FIRST-TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)

Case reference	:	**LON/00BG/LVM/2016/0020**
Property	:	**Canary Riverside Estate, Westferry Circus, London E14**
Appellants	:	**Octagon Overseas Ltd (1)** **CREM Ltd (2)** **Palace Church 3 Ltd (3)** **YFSCR Ltd (4)** **Yianis Hotels Ltd (5)**
Representative	:	**Trowers & Hamlins LLP**
Respondent	:	**Mr A Coates – Tribunal appointed manager**
Interested Persons	:	**Various leaseholders as per original application**
Representative	:	**Ms Cattermole**
Type of application	:	**Application for permission to appeal**
Tribunal members	:	**Judge Amran Vance** **Luis Jarero BSc FRICS**
Date and venue of hearing	:	**N/A**
Date of decision	:	**25 May 2018**

DECISION ON A REVIEW OF THE TRIBUNAL'S DECISION OF 29 SEPTEMBER 2017

DECISIONS OF THE TRIBUNAL

1. We determine that responsibility for dealing with assignments and applications for consent under the residential leases lies with the landlords and not with the Manager.

2. We set aside the extension of the term of the management order made by the tribunal in its decision of 29 September 2017, with the result that the original term of the order specified in the original management order made on 5 August 2016 is reinstated (a term of three years from 1 October 2016). The tribunal will re-decide if an extension of the current term is just and convenient as part of the current applications to vary the management order, due for hearing in July 2018.

3. We set aside the tribunal's decision requiring the landlords to provide two indemnities to the Manager and will re-decide if either indemnity is just and convenient as part of the current applications to vary the management order due for hearing in July 2018.

Background

4. This is a review of the decision of this tribunal dated 29th September 2017, sent to the parties on 3rd October 2017. That decision was made following an application by the freeholder of the Canary Riverside estate ("the Estate"), Octagon Overseas Ltd ("Octagon") and a number of head-lessees, including CREM Ltd ("CREM") which is the immediate landlord of the residential lessees on the Estate. The application sought to vary a management order made on 5 August 2016 which appointed Mr Coates as a Manager pursuant to section 24 of the Landlord and Tenant Act 1987 ("the 1987 Act") for a term of three years from 1 October 2016.

5. In its decision of 29 September 2017, the tribunal made various determinations concerning the scope of the management order, and the extent of the premises over which it applied. The tribunal also extended the duration of the management order so that it was to expire on 31 August 2010 and approved a revised form of order which was appended to its decision.

6. Permission to appeal the decision of 29 September 2017 was sought by the appellants on 27 October 2017. In a decision dated 12 January 2018, the Chamber President, Judge Siobhan McGrath, refused permission to appeal but determined that the tribunal would review its decision on grounds 1, 2, and 3 as specified in the appellants' application for permission to appeal. Ground 4 concerned asserted omissions and typographical errors and was not a ground of appeal.

7. The tribunal has received written representations in respect of this review from: (a) Octagon and CREM; (b) Mr Coates; and (c) the leaseholders to the original application for an appointment of a

manager ("the section 24 leaseholders") and their arguments are summarised below.

8. The courses of action open to a tribunal, following a review of its decision, are set out at section 9(4) of the Tribunals, Courts and Enforcement Act 2007 which provides as follows:

> "(4) Where the First-tier Tribunal has under subsection (1) reviewed a decision, the First-tier Tribunal may in the light of the review do any of the following -
>
> (a) correct accidental errors in the decision or in a record of the decision;
>
> (b) amend reasons given for the decision;
>
> (c) set the decision aside."

9. In his written submissions, Mr Bates, counsel for the appellants, contends that no new evidence can be called or presented as part of this review and that, unusually, no additional or amplified decisions can be given by the tribunal. This is because of a change in composition of the tribunal which has seen Judge Vance substituted as chair of the tribunal in place of Ms Hamilton-Farey. This change was directed by the Chamber President in her decision of 12 January 2018 and was made in accordance with paragraphs 11 and 12 of the Senior President of Tribunal's Practice Statement on the Composition of Tribunals in the Property Chamber, dated 15th November 2013. According to Mr Bates, as Judge Vance has not heard any of the evidence that led to the underlying decision, the tribunal is not able to provide additional or amplified reasons for its decision and for the tribunal to go beyond what is in the existing materials before the tribunal would, in itself, be an error of law.

10. Ms Cattermole, counsel for the Manager, disagrees. Her position is that as Mr Jarero has heard the evidence and continues to sit as a member of the tribunal conducting the review, the provision of additional reasons is possible.

11. In our judgment itwould be permissible for the tribunal to amend its reasons for its decision given that Mr Jarero remains a member of the tribunal and has heard the evidence that led to the tribunal's decision. However, the tribunal has not sought to do so on this occasion and has instead set aside parts of its decision, as referred to below.

12. We address, in turn, each of the grounds of appeal for which the tribunal has agreed to carry out a review.

Ground 1 Dealing with assignments and applications for consent under the lease.

13. This ground concerns whether it is the Manager, or the landlord, Octagon, 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 consent under the lease.

14. Although this was a point of contention between the parties, as evidenced at section 28 of the Scott Schedule that was before the previous tribunal, the issue is not referred to or addressed in the tribunal's decision of 29 September 2017. As indicated in the Scott Schedule, the Manager's position was that he should be responsible for exercising these functions for the residential leaseholders given that he held the management and service charge information required by conveyancers. It was the Manager's position that for Octagon/CREM to be involved in the residential sales process would add a layer of unnecessary administration and cost.

15. On 13th October 2017, the tribunal received a letter from the section 24 Leaseholders asking the tribunal to *"provide explicit confirmation that, unless stated to the contrary within the management order, paragraphs 5 and 6 of the* [revised management] *order should be taken to mean that Mr Coates is responsible for all aspects of the residential leases."*

16. The tribunal responded to the request for clarification on the same day stating that it was unable to give legal advice but that, for the purposes of clarifying its decision and Order, the manager had effectively 'stepped into' the shoes of the landlord and that *"the manager's powers include the grant or refusal of permissions and the production of sales packs for sales in relation to the residential units, and these matters were not reserved to the landlord".*

17. In their grounds of appeal, the appellants contend that the tribunal erred in law in making these assertions about the powers of the manager when no such powers are specified in the management order and no reasons justifying the assertions were provided.

18. Permission to appeal on this ground was refused by the Chamber President on the basis that although the contents of the letter indicated the tribunal's view, it was not determinative and did not form part of the tribunal's decision. It was not, therefore, susceptible to challenge in the Upper Tribunal. However, the Chamber President confirmed that the tribunal would review its decision to specifically consider and decide the issue and would do so under the power contained in section 9(1) of the Tribunals, Courts and Enforcement Act 2007.

The Appellants' Position

19. Mr Bates points out in his written submissions that the original tribunal decision conferred no specific power on the manager to produce sales packs, nor any specific functions in respect of applications for consent under the lease, such as a request for license to

alter. Further, whilst the appellants, in their application, had asked the tribunal to clarify that these were functions reserved to the landlord, that request was not addressed in either the tribunal's decision or in the revised management order. There was, he argues, no finding of fault by the landlord in the handling of these applications in the tribunal's decision and there was no evidential basis for the tribunal to conclude that these functions should be removed. In his submission, the subsequent letter from the tribunal of 13th October 2017 is a nullity.

20. He also submits that these matters are, under the leases, the landlord's responsibility and that it is impossible, as a matter of law, for a tribunal to confer functions in relation to consents on a s.24 manager. This, he says, is because the Manager has no proprietary interest in the property to be managed and cannot act in the name of, or on behalf of the landlord, which is what would be required for him to deal with consents under the leases. It is, says Mr Bates, only the landlord who can provide such consent under the leases.

The Manager's Position

21. Ms Cattermole draws our attention to paragraph 4 of the revised management order which states that *"the Manager is given 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....."* including, at paragraph 4(e) the *"power and duty to carry out the obligations of the Landlord contained in the Leases, the Commercial leases and any occupational agreements in relation to any services shared by any of the foregoing with the Lessees.....".*

22. She submits that whilst the leases may confer responsibility for dealing with assignments and consents on the landlord, paragraph 4 of the management order, gives those rights to the Manager as part of his management function and that this is permitted by and consistent with the wide powers conferred on the tribunal under s.24 of the 1987 Act. She argues that it was not a requirement to show fault by the landlord concerning assignments or consents and that what was relevant was whether the powers conferred were proportionate to the aim sought to be realised by the management order and the tasks that the tenants are entitled, under their leases, to expect the landlord to perform.

23. As to the asserted lack of reasons for the tribunal's decision, Ms Cattermole asserts that: (a) the tribunal did find that the circumstances that prompted the application for the appointment of a manager were severe and that the leaseholders had endured poor management for a considerable time; and that (b) there is no reason why the tribunal could not provide reasons for its decision now, having regard to contents of the Scott Schedule and written submissions provided by the parties in advance of the hearing on 20 and 21 June 2017.

The Section 24 Leaseholders Position

24. The s.24 leaseholders contend that the management order placed all the rights and powers contained in the residential leases with the Manager, including all management responsibilities, unless otherwise excluded. They assert that s.24 does not define or list what amounts to 'management functions' and rely upon paragraph 28 of the decision in *Maunder Taylor v Blaquiere* [2002] EWCA Civ 1633 where it was stated that:

> *"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".*

25. They also suggest that it is not necessary for the management order to set out in detail the Manager's responsibilities with regard to every single provision of the lease and that the tribunal's concern when making such an order is that it facilitates the proper management of the Estate which requirement, they say, was met in this case.

26. The s.24 leaseholders also refer us to the provisions of s.96 to 98 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act") including s.96(2) which provides for a landlord's management functions under a lease to instead be functions of the RTM Company and s.98(2)(a) which provides that where a landlord under a long lease has functions in relation to the grant of approvals these functions are instead functions of the RTM Company. These statutory provisions, they say support their submission that the making of the management order conferred all management functions under the lease on the Manager.

Decision on this Issue and Reasons

27. In her decision of 12 January 2018, which has not been appealed by any party, the Chamber President confirmed that the tribunal would review its decision of 29 September 2017 and specifically consider and decide this issue. The tribunal has reviewed the decision and considers that it contained a material omission in that it did not determine this issue, which was a live issue before it. To that extent only, we set aside the decision of 29 September 2017 under section 9(4)(c) of the 2007 Act and re-decide this issue under s.9(5)(a).

28. In our determination, absent any specific provision to the contrary in the management order, dealing with assignments and applications for consent under the leases are functions to be exercised by the landlord and not the Manager (although this will clearly require co-operation between the landlord and the Manager). We agree with Mr Bates that these functions derive from the wording of the leases themselves and the landlord's proprietary interest in the properties in question. The fact that the management order does not confer any proprietary interest on the Manager is made clear at paragraph 43 of the judgment of the Upper Tribunal in *Octagon Overseas Ltd and another v Coates*

[2017] EWHC 877 (Ch). These functions, are not, in our view, functions to be exercised by a manager as part of his management functions and we reject the s.24 leaseholders and Ms Cattermole's submission that they fall within the scope of paragraph 4 of the management order. The s.24 leaseholders reference to the RTM provisions of the 2002 Act do not support their argument, as that is a different statutory regime. If anything, it weakens their argument because the 2002 Act deals separately with management functions under leases (ss.96 and 97) and functions relating to the grant of approvals under long leases (s.98), thereby suggesting that the grant of approvals is distinct from the exercise of management functions.

29. 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.

30. This tribunal has not had the benefit of oral argument when dealing with this review and on the evidence before us we stop short of accepting Mr Bates' submission that it is impossible, as a matter of law, for a court or tribunal to *ever* confer responsibility for dealing with assignments and applications for consent on a manager. However, in our view, if this was permissible, it would require compelling evidence that these functions should be removed from a landlord and vested with a manager. No such evidence appears to have been before the original tribunal who made the decision of 29 September 2017 and none is referred to in the written submissions of the manager or s.24 leaseholders provided as part of this review. 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.

31. Mr Bates asks us to amend the management order to make clear that the manager has no power to give consent or license under the leases and that such matters remain with the landlord. We do not consider that this is necessary given that the parties now have the tribunal's decision on the point. If any party wishes there to be specific reference in the management order to this decision they can make submissions as to why this is needed as part of their submissions in respect of the new applications to vary the current management order, brought by both the appellants and the Manager, which are listed for a hearing commencing on 16 July 2018.

Ground 2: Duration of appointment

32. As stated above, the original management order appointed Mr Coates as manager for three years commencing 1 October 2016. At paragraph 39 of its decision of 29 September 2017 the tribunal varied the duration of the order so that the revised form of order was expressed to take

effect from 1st September 2017, for a period of three years, therefore expiring on 31st August 2020. The reason given was that this was appropriate *"due to the various appeals, legal action and other difficulties experienced by the manager in actually managing this estate"*.

33. Following circulation of the draft amended management order, counsel for the appellants made certain comments and raised certain objections concerning its contents. One comment was that there had been no discussion at the hearing about extending the term of the Manager's appointment, only whether it was appropriate to reduce it. Despite that objection, the final order made reflected the extended term.

34. In their grounds of appeal, the appellants contended that the tribunal was wrong to extend the term of the order because the only application before it concerning duration of the order was the appellants' application to reduce the term of the management order to two years less one day. They pointed out that no submissions had been invited on an extension of the term and the tribunal was not seized of the question.

35. In her decision of 12 January 2018, the Chamber President concluded that it was open to the tribunal to consider that three years were required for the management order to be effective and that if early discharge of the order were appropriate a party could make an application for that purpose under section 24(9) of the 1987 Act. However, she accepted that because the parties were not invited to make representations on the revised duration of the order there was a danger that there may have been a breach of natural justice and for that reason the tribunal would review its decision.

The Appellant's Position

36. Mr Bates submits that the extension of the term is a breach of natural justice as a party is entitled to know what case it has to meet and be given the opportunity to influence that decision by way of evidence and/or submissions.

37. In his submission, this breach of natural justice cannot be cured by this review as it does not permit for the calling of evidence and this tribunal cannot proceed on the basis of what limited evidence was before the last tribunal, given the change in composition of the tribunal. He proposes that on review, we dismiss the appellants' application to reduce the term of the order; but reinstate the original term of the order so that it is to run for three years commencing 1 October 2016.

The Manager's Position

38. Ms Cattermole submits that the change in composition of the tribunal does not preclude this review and the calling of further evidence is unnecessary as it is undoubtedly the case that the Manager has been

embroiled in legal action since he was appointed. She argues that we should confirm the term ordered by the tribunal on 29 September 2017.

39. The alternative, she suggests, is for us to set aside the decision under s.9(4)(c) of the 2007 Act and either re-decide the question of the increased length of the term or refer it to the Upper Tribunal.

The s.24 Leaseholders Position

40. The s.24 leaseholders assert that the tribunal was entitled to exercise its discretion and extend the term of the order as it did.

Decision on Review and Reasons

41. Neither Ms Cattermole or the s.24 leaseholders responded to Mr Bates' submission concerning a breach of the rules of natural justice and neither take issue with the contention that there was no discussion at the hearing about extending the term of the Manager's appointment.

42. In our view Mr Bates' submission is clearly correct. As he suggests, it is trite law that a party is entitled to know or have a reasonable opportunity of learning what case it has to answer and of putting forward its own case in response. Given that neither party had invited the tribunal to extend the term of the order, no representations had been invited from the parties on the point and no discussion as to whether an extension was appropriate took place at the hearing, the tribunal's extension of the term breached the rules of natural justice and we therefore set-aside that aspect of its decision under s.9(4)(c) of the 2007 Act.

43. The effect of setting aside is to reinstate the original term of the order so that it is to run for three years commencing 1 October 2016. However, the tribunal will re-decide if an extension of the current term is required as part of the current applications to vary the management order due for hearing in July 2018. The parties may make representations and submit evidence on this point as per the directions previously issued by the tribunal on 6 March 2018 and varied on 9 May 2018. There is no need for us to dismiss the appellants' application to reduce the length of the term of the management order as that was the effect of the tribunal's decision of 29 September 2017 and that aspect of its decision has not been set aside.

Ground 3: Indemnities

44. At paragraph 20 of its decision of 29 September 2017, the tribunal decided that the landlord should indemnify the Manager for any reasonably incurred claims or losses made by occupiers arising because there are areas on the Estate for which the manager must give notice to gain access. Its reasoning was that this was appropriate given the practical difficulties that might arise in securing access which put the manager at risk of legal action, for example where access could not be

granted in the event of an emergency resulting in losses being sustained by an occupier.

45. At paragraph 41 of its decision the tribunal decided that the landlord shall be responsible for placing insurance in respect of the buildings, common parts, shared and service areas that comprise the entire Estate and, in addition, that the landlord should provide public liability indemnity for Mr Coates.

46. In their grounds of appeal, the appellants contended that that the scope of the first indemnity was too wide and that that the second indemnity was unnecessary as public indemnity insurance in favour of Mr Coates had been procured.

47. The Chamber President decided that the tribunal would review both indemnities pursuant to its power under rule 55 of the Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013 ("the 2013 Rules").

The Appellant's Position

48. Mr Bates submits that there was no application before the tribunal to amend the management order to provide these indemnities and that if Mr Coates considered one was required it was up to him to apply to vary the management order accordingly.

49. He also submits that in respect of the first indemnity, the terms specified are so broad as to be perverse and would, for example, require the landlord to provide an indemnity for any actions carried out by the Manager even if they were unreasonable or unlawful, such as if he broke down a door and committed a trespass.

50. As to the second indemnity, he suggests that the tribunal may have been confused by the decision of the Upper Tribunal in *Octagon Overseas Limited & ors v Coates* [2017] UKUT 190 (LC) in which the Upper Tribunal made it clear that the landlord retained responsibility for the insurance of the Estate but that to protect Mr Coates in his management from potential third party claims he was *either* to be given the benefit of public liability insurance arranged by CREM *or* an indemnity in respect of the same. Mr Bates contends that as public liability insurance was then obtained by CREM for Mr Coates there was no basis for requiring a further indemnity.

The Manager's Position

51. Ms Cattermole accepts that public liability insurance has now been procured but suggests that it does not follow that the indemnities ordered should be removed which, she contends, fell within the scope of the powers that can be conferred by the tribunal under s.24(4) of the 1987 Act.

The s.24 Leaseholders Position

52. The s.24 leaseholders made no representations on this ground.

Decision on Review and Reasons

53. We set aside the tribunal's decision concerning both indemnities under s.9(5)(a) of the 2007 Act and will re-decide if either indemnity should be required as part of the current applications to vary the management order due for hearing in July 2018.

54. In our determination the decisions must be set aside because:

(a) Whilst the tribunal had the power to require the first indemnity we agree with Mr Bates that the terms of the indemnity specified by the tribunal are overly broad. Although the indemnity required by the tribunal was in respect of only losses that were "reasonably incurred" the wording of the indemnity does not limit the landlord's liability to circumstances in which the manager acted lawfully, proportionately or reasonably. To require an indemnity to cover losses that occur as a result of the manager being unable to timeously access areas of the Estate without such limitation is, in our view, too broad a requirement.

(b) in respect of the second indemnity the tribunal did not provide any reason as to why the landlord was required to provide this indemnity to Mr Coates. The lack of reasons requires that the decision be set aside. Further it appears that such an indemnity may, in any event, have been unnecessary given that public liability insurance was secured by CREM for Mr Coates. In our view it is likely, as Mr Bates suggests, that the tribunal's decision to require this indemnity may well have originated from a misunderstanding of the terms on which the Upper Tribunal remitted the insurance issue to the tribunal following the decision in *Octagon Overseas Limited & ors v Coates*. In that decision the provision of an indemnity was suggested as an alternative to the provision of public liability insurance arranged through CREM.

Other Matters – Asserted Omissions

55. The appellants contend that several matters that were agreed between the parties were omitted from the tribunal's decision of 29 September 2018 and request that its decision be corrected to include those omitted matters.

56. The tribunal's power to do so is contained at rule 50 of the 2013 Rules which provides that the tribunal "may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it".

57. However, aside from some minor typographical errors referred to in the letter from the appellants' solicitors dated 19 October 2017, the asserted accidental omissions are not agreed by the other parties. Ms

Hamilton-Farey's notes of the hearing on 20 and 21 June 2017 are not available. Mr Jarero has checked his notes of the hearing and can find no record that:

(a) it was agreed at the hearing that the appellants should be entitled to their costs of complying with the management order. That this was agreed is disputed by both the Manager and the s.24 leaseholders;

(b) it was accepted during the hearing that the Manager should report to the tribunal every quarter;

(c) it was agreed that the words "or other monies" should be deleted from paragraph 4(i) of the management order and that "rents and other monies" should be deleted from paragraph 5 of the schedule to the order. That this was agreed is disputed by the Manager. The s.24 leaseholders make no comment;

(d) it was agreed that the words "with the consent of the landlord" should be added to clause 4(i) of the management order. Whilst there appears to be agreement between the appellants and the Manager that these words can be included the Manager contends that this should be subject to a proviso namely that the indemnity provision in paragraph 4(j) of the management order must remain. The s.24 leaseholders object to the inclusion of the proposed wording.

58. We concur with Ms Cattermole and the s.24 leaseholders that aside from the typographical errors referred to in the appellants' solicitors dated 19 October 2017, the matters identified at Ground 4 of the appellants' grounds of appeal are not clerical mistakes, accidental slips or omissions in the tribunal's decision that can be corrected under Rule 50.

59. Given the lack of agreement between the parties on these points it is our view that if the appellant wishes to seek these amendments to the management order and schedule then it should apply to the tribunal to vary the terms of the order under s.24(9 of the 1987 Act and its application will be heard at the forthcoming hearing in July 2018. Any application for a direction that the manager returns monies relating to service charges collected prior to 1 October 2016 should also be the subject of an application. Any application should be made promptly so that the parties may make representations and submit evidence in response to that application as per the directions previously issued by the tribunal on 6 March 2018 and varied on 9 May 2018

Amran Vance

25 May 2018

Appendix - Rights of Appeal

1. 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.

2. 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.

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 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.