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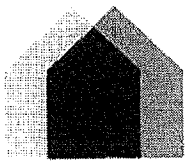

RESIDENTIAL PROPERTY TRIBUNAL SERVICE
LEASEHOLD VALUATION TRIBUNAL for the
LONDON RENT ASSESSMENT PANEL
LEASEHOLD REFORM ACT 1967

LON/00BK/OEM/2010/0001

Premises:	Grosvenor Belgravia Estate Management Scheme
Applicant:	Mr George Donath
Respondents:	Trustees of the Second Duke of Westminster Will Trust
Represented by:	M A Radevsky (counsel) Boodle Hatfield (solicitors)
Tribunal:	Siobhan McGrath Ms Aileen Hamilton-Farey
Date of Hearing:	01/05/10
Date of Decision:	17th June 2010

George Donath v Trustees of the Second Duke of Westminster Will Trust LON/00BK/OEM/2010/0001

Decision

Background

1. This is an application by Mr George Donath for the amendment of the Grovesnor Belgravia Estate Management Scheme. In short Mr Donath, who lives in Eaton Mews South, seeks to add words to the scheme that will require the Trustees to enforce the scheme with more rigor.

2. The Scheme was approved by the High Court in December 1973, under the provisions of section 19 of the Leasehold Reform Act 1967. When the right to enfranchise was conferred by the 1967 Act, it was recognised that the mutual benefits of some leasehold covenants would be lost and as a result, those covenants ensuring the maintenance of the character and standards of an estate as a whole could not be enforced. Provision was therefore made in section 19 for a landlord's management powers to be retained in a scheme of management.

3. Scheme of management which were to be approved by the High Court following certification by a minister and by section 19(6) of the Act must have included provision for variation. By section 75 of the Leasehold Reform Housing and Urban Development Act 1993, section 19 was amended to give jurisdiction to approve such variations to the Leasehold Valuation Tribunal instead of the High Court.

4. The motivation for Mr Donath's action is set out in his application. He asserts that the respondents have failed to deal with breaches of the scheme. As a result, he says, a number of properties are in need of repair and others have been converted to office use. In the vicinity of his home, he cited 9 out of 24 properties in a state of disrepair. The respondents do not accept these assertions.

5. Following receipt of the application, the Tribunal arranged for Pre Trial Review hearing to be convened on 7th May 2010. On 26th April 2010, Boodle Hatfield, solicitors for the respondents, wrote to the tribunal raising several jurisdiction

issues and asked that they be dealt with as a preliminary issues. Mr Donath agreed.

6. The variation sought by Mr Donath is for the addition to the scheme of the following phrase (or such similar wording as the Tribunal may see fit):

> "The Landlords shall, in general, use their best endeavours to maintain established standards in the area and, in particular, advise owners of any breach under sections (5);(6);(7) and (8) of the Order as soon as such breach comes to their attention and after so doing not fail to use all powers granted them by the Order to maintain such standards and in remedy of any breach. In so doing, and in every other respect terms of and actions under the Scheme must be fair and equitable."

7. On behalf of the respondents, it is contended that the application is misconceived on the following grounds:

   (a) Any application to vary the scheme may only be made by the landlord under the scheme;

   (b) The Tribunal lacks power to impose amendments on the landlord which are not agreed by the landlord.

   (c) In seeking to impose obligations on the landlord, rather than on the enfranchising freeholders, Mr Donath's application seeks to go beyond that which the legislation provides for.

Submissions

8. At the hearing, the applicant appeared in person and the respondents were represented by Mr Radevsky of counsel. It was agreed that for convenience, the respondents would be referred to as the "landlords" under the scheme.

Landlords' submissions

9. Mr Radevsky submitted that the clear purpose of estate management schemes is to be found in section 19 which requires the Minister certifying a scheme to be satisfied that it was in the general interest for the landlord to "retain powers of management in respect of *the house and premises* or have rights against *the house*

and premises". He pointed out that there is no provision for the landlord to have a duty or obligation to enforce such powers as it retains. By section 19(10)(a) the powers are to be enforceable as if each lessee had covenanted with the landlord. An estate management scheme is there, he said, to preserve powers held by a common landlord, not to impose obligations on that landlord. Nothing in the 1967 Act allows a property owner who has enfranchised to impose positive covenants on the landlord.

10. Additionally, he argued there is good reason why management schemes do not provide for obligations to be imposed in this way. First, there would need to be detailed statutory provisions for the imposition of such obligation, including dealing with how the obligation was to be enforced, who could enforce it and who would decide a dispute as to whether the obligation ought to be enforced. Secondly, if an obligation were to be imposed of the type sought here, it would be much more expensive to administer the Scheme. The management charge under clause 29 of the scheme as currently framed is £10 plus an RPI increase. The landlord would have to apply to vary the scheme to increase this sum. Thirdly, the landlord reject the allegation that they had wrongfully neglected to enforce the scheme where appropriate.

11. Mr Radevsky's second submission was that it is only if the landlord applies for a variation, or consents to a variation proposed by someone else in the course of its application, that the scheme may be varied. Here, the landlord had not applied to vary the scheme nor did they consent to the application.

12. Mr Radevsky pointed out that under section 19(5) of the 1967 Act, the High Court could approve the scheme as originally submitted by the applicant, or with any modifications proposed or agreed to by the applicant. The High Court could refuse to give its approval to the proposed scheme (or to the scheme as amended by agreement) but that was the limit of its power.

13. He submitted that in deciding whether to grant a variation based on a change of circumstances, the same criteria apply as in deciding the terms of an original scheme.

14. The point had been considered by a Leasehold Valuation Tribunal in respect of the *Smiths Charity/Welcome Trust South Kensington Estate* LON/EMS/201. That

scheme had originally been approved under the 1993 Act and similar provision was made in the legislation for variation. There the Tribunal concluded at paragraph 20(1) that "...in respect of the subsisting application to amend, of which it was seized, the Tribunal had no power to impose modifications upon the proposed amended Scheme which were not proposed or agreed to by the Applicants...."

15. Mr Radevsky also drew the Tribunal's attention to section 159 of the Commonhold and Leasehold Reform Act 2002. This makes provision for individual owners to seek a determination on the payability of estate management charges and where appropriate to seek a variation of that part of a scheme dealing with the payment of those charges. He submitted that if there was a general power for an individual to apply under section 75 of the 1993 Act, there would have been no need for such a provision.

Mr Donath's submissions

16. Mr Donath made two written submissions and helpfully elaborated on these at the hearing. He contended that the 1967 Act does not state who may apply to the Minister for a certificate and that there is no stated limitation in the Act as to who may or may not apply for termination or variation. He cited an email memorandum from the Chairman of the Belgravia Residents Association in support of his application.

17. Mr Donath also submitted that the 1967 Act does not require the landlord's agreement to any amendment. He sought to distinguish the *Welcome Trust* case on the basis that it was concerned with the provisions of the 1993 Act and not the 1967 Act. He pointed out that there is nothing in the legislation which suggests that any part of the 1993 Act, other than section 75 conferring jurisdiction on the LVT, is applicable to the provisions of section 19.

18. He argued that the clear purpose for which Estate Management Scheme are to be created is for the maintenance of adequate standards. He said that the legislature did not consider it necessary to expressly impose such terms on the landlord for obvious reasons, but it most certainly did not exclude imposing such obligations

where a variation was sought. The legislation, he said, expected a landlord to use the powers acquired under a scheme to maintain previously accepted standards.

19. He pointed out that when the scheme was first crafted, only 14 owners had enfranchised their properties. There are now some 1000 properties on the estate that had been enfranchised and he surmised that this might explain the diminishing interest of the landlord in maintaining standards.

20. Mr Donath also contended that the requirement for a change of circumstances to trigger variation applies only where there is a change in the area covered by the scheme. Accordingly, there was, he said, no limitation in the Tribunal's power to vary in this case.

21. He argued that the scheme had been established to maintain standards for the entire neighbourhood. He said that if the provisions of the scheme were ignored, damage would be done to the quality of the neighbourhood which would inevitably result in an impairment of property values. He emphasised that the application was not designed to claim damages or compensation or indeed to change any of its provisions, rather it was intended to ensure that the provisions of the scheme were followed.

22. Mr Donath rejected the proposition that practical difficulties would ensue from enforcement of any landlords' obligations. He suggested that there are already schemes containing such clauses, such as the scheme governing the Alexander Estate in South Kensington, and that no additional provisions would be required. So far as additional costs are concerned, Mr Donath pointed out that the scheme is self financing and that the landlord's expenses would be met by delinquent owners.

23. Mr Donath made it clear to the Tribunal that this application had only been made after lengthy discussions and meetings with the landlords which had not resulted in an improvement in the situation. He was certain that the LVT has jurisdiction and that the purpose of section 19 could only be met if the landlord was under a duty to enforce the provisions of the scheme.

Decision

For the reasons set out below, the Tribunal considers that it lacks jurisdiction to vary the estate management scheme for the Grosvenor Belgravia Estate to impose a duty on the landlords to enforce the terms of that scheme against owners acting in breach thereof.

Reasons

24. The Tribunal had sympathy with Mr Donath's submissions and in particular his argument that in a broad sense it should be possible for an owner to ensure that the provisions of the scheme were being properly enforced. However, it considered that the provisions of section 19 of the 1967 Act do not give it jurisdiction to impose duties on a landlord in the manner suggested.

25. In reaching this conclusion the Tribunal accepted Mr Radevsky's submission that the purpose if section 19 was to preserve management powers rather than to impose management duties, or to regulate the manner in which management powers ought to be exercised.

26. In this respect, the Tribunal had careful regard to the statutory provisions. Section 19(1) sets out the consideration for the Minister's opinion that it is "likely to be in the general interest that the landlord should *retain powers* of management in respect of *the house and premises* or have *rights* against the house and premises in respect of the benefits arising from the exercise elsewhere of his *power* of management..." This clear language does not refer to a landlord' duties or obligations.

27. In section 19(3) both the Minister and the High Court were to "have regard primarily to the benefit likely to result from the scheme to the area as a whole (including houses likely to be acquired from the landlord under this Part of the Act) and the extent to which it is reasonable to impose, for the benefit of the area, *obligations on tenants so acquiring their freeholds;...*" The obligations anticipated here are obligations on owners and future owners and not on the common landlord.

28. In section 19(5) the Court was to approve the scheme "either as originally submitted or with any modifications proposed or agreed to by the applicant for the scheme, if the scheme...appears to the court to be fair and practicable and *not* to give the landlord a degree of control out of proportion to that previously exercised by him or to that required for the purposes of the scheme" Here there is a clear indication that the level of control a landlord ought to be given is to be restricted.

29. Taking those provisions together it seemed clear to the Tribunal that section 19 was intended only to preserve the landlord's position as it had pertained before the right to enfranchise was conferred by the Act and not to impose on the landlord any additional duty to preserve the nature and amenity of the estate. On that basis, the Tribunal considered that this type of variation could only be achieved with the landlord's consent.

30. Since the Tribunal considers that it lacks jurisdiction to vary the scheme to extend the duties of the landlord as requested, it was not necessary for it to deal with the other grounds for dismissal raised by the landlords. However, for the sake of completeness the Tribunal makes some further observations.

31. First, the Tribunal noted that section 19(11) provides that "Subject to subsections (12) and (13) below, a certificate shall not be given nor a scheme approved under the section for any area except on the application of the landlord". Subsection (12) makes provisions for applications by two or more persons as landlords of neighbouring areas and subsection (13) makes provision for applications to be made by "any body of persons...capable of representing for the purposes of this section the persons occupying or interested in property in the area..." with a view to a scheme being made in accordance with section 13(b)(i) and (ii).

32. During the course of the hearing, Mr Radevsky reserved his position on the ability of a group of owners applying for a variation or termination of the scheme on grounds other than those put forward by Mr Donath. In the Tribunal's view that issue of whether an owner or a group of owners may in any circumstances apply for a variation properly remains open as does the issue of whether or not a landlord's consent is required to variations sought. The Tribunal noted the comments of the LVT in the *Welcome Trust* case but found them to be of limited

assistance in this matter not only because the case dealt with a 1993 Act scheme but also because the terms of that scheme were significantly different then those in this application.

33. In this case however, the Tribunal considered that the application was misconceived and must be dismissed.

Chairman.....

Date.....17th June 2010.....