RESIDENTIAL PROPERTY TRIBUNAL
LONDON RENT ASSESSMENT PANEL
LEASEHOLD VALUATION TRIBUNAL

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Residential Property
TRIBUNAL SERVICE

Section 35 Landlord and Tenant Act 1987 (the "Act")
Re: Castle Heights, 1 Castle Road, Dagenham, Essex RM9 4XW
Case Number: LON/OOAB/LVL/2010/0014

DECISION

Applicants	Gateways Holdings NW8 Limited (Landlords)
Representation	Mr B Meagher and Ms K Green of Gateway Property Management Limited (Managing Agents)
Respondents	Mr Cubitt, Mr Bourne and Mr Callanan the leaseholder of flat 14.
Representation	In person
Hearing Date	13 January 2011
Inspection Date	Not applicable but note that additional written submissions were made on 16 January 2011 and the respondents were given two weeks after that date to respond.
The Tribunal	Professor James Driscoll, LLM, LLB Solicitor (Lawyer Chair) with Ian Holdsworth MSc, FRICS
Decision Date	15 March 2011
Decisions	The current leases do not permit the landlord to assume the powers, duties and the responsibilities of the defunct management company which was a party to the leases before it was dissolved. A variation of the leases should not be ordered under Part IV of the Landlord and Tenant Act 1987 and the application for such a variation is refused.

Introduction

1. This is an application made on behalf of the applicants, the owners of the freehold of the premises, which consists of 36 flats all held on very long leases originally granted for a term of 999 years. It is made under the 1987 Act and variations are sought of the leases of the flats. Following the application a pre-trial review was held on 13 July 2010 when directions were given. A hearing was arranged for 6 October 2010. However, the tribunal could not consider varying the leases at that hearing as the applicants had not obtained legal advice on what needed to be changed and it had not obtained draft clauses prepared by a property lawyer. As a result, and having heard from those present, the tribunal adjourned the hearing until 13 January 2011 with additional directions for that hearing. The tribunal heard the application in full on this date and heard also the objections to the variation made by and on behalf of the leaseholders. Following that hearing we asked for additional written submissions on the date from which any variation should be effective should the tribunal determine a variation to the lease be considered appropriate.

2. To summarise the position of the parties, the applicants have assumed the management and the insurance of the premises and have appointed managing agents who have made this application on their behalf. They are of the view that the current leases can be interpreted as to allow the landlords to intervene in a case such as this where the managers who are appointed by virtue of being a party to the leases are no longer managing (having been dissolved as a company). If the applicants are successful in persuading the tribunal to order the variations they propose that the variations should be back-dated to the date on which they took over the de facto management of the premises.

The application

3. The applicants are the landlords under these leases. The respondents are the leaseholders. The application is made by managing agents appointed by the applicants. We will refer to the parties as the 'landlords', the 'leaseholders' and the 'managing agents'. There was a third party to the leases called Castle House Residents Management Company Limited (CHRMC). In summary, this company had the responsibility for the insurance, repair and management under the leases. Each

leaseholder is entitled to be a member of this company and is required to transfer that share to the new owner if they sell their flat. However, CHRMC was dissolved, we were told by the applicants, in 2007. It is important to note that under these, in effect, tripartite leases, the landlord does not have the responsibilities to insure, maintain or repair the premises, nor the power to charge the leaseholders for the costs of providing any services. Under the leases, only CHRMC has these powers and only they can recover their costs in providing services, or insuring the building, or the costs of using managing agents or other professionals.

4. As a result it appears that there is no-one to discharge the insurance and management responsibilities because CHRMC is now dissolved. This, in summary, is the background to the application to vary the leases to include a new clause allowing the landlord to intervene should the management company fail. The landlord's position on need for such a lease variation through this application was and remains ambiguous. On the one hand the landlord considers that a provision in the lease which allows it to modify certain covenants in the leases is sufficient to allow them to take over management of the premises and to charge the leaseholders for the costs of doing so. This application to vary, say the applicants, is only necessary to clarify any ambiguity in the leases.

5. The tribunal gave directions following a pre-trial review on 13 July 2010 (neither party attended that hearing). The managing agents appointed by the landlord prepared and filed a bundle of documents. The tribunal has received letters from several of the leaseholders stating their opposition to the application, complaining that the property is not being properly managed, and that the charges are too high.

The hearing on 6 October 2010

6. At the hearing on 6 October 2010 Mr Meagher of the managing agents told us that his company was originally appointed by the former freeholder, Mr Gibbs who sold the freehold to the landlords with the transfer of the title taking place on 12 February 2010. Mr Meagher's company now has an annual contract with the landlords. Their concern is that with the dissolution of CHRMC there is no-one to insure the building or to maintain it. To fill this lacuna his company has been appointed by the freeholder to manage the premises.

7. Mr Meagher told us that he is instructed that the previous landlords served notices of the proposed disposal to the current landlords on all the leaseholders (under Part I of the Landlord and Tenant Act 1987). The leaseholders who attended this hearing, Messrs Cubit and Bourke , told us that they had not received such notices and that they were unaware of the proposed sale until after it had taken place.

8. Mr Meagher also told us that the landlords have insured the building and that they considered it to be in everyone's interest that they assume all the management obligations under the lease which should be exercised (under the leases) by the currently defunct management company. However, Messrs Cubitt and Bourke told us that they are opposed to this and they believe most or all the other leaseholders are as well. Their preferred solution is to revive the management company and to appoint their own managing agents. They have both received legal advice that the landlords cannot currently manage or collect service charges under their leases as they are presently drafted.

9. Following a brief adjournment Mr Bourke told us that application is being made to the Companies Registry to reinstate the management company and that this may take several months. For the managing agents, Ms Gillywater told us that some £18,309.84 is currently owed in unpaid service charges. There is some £3,000 in a reserve fund.

10. Mr Meagher told us that his company has not taken legal advice on this application and that the draft clause he submits should be added to the existing leases had been prepared by himself. He added that the application is made under section 35(1) of the Act. He has some 20 years experience in residential management and has considerable experience also in residential leasehold matters. As to this application he is of the view that the terms of the existing leases already allow for the landlords to step in if the management company is not or cannot act. However, as some doubts have been expressed about this interpretation of the leases, he submits that it would be sensible for these uncertainties to be settled by appropriate variations of the current leases.

11. We told those attending the hearing that we consider that it is essential that the managing agents obtain specialist legal advice on whether or not the current leases need to be varied to allow the landlords to take over management of the premises. At the very least a statement of case must be prepared by them which should be based on legal advice on the current leases and draft proposed draft clauses must be prepared by a property lawyer. It is in everyone's interest that this matter and the attendant uncertainties should be resolved as soon as practicable. In these circumstances it was not appropriate for the tribunal to consider the merits of the application without the exchange of statements of case. We therefore decided to adjourn the application and we gave additional directions.

The adjourned hearing held on 13 January 2011

12. At the adjourned hearing which took place on 13 January 2011 the landlord was represented by Mr Meagher and Ms Green of the managing agents. Mr Cubitt and Mr Bourne represented the leaseholders and they were accompanied by Mr Callanan the leaseholder of flat 14. Mr Callanan lives in his flat.

13. Mr Meagher had produced a supplementary bundle of documents which included a letter from Tolhurst Fisher LLP solicitors for the landlords dated 26 October 2010. In that letter the solicitors expressed the view that the landlords had assumed responsibility for insuring and managing the building as the management company had been dissolved. Because of what they describe as a possible 'misinterpretation' of the lease and to remove any 'ambiguity' in the lease that there should be a new covenant in the lease that the landlord will assume the obligations of the management company should that company cease to exist or is otherwise unable or unwilling to discharge its duties under the leases. They also expressed the opinion that application should be made to this tribunal under section 35 of the Act.

14. The respondents told us that they are deeply unhappy with the current manager's performance and they fear that if the effect of the lease variation is to increase the power of the landlords this would be detrimental to their interests. They have offered to take over management of the premises on several occasions and they say that such offers have been spurned by the landlords and their managing agents. Having looked into trying to revive the defunct management company they were advised by the Companies Registry that the company was removed from the register on 13 August 2008 and that the last company return was made on 2 May 2007. It would cost some £6,000, they were advised, to resurrect that company (taking account of fines levied for the company's failure to file returns) so they decided to have incorporated a new company called Castle House Residents Maintenance Company Limited which they had assumed could take over from the defunct management company.

15. They referred to a letter sent by Mr Meagher to Mrs Cubitt of 2 December 2010 in which he declined to agree to any transfer of management to the new company and he pointed out that this is a different company to the one which is appointed under the leases. We consider that this is correct. The new company is not a party to the leases and it cannot without the agreement of all of the parties to be appointed as the manager. The landlords have not agreed to this course of action.

16. We told the parties that our determination on the application for a lease variation will not affect the rights of the parties to seek determinations of service charges under section 27A of the Landlord and Tenant Act 1985. Nor does it affect the rights of the leaseholders collectively to exercise the right to manage under the provisions in Part 2 of the Commonhold and Leasehold Reform Act 2002, or the right to acquire the freehold under the enfranchisement provisions in Part I of the Leasehold Reform, Housing and Urban Development Act 1993, or to apply to this tribunal for a manager to be appointed under Part 2 of the 1987 Act. The issue in these proceedings is whether the leases in their current form fail to make satisfactory provision for one or other of the matters set out in section 35(2) which requires the applicants to show that

the current lease fails to make satisfactory provision for such matters as the repair, maintenance and insurance of the building.

17. After the final hearing a tribunal case officer wrote to the landlord's managing agents asking them if they wished to make written submissions on whether any order varying the leases could be backdated and if so, to what date. They were asked for this by 27 January 2011 and the respondents were given the period of 14 days to respond to these written submissions. In the event the landlord's solicitors wrote to the case officer in a letter dated 16 January reiterating the position that the current lease allows the landlord to intervene, that to avoid any misinterpretation the lease should be varied, and that it should be backdated to August 2008. No response was received from the respondents.

Our decision

18. Although we do not consider that the leases fail in themselves to make satisfactory provision for any of these matters the tribunal acknowledges that the only party to the lease that can exercise management powers no longer exists as a legal entity. It is therefore unable to discharge these duties.

19. This position is supported indirectly by the proposed new clauses prepared by the landlord's solicitors which explicitly provides, a new power for the landlord to assume these responsibilities where. Their application is founded on a number of propositions. Firstly, the current lease already provides for the landlord to intervene if the management company fails to discharge its functions under the lease. And secondly, an alternative proposition that to avoid any possible ambiguity that the leases should be varied.

20. It is common ground that that the management company ('CHRMC') has the responsibilities for the insurance and maintenance of the premises. This is provided for in the sixth schedule to the lease. It is also agreed that CHRMC has been dissolved and there is currently no replacement company in place to take on these tasks. The leaseholders have formed a company to act as a replacement, but as the landlords correctly point out this is not the same as resurrecting the dissolved company.

21. The landlord's position is summarised in a letter dated 26 October 2010 from their solicitors Tolhurst Fisher LLP. In paragraph 3 of the letter they state 'In the absence of the Management Company, the Landlord has taken its place in terms of ensuring that the property is insured and managed'. The next paragraph of the letter suggests 'There is a possibility that the Lease terms could be misrepresented and in my opinion it would be good housekeeping to remove any ambiguity in respect of the covenants to maintain and insure on the part of the Landlord. If the lease terms are not varied and are subsequently misinterpreted, there would be no covenant on the part of the Landlord to take on the obligations of the Management Company which would not

meet CML regulations thereby detrimentally affecting the value of the flats because they are unmortgagable'. The letter then proposed a Deed of Variation.

22. We return to the terms of the lease. It is common ground that the leases are in the same form. Clauses 1 to 3 set out with reference to the first, second, third, fourth and fifth schedules the obligations of the landlord and the leaseholder. The Management Company (CHRMC) covenants with the lessee in the terms in the sixth schedule whilst the seventh schedule set out the lessee and CHRMC covenants with each other. The landlord, CHRMC and the lessee agree and 'declare in the terms in the Ninth Schedule' (paragraph 6 of the lease).

23. The first and second schedules set out the lessee's appurtenant rights such as use of the common parts in the building and landlord's reserved rights. In the third schedule the lessee covenants to indemnify the landlord for any damage suffered as a result of failure to comply with the terms of the lease. The fourth schedule sets out covenants to pay rent to the landlord and other covenants such as user covenants. In the fifth schedule there are the landlord's covenants of quiet enjoyment and a covenant to enforce the lessee's covenants.

24. The sixth covenant is of particular significance to this case for it sets out CHRMC's covenants. These include covenants to repair the land, common parts and installation, to insure the building and to repair and to keep in good condition the lift

25. The seventh schedule provides for the setting and the recovery of the 'maintenance charge' that is to say the charges of CHRMC in discharging its obligations under the sixth schedule and the recovery of these costs from the leaseholders. This expenditure is set out in further detail in the eighth schedule which includes the costs of any managing agent, auditor and other agents as well as matters such as the costs of insuring and maintaining the premises.

26. Several matters are relatively clear from reading the lease. First, the landlord's covenants are limited and they do not currently extend to managing and insuring the premises. Second, only CHRMC has the obligation to insure, repair and maintain the premises. These management responsibilities are owed to the lessees who in turn covenant to pay the costs incurred through maintenance charges. Third, CHRMC has a right to appoint agents and to recover the costs of this from the lessees.

27. There is currently no clause or covenant in the lease which provides for the replacement of CHRMC by another agent or a default power allowing the landlord to do so. According to the landlords paragraph 5 of the ninth schedule gives them the power to appoint a replacement. This paragraph reads as follows: 'The Lessor may at any time modify or release any covenant or other restriction enforceable by it in respect of any part of the Management Land the Common Parts or Building'. The

leaseholders argue that this does not permit the replacement of CHRMC by the landlord.

28. We agree with the leaseholders. This clause relates to the landlord's covenants, not those of CHRMC. It does not allow the landlord to unilaterally vary the lease by introducing a new management company. Nor does the lease provide for the maintenance and other responsibilities to devolve to the landlord if CHRMC is unable or unwilling to discharge its duties. Only CHRMC can carry out these responsibilities and only CHRMC can recover the costs of employing managing agents. Whilst under the ordinary rules of agency the landlord is entitled to appoint managing agents, as it has in this case, it does not have the right to recover the costs of doing so from the leaseholders. Clearly this is a most unsatisfactory state of affairs - but does this justify a variation of the lease?

29. We conclude that as the current leases stand (with CHRMC dissolved) they clearly fail to make provision for repair and maintenance or the insurance of the premises. In fact they currently make no provision for these matters at all as CHRMC no longer exists and there are no default powers in the leases that allow the landlord to assume these vitally important duties. The case of a variation of the current leases is therefore compelling. However, under section 38 of the Act the tribunal if satisfied that there are grounds for varying the lease may (emphasis added) make an order varying the lease (section 38(1)). This is subject to section 38(6) which provides that no such order can be made if it is not reasonable to in the circumstances to make it.

30. For the following reasons we do not think that it is reasonable to make such an order. First, the leaseholders with leases granted for terms of 999 years, between them have the overwhelming share of the equity in the premises by comparison to the landlord. As such their views and opinions on this application must be given prominence. At the hearings and through letters sent to the tribunal it is clear that many leaseholders are opposed to the landlord's application to vary their leases.

31. Second, we have concluded that the landlord's main reason for bringing this application is to seek, in effect, retrospective authority to take over the management of the premises including a retrospective authorisation of the appointment of the managing agents.

32. Third, the leaseholders are not without remedies. They can take over management by exercising the right to manage (under Part 2 of the Commonhold and Leasehold Reform Act 2002) or they can apply to this tribunal for a manager to be appointed under Part II of the 1987 Act.

33. Fourth, the proposed new clauses in themselves demonstrate that the current clause does not allow the landlords to step in. What their solicitors proposed (in their faxed

letter dated 25 January 2011) is the insertion of a new clause 7 to the 9th schedule to the lease to read as follows: *'If during the Term the Management Company shall fail or neglect to perform and observe is obligations or any of them hereunder or shall go into liquidation, the Lessor shall be entitled to undertake the obligations or any of them hereby agreed to be undertaken by the Management Company and shall be entitled to recover from the Lessee a due proportion of all monies, costs, charges and expenses incurred by the Lessor in connection therewith'.*

34. If such a clause was contained in the current leases there is little doubt that the landlords could have taken over management when CHRMC was dissolved. Clause 5 of the 9th schedule clearly does not, in our view, allow the landlords to do this.

35. Even if an order was made we were not impressed with the landlord's contention that any order should be backdated to when they started to assume management responsibilities. The parties were invited to make written submissions on this point. The landlord's solicitors simply referred to the High Court decision in *Bradshaw v Pawley* [1980] 1 WLR 10. This case related to the grant of a new business lease. It was held that although the term of the new lease could not run from a date earlier than the new lease its obligations could. The rent payable under the new lease applied from the date of the consent order that resulted in the new business lease being granted. We do not see how this supports the landlord's contention. The case decides that where the parties had agreed a new 10 year lease at a higher rent that the tenant was bound to pay this new rent from the date of the consent order (that is an agreement for a new lease) not from the later date when the new lease was executed

36. As we have decided that no order varying the lease should be made we do not have to make a decision on when any variation should start from. However, we cannot see how the order could take effect any earlier than the date of the landlord's application to the tribunal.

Summary

37. Schedule 9, paragraph 5 of the current lease does not allow the landlord to assume and take over the management powers, duties and responsibilities of CHRMC the former third party of the leases and former manager of the premises. Nor can they charge service charges to the leaseholders for any costs they may have incurred. As landlords they have the right to insure the building, the right to appoint managing agent if they chose to. But they do not have the right to make service charges of the leaseholders. Whilst some sympathy might be expressed to the landlords, they could have taken legal advice before they acquired the freehold in February 2010 by which time it had become evident that the management arrangements had fallen apart and that the leases were clearly faulty in making no explicit provision for the landlord to intervene and take over the covenants of CHRMC, to manage the building and to pass on the costs to the leaseholder. That would have been the time to make the application for a variation of the leases.

38. In the face of the leaseholder's opposition, to say nothing of what it is clearly a difficult working relationship between the leaseholders and the agents appointed by the landlords, it would not be appropriate at this point to vary the leases with retrospective effect to sanction the actions of the landlords and their appointed agents since they purported to take over the management of the premises.

39. The application for a variation of the current leases is therefore dismissed.

JAMES DRISCOLL, LLM, LLB, Solicitor

Lawyer Chair

15 March 2011