HM Courts & Tribunals Service

LEASEHOLD VALUATION TRIBUNAL

Case no : CAM/33UF/LAM/2011/0003

Property	:	**Trafalgar Court, 42 Cromer Road, Mundesley, Norfolk**
Application	:	For the appointment of a manager [LTA 1987, s.24]
Applicants	:	Mr & Mrs A D Roper, 158 Strumpshaw Road, Brundall, Norwich, Norfolk NR13 5PI & others
	c/o	Maunder Taylor, 1320 High Road, Whetstone, London N20 9HP
Respondent	:	London Land Securities Limited, of 70 Tudor Road, Hampton, Middlesex TW12 2NF

REASONS FOR THE TRIBUNAL'S DECISION DATED 9TH FEBRUARY 2012

Tribunal	:	G K Sinclair, J R Humphrys FRICS & G F Smith MRICS FAAV REV
Hearing date	:	Wednesday 8th February 2012, at Quern House, Mill Court, Great Shelford, Cambs CB22 5LD
Representation	:	Bruce Maunder Taylor FRICS MAE for the Applicants
		Jonathan Pennington Legh (counsel), instructed by the Respondent under the Bar Public Access Rules

Introduction

1. By this application dated 3rd October 2011 a group of five leaseholders of flats at Trafalgar Court (generally known as the "independent leaseholders") apply once again to place the building under the control of a professional manager capable of undertaking the major works required to convert the property into the physically sound, lettable investment that the original purchasers were initially promised by the developer. Regrettably, this tribunal has been involved in disputes between freeholder and independent leaseholders (the number and identities of the latter changing over time) ever since 2001, during which time two persons have been appointed successively as Receiver & Manager. Upon the resignation of the second, Mr Robert Wells, an application was made in 2009 for the appointment of a third, but as :
   a. the tribunal was unimpressed with the proposed manager's experience and ability

to tackle a building with challenges as difficult as Trafalgar Court, and

b. the evidence given by Mr Ravinder Sharma and his son Sonal Sharma gave the tribunal hope that their efforts to obtain RICS qualifications might ensure that past problems would not be repeated,

the management order was simply discharged and the freeholder resumed management and control.

2. Due to their concern that the freeholder had since then failed to live up to expectations, had simply resumed the bad habits of the past, and could not be trusted to manage a new major works contract which not only had to complete but also put right the mistakes of the earlier contract, the applicants applied again for the tribunal to appoint a professional manager. Their candidate on this occasion was Mr Bruce Maunder Taylor, a chartered surveyor with considerable experience of the management of residential leasehold flats.

3. At the same time the tribunal also had to deal with an application by the freeholder – which after evidence was given and consideration of the cases of *Daejan Investments Ltd v Benson*[1] and *Stenau Properties Ltd v Leek*[2] was then withdrawn – under section 20ZA of the Landlord and Tenant Act 1985. While matters arising in that application only added to the tribunal's existing disquiet about the freeholder's ability effectively and fairly to manage the property, the tribunal determines, essentially for the procedural reasons discussed below, that this application for the appointment of a manager must fail.

Applicable legal provisions

4. The law concerning the appointment by the tribunal of a manager can be found in sections 21 to 24A inclusive of the Landlord and Tenant Act 1987. Section 21 refers to the tenant's right to apply, section 22 to service of a preliminary notice, section 23 to the manner of application to a tribunal, and section 24 deals with the order which a tribunal can make and the circumstances in which it may do so. Section 24A deals with the jurisdiction of the tribunal.

5. Critical to this application are the provisions in section 22 concerning the service and content of a preliminary notice by the tenant :

(1) Before an application for an order under section 24 is made in respect of any premises to which this Part applies by a tenant of a flat contained in those premises, a notice under this section must (subject to subsection (3)) be served by the tenant on –

(i) the landlord, and

(ii) any person (other than the landlord) by whom obligations relating to the management of the premises or any part of them are owed to the tenant under his tenancy.

(2) A notice under this section must –

(a) specify the tenant's name, the address of his flat and an address in England and Wales (which may be the address of his flat) at which any person on whom the notice is served may serve notices, including notices in

[1] [2011] EWCA Civ 38; [2011] 1 WLR 2330; [2011] HLR 21

[2] [2011] UKUT 478 (LC), reported in the *Estates Gazette* that week

proceedings, on him in connection with this Part;

(b) state that the tenant intends to make an application for an order under section 24 to be made by a leasehold valuation tribunal in respect of such premises to which this Part applies as are specified in the notice, but (if paragraph (d) is applicable) that he will not do so if the requirement specified in pursuance of that paragraph is complied with;

(c) specify the grounds on which the tribunal would be asked to make such an order and the matters that would be relied on by the tenant for the purpose of establishing those grounds;

(d) where those matters are capable of being remedied by any person on whom the notice is served, require him, within such reasonable period as is specified in the notice, to take steps for the purpose of remedying them as are so specified; and

(e) contain such information (if any) as the Secretary of State may by regulations prescribe.

(3) A leasehold valuation tribunal may (whether on the hearing of an application for an order under section 24 or not) by order dispense with the requirement to serve a notice under this section on a person in a case where it is satisfied that it would not be reasonably practicable to serve such a notice on the person, but the tribunal may, when doing so, direct that such other notices are served, or such other steps are taken, as it thinks fit.

(4) ...

6. Section 24(7) goes on to provide that :

> In a case where an application for an order under this section was preceded by the service of a notice under section 22, the tribunal may, if it thinks fit, make such an order notwithstanding –
>
> (a) that any period specified in the notice in pursuance of subsection 2(d) of that section was not a reasonable period, or
>
> (b) that the notice failed in any other respect to comply with any requirement contained in subsection (2) of that section or in any regulations applying to the notice under section 54(3).

7. Neither representative was able to find any authoritative case law relating directly to section 22 notices, although Mr Maunder Taylor sought to pray in aid that of *Orchard Court RA v St Anthony's Homes Ltd*[3], which really concerns the matters which need or need not be proved when seeking a variation of an existing section 24 order, and Mr Pennington Legh referred to an LVT case, *Erogbogbo & anor v Dawkin*[4], in which it was held that the purpose of the preliminary notice is to put the landlord on notice of the reasons for applying for the appointment of a manager. He also referred to a passage from *Hill & Redman* explaining, in the context of the service of a section 146 notice, the distinction between remediable and irremediable breaches of covenant :

> Broadly, a breach of a positive covenant will be capable of remedy. A breach of

[3] [2003] EWCA Civ 1049

[4] LON/00AH/LAN/2010/1, a decision of the London LVT

an obligation to do something can be remedied by doing that which is required, and perhaps paying compensation. Even the breach of a promise to do something by a certain time can be remedied by doing that which is required, albeit late.[5]

Hearing and evidence

8. The tribunal was provided with a large hearing bundle comprising the documents both for this application for the appointment of a manager by the independent leaseholders and that by the freeholder for dispensation with the statutory consultation requirements. The respondent freeholder's Statement of Case and the applicant's Reply are at tabs 4 and 6 respectively. In addition to various witness statements filed by the applicants, at tab 7, the bundle also included at tab 8 the tribunal's recent decision dated 19th January 2012 dealing with the service charges which are payable for the property in respect of the years 2004–2010 (and the advance service charge payable for the year 2010–2011). A skeleton argument prepared by Mr Pennington Legh also proved extremely helpful.

9. At tab 1 in the bundle is the application dated 3rd October 2011, to which is annexed the letter from Mr Maunder Taylor purporting to be the required section 22 preliminary notice. That letter/notice is dated 30th September 2011, a Friday. If posted on that day then it is unlikely that it was received before the next business day, Monday 3rd October. No time had therefore been allowed in which the freeholder could seek to remedy the matters complained of in the notice.

10. The notice itself relies on the following grounds for an application under section 24 :

A. The property is dilapidated, the east wing is subject to an enforcement notice preventing its occupation and many other parts of the property are incapable of reasonable habitation. This state of disrepair and dilapidation has persisted for over 10 years.

B. Whereas it is accepted that you have estimates from reputable builders (Draper and Nichols) and contract administrators (Drury and Reynolds), and it is understood that they are able to start work in the near future, the necessary funds have not been raised. The tenants on whose behalf I am sending this letter refuse to pay funds into any account other than a genuinely independent trust account for reasons which have already been rehearsed in previous Leasehold Valuation Tribunal hearings of which you are aware. It is not known whether or not all other tenants of all other flats have or have not paid the necessary funds to you or into a trust account. It is understood that you have opened up a separate account but still in the name of London Land Securities Limited and, because of the complete breakdown of trust between the above tenants and yourselves, those arrangements are unacceptable.

C. In regard to other management matters, there is substantially no effective management of the property, and certainly none in accordance with the RICS Code and the terms of the lease. In the normal course of events this letter would specify each and every breach of management obligation, but these have already been fully rehearsed in front of previous LVT hearings, you are aware of these

5 *Hill & Redman : Law of Landlord & Tenant*, para A[4682]

allegations, and it is therefore my opinion that it is unnecessary for me to repeat them here. Indeed, I understand that there has been at least 1 previous manager appointed by the LVT pursuant to section 24 of the Act, that appointment did not prove successful in resolving the matters of default and this section 22 notice is with a view to applying for a new appointment.

The notice goes on to say that the applicants believe that the matters complained of are not capable of being remedied by the freeholder and therefore it does not specify a time limit within which such remedy must be made.

11. In opening his case Mr Maunder Taylor acknowledged that the first point taken was on the validity of the section 22 notice; the thrust of Mr Pennington Legh's argument being that the applicants had not specified the grounds or given sufficient time to remedy them. However, he referred to the tribunal's latest decision, at tab 8, from paragraph 13 on page 174, concerning the tribunal's finding that once again the freeholder's ability to manage, following its resumption of that role in 2009, had been shown to be wanting.

12. Mr Maunder Taylor also referred in that decision, at paragraph 24, to the tribunal's note in 2010, upon the withdrawal by London Land Securities Ltd of an earlier misconceived application for determination of the payability of past years' service charges, to the cause of or factors contributing to the persistent trouble between freeholder and independent leaseholders over the years. He also drew the tribunal's attention to a principal reason why a management order is necessary, namely clause 7(4) of lease (mentioned in paragraph 34 of that decision) which creates a "black hole" in the finances due to the lack of liability imposed on the lessor for any flats which have not been let. Mr Sharma has said that the freeholder will make voluntary contributions, but he can stop. That black hole can, said Mr Maunder Taylor, be remedied only by making a management order which takes precedence over the lease; referring to his own case of *Maunder Taylor v Blaquiere*[6] where his view was upheld by the Court of Appeal.

13. Mr Maunder Taylor explained that the background was that he had made an inspection before making the application. There were still holes in the roof, builders were on site, and there was continuing delay in getting to grips with a serious problem, during which time extensive damage has occurred. This urgent requirement to get on with things was why the application was made quickly and expedition requested. He cited various passages from the tribunal's most recent decision (which concerned an application that had not even been heard when this section 24 application was made) to demonstrate some pretty severe criticism by the tribunal about what had been done on a block that requires intensive and skilled management.

14. Insofar as section 22 is concerned he stated that subsection (2)(d) was the important provision, and he agreed in principle with Mr Pennington Legh that all of these matters are capable of being remedied. Where he disagreed with him was with regard to the particular circumstances of this case. The Sharma family had shown themselves, and been found by this tribunal, to be lacking in the skills, legal knowledge, readiness and willingness properly to manage this property in accordance with the terms of the lease, with the law, and the provisions of the RICS Code. He commented that he was being

6 [2002] EWCA Civ 1633; [2003] 1 WLR 379; [2003] HLR 43

criticised for not spelling those out one by one by one, and submitted that the section 22 notice in the particular circumstances of this case was valid, and that the case cries out for competent management to be imposed, and that it was just and convenient to do so.

15. Mr Maunder Taylor then dealt with various points raised by the respondent, with how he preferred not to spend money on legal action arising out of the past major works problems because there was no expert report on liability, that obtaining one would be expensive, and that even if successful there would be a deficit in recoverable costs. The leaseholders funds should be spent primarily on the restoration of the building. He then explained his proposals for managing the building, referring to a draft management order and management plan that were at tabs 10 and 11 respectively. The draft order had been prepared by counsel and had been adopted by a tribunal in a previous case in which he had been appointed.

16. As further examples of mismanagement Mr Maunder Taylor also drew the tribunal's attention to, and evidence was heard concerning :

a. The freeholder's lack of consultation about re-roofing works now considered necessary notwithstanding the evidence and work schedules put forward last summer in support of the application for determination of the reasonableness and payability of the proposed costs of the major works needed to finish the external and other works started years before and then abandoned,

b. the single invitation to tender for the roofing works that had been extended to Draper & Nichols (and then only on 12th January 2012), despite the significant difference this made to the overall contract price and timing; and

c. The very limited instruction given by Mr Sharma to the architect, Ms Jury, when preparing that initial schedule of works. She had not been asked to decide whether the roof needed to be replaced, and had no access to the flats on the upper floors in order to determine the extent of any water ingress. The basis on which the tribunal had been asked to and did approve the works (and their cost) in 2011 was therefore fundamentally flawed.

17. On behalf of the respondent freeholder Mr Pennington Legh stressed the importance of a valid section 22 preliminary notice to the tribunal's jurisdiction to hear an application under section 24. Unless the need for service could be dispensed with on the grounds that it was not practicable then unless there was a valid notice no application under section 24 could be brought. A valid notice had to differentiate between remediable and irremediable breaches and, insofar as the former were concerned, the nature of the breaches had to be clearly identified and a sufficient time allowed in which the landlord could attempt to rectify them. In support of these propositions he quoted a passage from *Hill & Redman*[7] and the London LVT case of *Erogbogbo v Dawkin*[8].

18. Turning to the purported section 22 notice in this case, Mr Pennington Legh stated that paragraph A is a criticism of the state in which the property is, and that is capable of being remedied. As to B, the question of the wrong bank account was clearly capable of being remedied, and he understood that this was rehearsed at the October 2011 hearing. A

7 Para A[4682]

8 LON/00AH/LAN/2010/1, at [31–32]

letter from Barclays Bank dated 7th February 2012, i.e. the day before the hearing, was handed in by Mr Sharma.. It confirmed that about which reassurance had been sought for a long time, namely that funds in that account would be treated as held by London Land Securities Ltd as agent for the "clients", and that it could not be merged with any other account held by the company or treated as company funds.

19. The tribunal was also shown another letter dated 2nd February 2012 from Nirav Shah, private banking manager at an indecipherable branch or department of the Bank of Scotland, confirming that Mr & Mrs R Sharma of London Land Securities Ltd are in position as of that date to pay to the above Barclays account the sum of £495 284.40, and the funds should be available for payment upon signature of the contract in April 2012. The reference is to the intended building contract with Draper & Nichols (which had yet to be drafted).

20. The matters set out in this notice were breaches of positive covenants and therefore are remediable. The tribunal chairman observed that it was not simply a question of whether they were capable of remedy, in logic, but whether they were in practice capable of remedy within a reasonable period. That period, said Mr Pennington Legh, had to be stated in the notice. Ground C is insufficient. It was not sufficient in a formal statutory notice to rely upon unspecified matters and previous LVT hearings. Referring to the tribunal decision in *Erogbogbo*, he said that the LVT there found that it was not good enough to refer to "matters ongoing for over a year". The notice needs to be precise and give time for a remedy.

21. Here that became even more impossible because the application was issued at the same time as (or slightly earlier than)the section 22 notice may have arrived in the post.

22. Insofar as the justice of the case was concerned, and the steps taken by the freeholder to progress the major works, Mr Pennington Legh drew the tribunal's attention to the points made in paragraphs 26–30 of his skeleton argument. Criticisms of Mr Maunder Taylor's proposed management regime appear in paragraph 32 of the same document.

Findings

23. The tribunal can understand the frustration of the independent leaseholders that yet again the freeholder has demonstrated its inability to manage this building professionally. In its most recent decision the tribunal was certainly critical of the management competence of the freeholder. The evidence concerning :

a. The giving of deliberately limited instructions to Ms Jury,

b. The delay in seeking a price for the re-roofing work only in mid-January 2012 – when the freeholder's section 20ZA application had been sent to the tribunal office on 30th November 2011 – and to invite a quote just from the previous winning tenderer, and

c. As before, requesting information from the bank only at the very last minute,

did nothing to alter that impression in the freeholder's favour.

24. However, the appointment of a manager for cause is a serious matter, particularly where the request comes from a minority of the leaseholders who are therefore unable to apply to assume management through a leaseholder-controlled RTM company.

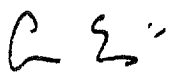
25. The tribunal has considered carefully the respective arguments in favour of and against the validity of the section 22 notice. It agrees that the breaches concerned are positive in nature, and therefore remediable in nature. There is a difference between a breach which is capable of remedy and one capable of remedy by "any person on whom the notice is served", as the latter might invite an assessment of the landlord's management experience and ability. On that argument a tribunal might determine that London Land Securities Ltd is simply incapable of remedying certain breaches, so that no matter what time is suggested as reasonable the task is beyond it.

26. However, fairness demands that a landlord be told precisely what is wrong and given some time in which to address all the problems or at least narrow the gap. If, as here, ground C does not descend to particulars and the notice is dispatched so that it will arrive on the day that the section 24 application is sent to the tribunal then it can hardly be described as a genuine notice, giving the landlord any opportunity to correct matters.

27. In these circumstances the tribunal finds that the letter dated 30th September 2011 is not a validly served preliminary notice. No-one sought to argue that it would not have been reasonably practicable to serve a notice on the landlord, so the tribunal lacks jurisdiction to deal with the application under section 24.

28. The tribunal is aware that the applicants intend to try again, so it restricts its comments on evidential matters to those stated above and shall address the merits of Mr Maunder Taylor's management plan and draft order when a fresh application is brought.

Dated 15th March 2012



Graham K Sinclair – Chairman
for the Leasehold Valuation Tribunal