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RESIDENTIAL PROPERTY TRIBUNAL (WALES)

LEASEHOLD VALUATION TRIBUNAL

Reference: LVT/0050/12/16

In the Matter of Hayes Point, Hayes Road, Sully, Penarth, CF64 5YA

In the matter of an Application under section 24 Landlord and Tenant Act 1987

APPLICANTS Peter Milford (1) Peter Daughton(2) Sabine Anderson(3)

RESPONDENT Avon Ground Rents Limited

Tribunal: Richard Payne, LLB M Phil
Roger Baynham FRICS
Kerry Watkins FRICS

Upon hearing Mrs M Mossop, Solicitor for the Applicants and Mr Jeff Hardman, Counsel for the Respondent at Southgate House, Cardiff on 22nd December 2016;

ORDER

1. It is ordered that the application to appoint a manager is dismissed.

Reasons for the tribunal's decision.

Background.

2. On 15th of December 2016 the tribunal received a letter from Mayfield Law dated 14th of December 2016 containing an urgent application (and enclosures) to appoint a manager at Hayes Point, Hayes Road, Sully, Penarth, CF64 5YA. Hayes Point is a substantial residential development comprising three main sections named Woodlands, Courtlands and Headlands in grounds of approximately 45 acres. There are around 236 residential apartments of varying sizes, and facilities such as an on-site gym and swimming pool. The Applicants are leaseholders of flats in Courtlands, Woodlands and Courtlands respectively. The letter accompanying the application said "The circumstances of the case are explained in the ground of the application and in the witness statement of Sarah Gregory. They require urgent action. In these exceptional circumstances we respectfully request the tribunal without the agreement of the parties, to hear the application at the start of the week commencing on 19th December and give less than 21 days notice of the appointed, date, time and place of the hearing of the application."

3. The application form, under the heading "Grounds of application" referred to a dispute as to the entitlement of Hayes Point RTM Company Ltd (HPRTM) to manage the premises. HPRTM had acquired the right to manage Hayes Point on 24 July 2014. In July 2015 the Respondent had purchased the freehold interest in Hayes Point from the previous freeholder Surelane Limited and HPRTM was named within the transfer documentation. In March 2015 the Court of Appeal's decision in Triplerose Ltd V 90 Broomfield Road RTM Company Ltd [2015] EWCA Civ 282 was promulgated. In essence the Court of Appeal held that references to 'the premises' or 'premises' or 'any premises' in other provisions of the Commonhold and Leasehold Reform Act 2002 were references to a single self-contained building or part of the building, and that accordingly a single RTM company cannot exercise the right to manage more than one property. In July 2016 the Respondent, with reference to the Triplerose judgement alleged that HPRTM was not legally entitled to manage the Hayes Point estate. The application form details how, in July 2016, the Respondent alleged that it retained the obligation to manage the estate and the legal right to do so and that it intended to appoint Y and Y Management. The Respondent alleged that HPRTM was interfering with the landlord's right to effectively manage the estate and had no legal authority to manage the estate.

4. The application form continued "*Since July 2016 HPRTM has continued to manage the estate and delivering all the services set out in the lease. It has considered its position and how to proceed in the best interests of its members. It is a not-for-profit company with no resources or desire to fight potentially long and protracted litigation. In the event that Triplerose makes it an invalid RTM company, the leaseholders believe the most practical way forward is to take steps to comply with Triplerose by registering three new RTM companies. In any event that the Respondent objects to those RTM claims the Residential Property Tribunal will decide whether the original RTM company or the new RTM companies have the right to manage."*

5. The next paragraph of the application form stated

   (4) "On 06.12.2016 the respondent has threatened to issue court proceedings for a declaration that it has retained the management functions of the estate. Further, on 13.12.2016 via its planned management company Y and Y Management has issued leaseholders with demands for the preceding six-month service charge period (The period in which HPRTM has been delivering services) and the future six-month period commencing 1 January 2017."

   (5) An order appointing a manager will preserve the status quo, HPRTM has managed the estate since 24.07.2014 under the supervision of Sarah Gregory. The new landlord purchased the freehold interest in July 2015 and did not raise any objection to HPRTM managing the estate until 12 July 2016. It is just a matter of time before the RTM is determined in the light of Triplerose. If the new RTM companies acquire the RTM it is intended that they will contract with HPRTM so that it continues to manage the estate (as their agent). Preserving the status quo will provide certainty for the lessees and continuity in provision of services. ***Without an order appointing a manager there will be chaos and confusion as to who is entitled to manage the estate."*** [Our emphasis]

6. It can be seen therefore that the application form moved from events in July 2016 to matters in December 2016 and the application was made upon an urgent basis the day after leaseholders received service charge demands issued by Y and Y Management. The Applicants asked the tribunal to list the matter for an urgent hearing. Upon the basis of the information in the application, the tribunal, by order of 16 December 2016, was satisfied that exceptional circumstances existed justifying the listing of the matter with less than 21 days' notice to the parties. The tribunal listed the matter for hearing on 22 December 2016 and ordered that the parties were to file witness statements and skeleton arguments by 12 noon on 21 December 2016.

7. Notwithstanding the Applicants' solicitor's letter of 14 December 2016 there was no witness statement from Sarah Gregory served with the application. An 8 page witness statement dated 19 December 2016 (and containing exhibits which in total numbered 177 pages) was received in hard copy by the tribunal on 21 December 2016 and had been served by letter of 20 December 2016 upon Avon Ground Rents Limited at 9:08 AM on 21 December 2016 (the Applicants' solicitor sent a proof of delivery confirmation slip to the tribunal.)

8. The Respondent filed written submissions drafted by Counsel Justin Bates and supporting materials on 21st of December 2016. The tribunal is grateful to both parties for the speed with which they prepared and provided comprehensive materials to assist in the determination of this matter.

Law

9. Under section 24 of the Landlord and Tenant Act 1987 ("the Act") an application may be made to the leasehold valuation tribunal for an order that a manager be appointed to carry out in relation to any premises to which this Part applies such functions in connection with the management of the premises, or such functions of a receiver or both, as the tribunal thinks fit.[1] The tribunal may only make an order in the circumstances set out in section 24(2). This lists a number of instances including at 24(2)(b) *"where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made."*

10. However before an application for an order under section 24 is made a preliminary notice under section 22 must be served (or be dispensed with by order of the leasehold valuation tribunal). The notice must be served by the tenant on the landlord and 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]

11. The notice itself must contain certain prescribed information as set out in section 22 (2). The notice must

[1] S.24(1) Landlord and Tenant Act 1987.
[2] S.22(1)(i)and (ii) the 1987 Act.

"(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 such steps for the purpose of remedying them as are so specified;…."

12. Section 22 (3) deals with dispensation and states that;
"*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."* [Our emphasis].

13. Section 24 (7) offers a saving provision as it states 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)."

Submissions and the hearing.

14. The Respondent had submitted that the tribunal did not have jurisdiction to appoint a manager because no valid section 22 notice had been served on it or indeed on HPRTM. The Respondent referred to the requirements of section 22(2) as set out above and stated that the purported section 22 notice was not a section 22 notice as it did not specify the matters to be remedied nor did it give any period of time let alone a reasonable period of time for them to be so remedied. Furthermore the Respondent submitted that the purported section 22 notice did not specify the grounds of application to the LVT by reference to section 24 (2).

15. The tribunal noted that the section 22 notice relied upon by the Applicants was headed "Landlord and Tennat Act" (sic), dated 14th of December 2016 and the grounds for the application were stated to be; "The grounds on which the tribunal would be asked to make such an order are set out in the enclosed application. The matters upon which the tenants would rely for the purpose of establishing the above grounds are set out in the enclosed application." This was a reference to the LVT application form which at page 6 had a heading "Grounds of application" and the substance of which is set out in paragraphs 3- 5 above.

16. The Respondent, in its written submissions stated that the LVT application form was for the purpose of starting a case whereas a section 22 notice was designed to enable the parties to avoid the case and they exhibited a model section 22 notice produced by the Leasehold Advisory Service as a contrast to the 'purported' section 22 notice relied upon by the Applicants.

17. The witness statement of Miss Gregory for the Applicants together with enclosures dealt with Miss Gregory's experience of property management and her suitability to be appointed as manager together with some detail upon the management of Hayes Point by HPRTM. However, since the jurisdictional point had been raised by the Respondent, it was incumbent upon the tribunal to deal with that matter first.

Applicants' case.

18. Mrs Mossop opened her case by noting that section 22 required the preliminary notice to be served on the relevant parties before an application for an order under section 24 was made. Mrs Mossop stated that the Applicants had sent out their section 22 notice at the same time as the application and it had therefore not been received or served before the application was made. She conceded that, to shortcut arguments about the validity of the notice, it was not served before the application had been made. Mrs Mossop therefore asked the tribunal to exercise its jurisdiction to completely dispense with the requirement to serve a notice under section 22 (3).

19. This was not an approach that had been urged upon the tribunal in the application papers but crystallised the issue to be decided as follows: **whether the tribunal was satisfied that it would not be reasonably practicable to serve a section 22 notice on the appropriate person and therefore should by order dispense with the requirement to serve a notice.**[3]

20. Mrs Mossop referred to paragraph 32-031 at page 492 of the Third Edition of Tanfield[4] which suggested that the dispensing power would appear to cover two main situations: where the landlord is missing and where the application is made urgently and an interim order is sought. Mrs Mossop argued that the latter was exactly the circumstances of this case and that the application had been issued as a direct result of the letter that leaseholders had received from Y and Y management dated 8 December 2016[5] that was accompanied by a service charge demand for the period of 1 January 2017 to 30 June 2017. The letter included the following paragraphs;

    "*… Please find enclosed a letter to RTM Company from the solicitor acting on behalf of the Freeholder. The legal costs of this action by the Freeholder will be charged to the service charge as this is a management issue and recoverable under the provisions of the lease. This will now hit every leaseholder financially and this is the reason why we offered to mediate in order to avoid this.*

[3] In accordance with the requirements of section 22(3) as set out in paragraph 12.
[4] "Service Charges and Management", 3rd edition, Tanfield Chambers, 2013.
[5] Exhibit 14c to the statement of Miss Gregory, page 102 of the Applicants' bundle.

Regrettably our offer was not taken up by the RTM company and the matter is now escalated and this legal action is now imminent.
In addition we have been instructed by our client Freeholder to commence legal action on each leaseholder who does not pay the service charges as per the enclosed invoice."

21. The solicitor's letter referred to was from Scott Cohen Solicitors dated 6 December 2016 and sent by email to Darwin Gray solicitors of Cardiff[6]. This letter referred to cooperation between the parties as being the most cost effective way forward in the transition of management and stated that Darwin Gray's client [presumably HPRTM] did not avail itself of the opportunity to meet by 10 November 2016 as requested. The letter stated

"*Under the circumstances our client requires an unequivocal acknowledgement from your client that the right to manage has not been acquired and confirmation that immediate steps will be taken to dissolve the company. If your client agrees with same, then our client will be willing to further meet to discuss management arrangements for the estate.*
In the absence of same kindly note that our client will be forced to issue court proceedings for the necessary declaration that our client has retained the management functions for the estate.
…… Our client will require confirmation of your client's position by 4 PM Friday, 9 December 2016 failing which proceedings will be issued without further notice."

22. Mrs Mossop stated that these communications were received by leaseholders on 13 December 2016 and that her firm Mayfield Law had been instructed on 14 December 2016 to make an application without delay for an interim order. The matter was urgent because service charge demands had been issued by Y and Y and yet there were competing service charge demands that had already gone out from HPRTM who were obliged to collect the service charge in accordance with its contractual obligation. She submitted that time was of the essence to get an interim application heard before Christmas and this is what made it impracticable to delay the application or to have given time for the freeholder to comply with any requests that the Applicants may have required. In answer to the tribunal's query as to why the application could not have been delayed for 24 or 48 hours, that is until a section 22 notice had been prepared and served, Mrs Mossop indicated that it was because the Applicants needed a hearing before Christmas and that they only had a postal address for the freeholder Avon Ground Rents who would need to be properly served. She submitted that there was no room for delay and the Applicants had endeavoured to serve a notice.

Respondent's case.

23. Mr Hardman made a number of technical points about the Applicants' compliance with the tribunal's order of 16th of December 2016 and the section 22 notice but in the event (the tribunal having been satisfied as to the receipt of Miss Gregory's

[6] Page 108 of the Applicants' bundle.

statement by the Respondent in accordance with the order) the tribunal was only concerned with his submissions upon the "urgency point" relied upon by Mrs Mossop.

24. Mr Hardman referred to the Applicant's contention that there would be chaos and confusion if a manager was not appointed by the tribunal. He rejected this but also suggested that any chaos and confusion would have been created by HPRTM and its Directors who had failed to reveal their position in the light of the issues raised by Triplerose. Mr Hardman submitted that in fact the dispute had "been rumbling on since at least July 2016" and submitted that the RTM company have been seeking to buy time until they are able to establish three separate RTM companies and that if they had revealed their true intentions earlier then the parties would not be in the position that they are now. He submitted that it was not the purpose of the LVT to circumvent the questions of lawfulness of the HPRTM Company and Miss Gregory's actions. He characterised the application to the LVT as "not urgency" but "convenience".

25. Mr Hardman then drew the tribunal's attention to detailed correspondence starting with a letter from Scott Cohen Solicitors to HPRTM dated 12th of July 2016.[7] This asserted in terms that, following Triplerose, that HPRTM has been carrying out management activities at the estate without the legal right to do so and that it was Scott Cohen's client as landlord who holds the management obligations for the estate. The letter stated that "*under the circumstances our client is immediately taking steps to take over the management of the premises. In the interest of the leaseholders of the estate it would be prudent for you to take steps to address this situation by co-operating fully both in a handover of all documentation, information and files relating to the management of the block and service charge funds held."* A response was sought within 7 days.

26. Mr Hardman referred to a further letter from Scott Cohen Solicitors to HPRTM dated 29th of July 2016[8] which amongst other things sought confirmation by 4 PM on 1 August whether it accepted that management rights were not held by HPRTM. The letter indicated that in the absence of the same that the freeholder intended to prepare new budgets for the collection of service charges upon the estate and would be notifying leaseholders independently of the present position. Mr Hardman pointed out that that is exactly what happened – service charge demands were issued in August 2016 on behalf of the Respondent. Mr Hardman referred us to a letter of 2nd of August 2016 from Scott Cohen to Mr Ian Rees Phillips, Counsel of Pump Court (who it is understood had been instructed upon a direct access basis by HPRTM). The letter amongst other things stated "*As previously indicated our client is quite surprised that the directors of the RTM company have not provided immediate cooperation in this matter to minimise the damage caused by the continuing unlawful acts of the company, especially as it now appears that they are in receipt of advice from counsel."* Mr Hardman stated that this letter was also dealing with concerns as to what would happen to funds received by the RTM Company and

[7] Exhibit 12a to Miss Gregory's statement, page 86 of the Applicants' bundle.
[8] Page 88 and 89 of the Applicants' bundle.

pointed out that the letter concluded by indicating that should HPRTM wish to issue proceedings then Scott Cohen Solicitors were instructed to accept service.

27. The tribunal's attention was drawn by Mr Hardman to a without prejudice letter of 27th of October 2016 from Scott Cohen Solicitors (privilege having been waived) to Darwin Gray solicitors referring to the latter's letter of 20 October 2016 but ending by stating that their client (the Respondent) was amenable to a meeting at its offices within the next 14 days and seeking dates so that the same could be arranged. There was a further without prejudice letter from Scott Cohen solicitors to Darwin Gray dated 2nd of November 2016 indicating that they had not yet had a response to the letter of 27 October but that their client required such a meeting to take place by 10 November 2016 and look forward to confirmation of dates for such a meeting. The letter concluded by stating that in the absence of such a meeting that their client would take the necessary steps to commence management of the estate and the necessary proceedings to obtain a declaration from the court that their client had retained the management functions in relation to the estate. Mr Hardman pointed out that although there had been reference in the correspondence in July to legal action this was the first indication that the Respondent would be seeking a declaration from the courts.

28. Mr Hardman referred to the application form and the reference to the letter of 6 December 2016 threatening to issue court proceedings. Whilst he stated that this was strictly correct he submitted that the tribunal's order of 16 December 2016 at paragraph 4 painted a picture erroneously that nothing had happened between July and December and that the Respondent had "turned up out of the blue". Mr Hardman emphasised that that was not the case and that the Respondent had been making its position clear since July 2016. Also within the Respondent's (unpaginated) bundle was a letter from HPRTM to RTM members dated 24th of October 2016. He described that this had been "leaked" to the Respondent and drew the tribunal's attention to the following paragraph;

> "*Legal advice has been that rather than fight a technical point in court and potentially spend a lot of money on legal fees, we are best advised to set up 3 new RTM companies to address the challenge that Avon have raised, while working towards the ultimate prize of obtaining the freehold from Avon which will take longer to achieve."*

29. Mr Hardman described that as the real objective of leaseholders. In conclusion upon the urgency point however, he noted that in the application it had been argued that a manager should be appointed to preserve the status quo and that without such an order there will be chaos and confusion as to who is entitled to manage the estate. He submitted that there was no chaos and confusion and the argument that a manager should be appointed to preserve the status quo is not a good enough reason to justify an urgent application. He submitted that it was not just and equitable to appoint a manager until HPRTM could set up three new RTM companies.

30. Mrs Mossop accepted that there had been correspondence going backwards and forwards since July 2016 but stated that it was only the week before the hearing that the dispute had escalated when the letters and service charge demands from Y and Y Management were threatening the leaseholders with legal action, and that that was a significant difference to the earlier correspondence. She maintained that the current position of the legal status of HPRTM was far from clear notwithstanding what the Respondent said about this, and pointed out that the Respondent had purchased the freehold and were aware from the relevant Land Registry document TP1 that HPRTM were named as the relevant RTM Company. Mrs Mossop referred to an email from the legal department at Avon Estates dated 25th of November 2015 to certain leaseholders advising that all repair matters were dealt with by the RTM company and referring the leaseholders to Miss Gregory.[9]

Decision.

31. The tribunal carefully considered all of the relevant evidence before it and the oral and written submissions. Although a technical point had been taken by Mr Hardman about the Applicants' compliance with the tribunal's order of 16th of December 2016, the tribunal was satisfied, as previously indicated, upon consideration of a proof of delivery slip, that the Applicants were not in breach of the order. The tribunal did not consider that the passage in Tanfield to which we were referred by Mrs Mossop was of much assistance as it simply re-states the legal position.

32. With regard to the validity of the notice under section 22, and the tribunal's power under section 24(7) to make an order notwithstanding defects in the notice, the tribunal determine that the notice was defective in that it (i) failed to set out the grounds of the application and comply with the requirements of section 22(2) and (ii) that the notice had not been served on the landlord before the application for an order under section 24 had been made (this latter point was conceded by Mrs Mossop). It follows that in any event section 24(7) can provide no assistance to the Applicants as it specifically applies to a case where an application for an order under this section was **preceded** by the service of a section 22 notice. That was not the case here as the application and the notice were served at the same time.

33. With regard to the principal matter, the application to dispense with the requirement to serve a notice under section 22(3), the tribunal was not satisfied that it would not be reasonably practicable to serve such a notice. The case has to be considered in the round, taking into account the full chronological sequence of events. There is no doubt that Mrs Mossop was instructed at short notice and acted expeditiously to prepare an application to the tribunal with her clients facing the imminent threat of legal proceedings and therefore considering the matter to be urgent. The lateness of the instructions however and the urgency of the situation in mid-late December 2016 has to be placed into context.

[9] Page 125 of the Applicants' bundle.

34. The fact that the Respondent may have initially recognised HPRTM and referred leaseholders to them on repair issues is of no assistance to the Applicants after the correspondence from the Respondent's solicitors dated 12th of July 2016. From that time the legal issues between the parties and the Respondent's contention that it is obliged by the covenants in the lease to manage the premises at Hayes Point were at large. The application form to this tribunal moved from July 2016 to legal threats from the Respondent made on 6 December 2016. Having heard the submissions from both sides' legal representatives, and had the opportunity to consider the correspondence in detail, the tribunal is satisfied that the issues between the parties had been under discussion and the subject of legal advice on both sides for more than 4 months. The Applicants did not offer any explanation as to why a section 22 notice could not have been prepared at an earlier time and in the tribunal's judgement **it would have been reasonably practicable** for the Applicants to have served a section 22 notice upon the landlord Respondent before 14th December 2016 and certainly at any time in October or November 2016 when the issues between the parties had been the subject of extensive correspondence and advice. The threat of legal action from the Respondent had been made before December 2016, indeed the letter from Scott Cohen Solicitors to Darwin Gray of 2nd November 2016 had indicated that declaratory relief would be sought.

35. With regard to the 24th of October 2016 letter from HPRTM to leaseholders (cited at paragraph 28 above), the tribunal attach no weight to the comments about obtaining the freehold (since this is a right that leaseholders are perfectly entitled to explore), however it does demonstrate that advice had been received at that stage that a potential way forward was to set up three new RTM companies. This proposed approach does not appear to have been shared at any time with the Respondent until the service of the application form. The tribunal also note that, as set out above, the Respondent had offered to meet with HPRTM in November 2016 but there was no evidence before us that any meeting took place.

36. The Respondent was entitled to take the approach that it did and to seek clarity upon the management arrangements at Hayes Point in the light of the Court of Appeal decision in Triplerose. The tribunal has determined that it would have been reasonably practicable to have served a section 22 notice before the matter became critical in the Applicants' eyes in December 2016. The Applicants' failure to have taken such a step at an earlier time cannot, impliedly, be relied upon when arguing that it is not reasonably practicable to serve such a notice at a later date. The question of reasonable practicability cannot be confined to the first two weeks of December 2016 given the factual background and circumstances in this particular case as set out earlier in this decision.

37. Further, although Mrs Mossop was instructed at short notice and wanted to secure a hearing before Christmas 2016, it would still, in our determination and against the background of the case, have been reasonably practicable to have served a compliant section 22 notice in December, even as late as December 13th or 14th 2016, and to have applied for an interim hearing date after the service of the notice. Even if that hearing date would then have been listed in early January 2017 the fact

of a correctly served notice and the application to the LVT would have placed the Respondent on notice of the action and would have enabled the substantive issues to be argued.

38. For those reasons, the application to appoint a manager is dismissed.

39. There were a number of interested leaseholders in attendance at the hearing. The tribunal decided this matter upon the relatively narrow technical points above and in particular in relation to whether or not dispensation to serve the section 22 notice should have been granted. Although within the tribunal's papers there were competing submissions as to the likely practical effects on the management of the estate depending upon who undertakes that management, it is important to stress that the tribunal heard no evidence upon these matters and therefore could not and does not make any decision or comment upon whether or not there will be "chaos and confusion" at Hayes Point if Miss Gregory is not appointed as a manager. The tribunal likewise did not get to the stage of considering the relative merits of Miss Gregory or Mr Gurvits as Manager and so makes no decision or comment upon this nor upon the management of the premises by HPRTM.

DATED this 20th day of January 2017

Richard Payne
CHAIRMAN