believe that the facts contained in this document are true. I am duly authorised to sign this statement on behalf of the Interested Parties known as the s.24 applicant leaseholders.

Signed:

Name:

Position:

Date: