



**FIRST - TIER TRIBUNAL
PROPERTY CHAMBER
(RESIDENTIAL PROPERTY)**

Case Reference : BIR/00CN/LVM/2014/0003

Property : Westside One, 22 Suffolk Street, Birmingham
B1 1LS

Applicant : Wenghold Limited

Representative : Estates and Management Limited

Respondent : Westside One Residents' Association

Representative : Centrick Property Limited

Type of Application : Under Section 24 of the Landlord and
Tenant Act 1987 for a variation or
discharge of an order appointing a
manager

Manager : Mr James William Ackrill

Tribunal Members : Judge W J Martin
Mr I D Humphries F R I C S

Date of Decision : 08 JUN 2015

DECISION

Preliminary

- 1 On 24th November 2014 the Tribunal received an application ('the Application') (dated 10th November 2014) under section 24 of the Landlord and Tenant Act 1987 ('the Act') seeking a variation of an order ('the Order') granted by the Tribunal (then designated the Leasehold Valuation Tribunal) by its decision dated 16th March 2009 ('the Decision').
- 2 By paragraph 31 of the Decision James William Ackrill ('the Manager'), who is a director of Centrick Property Limited ('Centrick'), was appointed to be manager and receiver of the premises comprising 63 apartments known as Westside One, 22 Suffolk Street, Birmingham B1 1LS ('the Property'). Paragraph 33 of the Decision expressed the appointment as indefinite and further made it a condition that the Respondent may not apply for a variation of the Order within three years from the commencement of the appointment on 1st July 2009.
- 3 Paragraph 34 of the Decision provides as follows:

The Functions of Receiver

34. *The manager shall collect all sums due, including maintenance expenses, rents and any other amounts payable under the leases. The charges for maintenance expenses shall be calculated by reference to the actual or expected costs of providing those expenses and the manager should not have to draw on rental income. Rents received should be transferred to the freeholder but may be retained if necessary to cover temporary shortfalls in funds.*

- 4 On 9th November 2009 the Leasehold Valuation Tribunal made a further decision ('the variation refusal Decision') following an application by the Applicant to vary the terms of the Order to enable the ground rents to be collected by the Applicant, and not by the Manager as provided for in Paragraph 34 of the Decision. The Leasehold Valuation Tribunal in the variation refusal Decision declined to vary the Order for the following reasons (contained in paragraphs 31 to 34 of the variation refusal Decision):

31. *The provision in the Order relating to the receipt and use of rents was inserted so that the Manager would have a small additional fund on which he could draw is necessary to pay unexpected bills for which the service charge fund was insufficient. Although there has been no recourse so far to the rents, as the Manager has been responsible for only four months he still has incomplete information about the funds available to him when all assets and liabilities are known.*

32. *The tribunal has heard no evidence from the Applicant to refute Mr Ackrill's opinion that the sum of £20,000 is a desirable level for a fund and the present financial position requires the retention of the current rents to maintain that level.*

33. Although it is not uncommon for ground rents and service charges to be paid to separate organisations, the reality is that these organisations are usually connected and a shortfall in the service charge income has to be made up from elsewhere in the overall structure. The right of the Receiver and Manager to receive rents reflects as far as possible this financial interdependence.

34. Rents are kept in the client's account, are held in trust for the freeholder and are payable at some stage to the freeholder.

- 5 Both parties to the Application agreed that the Tribunal's determination should be based on the written submissions of the parties, and Directions were issued on this basis.

The Applicant's initial submissions

- 6 In the Application the Applicant stated that there was currently £6,798.19 of ground rents due and owing to the Applicant, some of which had been outstanding for more than 11 months. Whilst it was appreciated that the Manager had substantial arrears to deal with at the outset of his appointment, it is considered that after 5 years the service charge finances should be in sufficiently good order so as not to require any drain on the rental income due to the Applicant. This was what was envisaged by the Decision. Centrick Property Limited have declined to provide an explanation as to why it still requires to collect the ground rents and a variation is requested that will revert the right of collection to the Applicant.

The Respondent's submissions

- 7 Centrick, on behalf of the Respondent, disputed the amount of the ground rents alleged to be outstanding. It produced a schedule, dated 14th April 2015, which showed the true amount owing by the leaseholders as £3,540.25. However, as this schedule includes rents due for the period January 2015 onwards, the true figure is reduced to £1,590.25. It is submitted that for a development containing 63 apartments the amount outstanding is not great. A brief outline of the reasons for the arrears by reference to the individual apartments was also provided.
- 8 As the Applicant has confirmed, at the commencement date of the appointment, the arrears were (including ground rents) in the order of £53,000. The arrears have been reduced drastically, so that the ground rent arrears are only £1,590.25.
- 9 Section 24 (9) of the Act provides that the Order shall not be varied or discharged by the Tribunal unless it is satisfied that (a) the variation will not result in a recurrence of the circumstances which led to the Order being made, and (b) that it is just and convenient in all the circumstances of the case to vary or discharge the Order. The Applicant has given no reason other than the alleged arrears of ground rent and it is submitted that the Tribunal

cannot be satisfied that there will not be recurrence of the circumstances which led to the Order being made.

- 10 The Respondent, Westside One Residents' Association has confirmed that passing collection of the ground rent back to the Applicant will not only confuse the leaseholders but may actually result in some of them withholding their service charge, due to a lack of faith in the Applicant arising from the past history of the site. It is submitted that in these circumstances it cannot be just and convenient to grant the variation.

The Applicant's supplementary submissions

- 11 The reason the Application arose is because it came to the attention of the Applicant that Centrick had instructed Crooks Commercial Solicitors to issue proceedings in the name of the Applicant to recover arrears of ground rent. The Order does not permit the Applicant to commence proceedings in the name of the Applicant without the Applicant's permission, which was not sought. The Applicant wrote to the Respondent concerning this on 13th June 2014. A copy of the letter is exhibited with the Applicant's bundle.
- 12 At that date £6,798.19 of ground rent was due and owing. By 1st January 2015 the figure had grown to £11,523.19. The Respondent made payments by BACS on 30th January 2015 and 28th April 2015 of £8,003.51 and £2,234.75 respectively, which reduced the outstanding amount to £1,284.93. This sum is remarkably similar to the figure quoted by the Applicant. It is true that this is not a large sum, but the Respondent has not stated why it still needs to retain the ground rent in order to supplement the service charge accounts.
- 13 The impetus behind the Order was the dissatisfaction of the leaseholders at the Property with the former managers, County Estates Management. The reason for the high level of arrears at the date of the Order was that Mr Barrington, of the Residents' Association, had advised the leaseholders to withhold payment. In support of this, a witness statement of Hilary Quinn of Estates and Management Limited dated 10th May 2010 was provided, in which Ms Quinn stated that Mr Barrington had led an internet campaign amongst the leaseholders to withhold their service charges. The witness statement was prepared in connection with proceedings before the Leasehold Valuation Tribunal under section 27A of the Landlord and Tenant Act 1985.
- 14 The Applicant trusts that now the Manager is in place and Centrick are appointed as managing agents, there will be no reoccurrence of the circumstances which led to the Order being made. The Applicant has averred that the contrary is the case. However, the ground rent is an income which is due to the Applicant and in respect of which a high premium was paid when it purchased the freehold. The Applicant has offered no valid reason why it should retain the right to collect the ground rents in order to prop up the service charge account.
- 15 The Applicant is also concerned that the Manager (via Centrick) has commenced proceedings in the name of the Applicant. Following *Maunder Taylor v Blacquiere* [2003] EWCA Civ 1633 and as set out in paragraph 32-

047 of Tanfield Chambers Service Charges and Management 3rd Edition, the Manager should act in his own name, not that of the Lessor: *'Service charge demands are issued in his name and cheques in payment of the service charge are made payable to the manager personally. The manager makes contracts, for example to carry out repairs, personally. Any proceedings brought by the manager in respect of those functions, such as to enforce payment of the service charge, are brought in the manager's own name.'*

- 16 It is accordingly submitted that the Respondent was not authorised to instruct Crooks solicitors to bring proceedings in the Applicant's name, and should not be allowed to continue to do so.
- 17 If the Order is varied to allow the Applicant to collect its ground rent, the Manager would be relieved of an unprofitable and time consuming burden whilst allowing the Applicant to pursue debtors and/or enforce any breaches of covenant directly. The Tribunal is therefore requested to vary the Order as requested by the Application.

The Tribunal's determination

- 18 The Tribunal's powers to vary the Order are contained in Section 24 (9) and (9A) of the Act, which provide as follows:

(9) The appropriate tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the Land registration Act 2002, the tribunal may by order direct that the entry shall be cancelled.

(9A) The tribunal shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied-

(a) that the variation or discharge of the order will not result in a recurrence of the circumstances which lead to the order being made, and

(b) that it is just and convenient in all the circumstances of the case to vary or discharge the order.

- 19 It is clear from the Decision and the variation refusal Decision that the reason for the provision in paragraph 34 of the Decision was to enable the Manager to have temporary access to the ground rents if need should arise, to cover cash-flow shortages. This was considered necessary because of the chronic arrears position at the date of the Decision. The Respondent has confirmed in its written submissions that the arrears have been reduced drastically and has not submitted that the Manager still requires access to the ground rents on the temporary basis envisaged by the Decision.

- 20 The Tribunal does not consider that in general it is desirable for the Manager to have access to funds that are in law the sole property of the landlord. Accordingly, in the absence of any compelling evidence or submissions from the Respondent or the Manager to the contrary, finds that it is now just and convenient that the Manager's power to draw upon the ground rents to cover cash flow shortages should be removed.
- 21 However, the Tribunal does not agree with the Applicant that the right to collect the ground rents should revert to the Applicant. The Tribunal is not persuaded that leaseholders would withhold their service charges if they were to receive ground rent collection invoices from the Applicant, but nevertheless finds that it would be an unnecessary expense, and could cause confusion, for the leaseholders to receive separate demands for the service charges and the ground rents from separate managing agents.
- 22 The Tribunal is satisfied that, by varying the Order appointing the Manager to remove the right to temporarily draw on the ground rents, there will not be a recurrence of the circumstances which led to the Order being made.
- 23 The Tribunal agrees with the Applicant that any proceedings brought by the Manager in the collection of the ground rents should be made by the Manager personally and not in the name of the Applicant or its agent. It also considers that the Manager should account half yearly to the landlord for the ground rents so that the delays in paying over collected ground rents complained of by the Applicant in its submissions should not recur in the future.
- 24 For the reasons stated above, the Tribunal finds that it is just and convenient that the Order appointing the Manager contained in the Decision is varied by substituting the following for the original paragraph 34 of the Decision.

The Functions of Receiver

34. The Manager shall in his own name collect all sums due, including maintenance expenses, rents and any other amounts payable under the leases. The charges for maintenance expenses shall be calculated by reference to the actual or expected costs of providing those expenses. Rents received must be transferred to the freeholder. The Manager is to account half-yearly to the freeholder for the rents.

- 25 If either party is dissatisfied with this decision they may apply for permission to appeal to the Upper Tribunal (Lands Chamber). Any such application must be made within 28 days of this decision (Rule 52 (2) of The Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013.

Judge W. J. Martin

08 JUN 2015