



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

Case reference : **CHI/00HG/LVM/2020/0004**

Property : **Charles Cross Apartments
22 Constantine Street
Plymouth
PL4 8AF**

Applicant : **Mr D Gerrard (Tribunal-appointed
Manager)**

Representative :

Respondents : **CX Freehold Limited
The Lessees**

Representative :

Type of application : **Discharge of Appointment of
Manager and ancillary applications**

Tribunal member(s) : **Judge D. Agnew**

Hearing : **By telephone on 10 August 2020**

Date of decision : **10 August 2020**

DECISION

Background

1. On 23 June 2020 the Applicant, Mr D. Gerrard, who is the Tribunal-appointed manager of Charles Cross Apartments, 22 Constantine Street, Plymouth PL4 8LF (“the Property”) applied to the Tribunal for the discharge of the Management order dated 2 January 2020 by which he was appointed manager under section 27 of the Landlord and Tenant Act 1987 (“the 1987 Act”).
2. The application was made in response to an invitation to do so by the Tribunal as he had reported that a RTM Company (22 Constantine Street RTM Company Limited) had been formed and was due to acquire the Right to manage the Property as from 1st September 2020. The RTM Company intends to appoint Mr Gerrard’s firm as managing agent in respect of the Property and, in those circumstances, Mr Gerrard sought the Tribunal’s directions.
3. The Tribunal’s response was to ask Mr Gerrard to issue an application for discharge of the Management Order because on the face of it, as the RTM Company would have the statutory right to manage the property after 1st September 2020 and the Tribunal-appointed manager would have no right to carry out management functions save with the agreement of the RTM Company under sections 96(2) and 97(2) of the Commonhold and Leasehold Reform Act 2002 (“the 2002 Act”) respectively, it would be otiose and confusing for a Tribunal-appointed Manager to remain in place after the RTM Company had acquired the right to manage. However, the Tribunal would need to consider the matter fully in the light of any objections or representations from any of the lessees or the freeholder. Such an application by the Manager would afford that opportunity.
4. The application prompted Mr Jason Short, who represented himself to be a Director of the freeholder, CX Freehold Limited, to make an application himself for a variation of the January 2020 Management Order and to oppose the discharge of the Management Order.
5. The variation sought by Mr Short is to revoke that part of the Management Order which concerns the collection of ground rent. As referred to in the decision of January 2020 a provision for the Tribunal-appointed Manager to collect ground rent on behalf of the freeholder is not a provision that is routinely made on the appointment of a manager as the ground rent is an asset that belongs beneficially to the freeholder and the lessees do not have any interest in it in the way that they do for service charges. The circumstances in

this case, however, were that Mr Jason Short's brother, Mr James Short, who effectively ran the freehold company had suddenly and tragically died, leaving a vacuum of management for the Property. The Tribunal were asked by the representatives of the freeholder to give the Manager authority to collect the ground rents from the period of his appointment onwards. It was further agreed that due to the complex and uncertain financial situation caused by the death of Mr James Short those ground rents collected by Mr Gerrard would be held in a separate account on trust pending agreement as to how they should be disbursed or further order.

6. It was specifically stated in the January 2020 decision and order that the Manager would have no power or responsibility to collect either ground rent or unpaid service charges that had been demanded for any period prior to the Manager's appointment. The freeholder had already instructed a firm to pursue these arrears. However, Mr Gerrard told the Tribunal that the company instructed by CX Freehold to collect historic ground rent and service charge arrears had agreed to pay over to him such monies that were collected and these funds too Mr Gerrard would hold on trust pending agreement as to their disbursement or further order.
7. Mr Jason Short now seeks to reverse the arrangement regarding ground rent mainly because ground rents are the only potential source of income for the freehold company. Without access to such funds, Mr Short says, he is unable to incur the cost necessary to make the annual return to Companies House or to instruct the necessary work to be done to comply with Tribunal Directions with regard to a current application before the Tribunal for a determination under section 27A of the Landlord and Tenant Act 1985 with regard to the reasonableness and payability of service charges for 2018/19 and 2019/20 up to the date of the Management Order coming into effect.
8. Both Mr Gerrard's and Mr Short's applications were copied to all lessees who were required to submit any opposition or representations with regard to them to Mr Gerrard who was then required to prepare a hearing bundle for the hearing on 10 August 2020. Mr Jason Short made submissions in opposition to the discharge of the Management Order. Representations were also received from lessees, Mr E Thurston, Mr R Clarke and Mr and Mrs Lippett. These objections concerned Mr Short's application with regard to ground rent collection. They strongly opposed CX Freehold Limited being involved directly with the lessees in the collection of ground rent. They made no other representations.

9. Mr R Carter, who not only spoke as a representative of his daughter who is a long lessee of one of the apartments at the Property but also the Company Secretary of the RTM Company, gave a much fuller response to the applications. He confirmed that he was very happy with Mr Gerrard's management of the Property since his appointment and confirmed that the RTM Company intended to appoint Mr Gerrard's firm as its managing agent going forward. Mr Carter's main concern was to keep in place the holding of ground rents already received and receivable in the future on trust as in the Management Order.

10. I must now deal with a further application made by Mr Short and received by the Tribunal on 5 August 2020. This seeks an order that should Mr Gerrard's appointment be discharged that another manager be appointed in his stead to manage the Property in place of the RTM Company. I refused to accept that application and explained to Mr Short why. First, it came very late in the day not giving any other interested party a reasonable amount of time to respond. Secondly, it has no reasonable prospect of success. The application misunderstands the effect of the provisions of the 2002 Act with regard to the right to manage. The statute specifically provides that once it has acquired the right to manage all the management functions of the landlord are to be exercised by the RTM Company. A Tribunal-appointed Manager thereafter has no right to exercise any of those management functions unless by agreement with the RTM Company. The Tribunal has no jurisdiction to interfere with those statutory provisions. In this case 76 out of 93 long lessees have opted to acquire the right to manage the Property themselves through the medium of the RTM Company. The only way of preventing that would have been for Mr Short or some other interested party to serve a counter notice within the period stated on the Claim Notice which he did not do. His application is therefore doomed to failure and it would be wrong to postpone the other applications to allow this one to proceed as all concerned need certainty as to what will happen come 1st September 2020.

The hearing

11. Due to the Covid-19 pandemic and the resulting exceptional procedural provisions, the hearing took place by telephone before a Tribunal Judge alone but with the proceedings being recorded.

12. Mr Jason Short confirmed that the freehold company, CX Freehold Limited was still in existence, was not in

Receivership or Administration and that he had been appointed as a Director of the company.

13. Mr Gerrard confirmed that he held approximately £5,600 in the trust account in respect of ground rent receipts for the period under his Management. Some 27 lessees were still to pay the ground rents for October 2019 which had been demanded in November 2019. He also confirmed that he had received no monies from the firm instructed by the freeholder to collect historic service charges or ground rent save for three instances of service charges erroneously paid to them relating to the period of Mr Gerrard's management. Those three payments had properly been credited to the service charge account.
14. Although I had not seen any paperwork relating to the right to manage I was assured by Mr Carter that all the necessary technical requirements had been complied with and copies of the documentation had been supplied to the Tribunal and Mr Gerrard. The RTM Company has 76 members, well over the 50% required by statute. I have proceeded on the assumption that the technicalities were complied with. No one has suggested they were not. Mr Short accepted that he did not serve a counter notice within the prescribed time limit. In those circumstances the RTM Company will, in accordance with the provisions of the 2002 Act acquire the right to manage the Premises on 1st September 2020.

The objections in more detail

15. I will deal with the objections of Mr Thurston, Mr Clarke and Mr and Mrs Lippett first. As stated above, they seek to avoid a situation where CX Freehold Limited resume responsibility for the collection of ground rent. There is reference to the company's aggressive and bullying tactics when seeking to recover payment. However, they did not supply me with any evidence of these accusations and I do not know whether they amount simply to letters threatening legal proceedings if payment is not made or something worse.
16. Mr Short's objection to the discharge of the management Order is set out in a letter dated 20 July 2020. He is happy with the way Mr Gerrard has managed the Property and he wishes the Management Order to subsist for its full term of 3 years rather than less than one year as proposed. He questions what there is to be gained if Mr Gerrard is to be appointed as agent for the RTM Company. His authority to act, not stemming from the Tribunal but from lessees in control of the RTM Company who have a vested interest in managing the Property to their advantage, would be diminished. He thinks (erroneously) that the RTM Company

will become responsible for pursuing historic service charge debts which, he says, some of those lessees have incurred.

17. Mr Carter wishes the current Management Order to continue so that the requirement for ground rent to be collected and held on trust by Mr Gerrard should continue. He seeks this because he considers that once the Tribunal has determined the service charges for 2018/19 and 2019/20 the lessees will be in a position to know whether any uncommitted service charges are due to be paid to the RTM Company and/or whether lessees are owed refunds of service charges overpaid. The amount currently being held by Mr Gerrard on trust is a relatively modest £5600 but he asserts that if this is paid to CX Freehold it will simply disappear and will not be available to be credited to the service charge account or repaid to lessees. Mr Carter asserts that CX Freehold have a “statutory duty” to collect service charge arrears and to pay them over to the leaseholders’ service charge accounts.

Decision

18. Although second in time, Mr Short’s application to vary the existing Management Order relating to ground rent collection and holding logically should be decided before the application to discharge the Management Order because it relates to the Order as it currently exists. However, the two applications are inextricably interlinked because if the Management Order is discharged in total there is no need for a variation because there will no longer be any authority for Mr Gerrard to hold the ground rent on trust and he will have no further authority to collect arrears of ground rent incurred during his management. If the Management Order is not discharged in any way at all then on the face of it Mr Gerrard can continue to hold the ground rent funds he has already collected on trust but he can only exercise any management powers by agreement with the RTM Company after 1st September 2020. Mr Gerrard would then wear two hats: one as Tribunal-appointed manager and the other as the managing agent for the RTM Company. This would also be the result if the Management Order were discharged in every particular save for the appointment of Mr Gerrard as Tribunal-appointed manager and the requirement to collect ground rents and hold them on trust.
19. In my view it is necessary for me to consider what is the right situation to bring about going forward from 1st September 2020 which is less than three weeks away. Then, by statute, the RTM Company takes over the management functions of the freeholder. Save for the complication of the ground rents being held in trust and the unpaid ground rents that have been demanded there would be nothing left for the Tribunal-appointed manager to do without the agreement of the RTM

Company. If he were not discharged as Tribunal-appointed manager he would wear two hats: one as Tribunal-appointed manager and the other as managing agent for the RTM Company. There would be no clear authority for his actions. The lessees would understandably be confused. Thus, if it were not for the complications concerning ground rent it would clearly be right to discharge the Management Order completely.

20. Do the complications concerning ground rents affect that position? In my view they do not for the following reasons.

21. First, Mr Gerrard was only given the power to collect ground rents at the request of those representing CX Freehold Limited. Again, the ground rent monies recovered as a result of demands issued by Mr Gerrard were ordered to be held by him on trust by agreement with those representing the freehold company. It was envisaged that the Management order would last for three years during which time one would hope that the confused financial situation would have clarified and the sums could either have been disbursed by agreement or, if necessary, by an order of the court or tribunal. The fact is that the Management Order has become otiose by the acquisition of the right to manage by the RTM Company far earlier than was envisaged when the Management Order was made and the financial situation has not yet crystallised. The Tribunal is due to determine the last service charges levied prior to the Management Order being imposed some time next month. That will hopefully be a further step towards finalising the financial position but from what I have heard there may well be fierce arguments ahead and it is not going to be easy to establish the true financial position which will probably involve some serious and expensive forensic accounting evidence.

22. The amount of ground rent currently held on trust is a relatively modest £5,600. Even if all the ground rents were paid as levied to date by Mr Gerrard that amount will only increase to £8,300 less costs of recovery. Mr Short says that without access to these funds the company cannot afford to file the annual return to Companies House or pay for the assistance necessary to respond to the lessees' outstanding section 27A application. Mr Carter fears that if the funds are released to CX Freehold, that will be the last the lessees will see of it.

23. In my judgment, it is necessary to consider the legal analysis of what ground rent is. It is an asset of the freeholder to which it is entitled as consideration for granting the long leases to the tenants. It has nothing to do with service charges and this distinction must be clearly borne in mind. The

freeholder is beneficially entitled to the ground rents. It is not obliged to hold them on trust (cf service charges which are statutorily held on trust). When paid the money becomes a general asset of the freeholder which it is entitled to spend as it wishes and, if not spent, is available to all general creditors. What Mr Carter is seeking to do by prolonging the holding of these monies on trust, is, in effect, to ring fence those monies so that they are available to be paid to the lessees if they can prove that monies are owed to them by way of uncommitted service charges or refunds of overpaid service charges. That would effectively give the lessees preference over other creditors. That cannot be right. The provisions to that effect in the Management Order were a convenient way of dealing with the matter with the agreement of the freeholder but once that agreement has been withdrawn, as it now has by Mr Short, in my view the provisions cannot be prolonged and the Management Order should be varied accordingly.

24. Although I have no jurisdiction to order it, I would hope that once released to CX Freehold the £5,600 will be put to the use Mr Short says it is required for, namely to pay for services to file the company's annual return and to comply with the Tribunal's directions in the section 27A application. I suspect that money will soon be used up.
25. Turning now to ground rent recovery in respect of the unpaid service charges claimed by Mr Gerrard and future recovery of ground rents for the reasons given in paragraph 23 above in my judgment these should henceforth be for the freeholder to pursue and so the Management Order will be varied to that effect before it is discharged. There should be little or no dispute as to whether ground rent has been paid. It is a fixed amount of £100 per annum. There is no question of the landlord having to account to the lessee for the money: it is the landlord's by right. If a lessee does not pay ground rent when demanded they must expect to receive letters before action. If ground rent is not paid then, ultimately, the landlord's sanction is to forfeit the lease. I know from experience that lessees sometimes take umbrage at the suggestion that proceedings might be taken to forfeit their lease but often the landlord is simply asserting what the law says he is entitled to do. I do not know what has led Mr Thurston, Mr Clarke or Mr and Mrs Lippett to complain of CX Freehold's tactics as being aggressive and bullying because they have not given me any examples but if the freeholder or its agents have overstepped the mark in the past they must be particularly careful not to do so in future. The County Court judge would take the matter very seriously if that were to be the case.

26. That brings me to historical arrears of ground rent and service charges (incurred before the Management Order). Although Mr Short says that no clear direction was given by the Tribunal concerning historic arrears, the Tribunal did make it perfectly clear that the Management Order had no affect upon those debts. The freeholder was thus perfectly entitled to enforce payment of such arrears. All the Order said was that if payment of these sums was paid to Mr Gerrard by Husband Collections Limited (the freeholder's agent) in accordance with the informal arrangement he had with them then he must hold them in trust as per the agreement for current ground rent payments. There is nothing to stop CX Freehold from pursuing those historic debts through the Courts. They were demanded by CX Freehold Limited and are payable to that company subject to any adjustments as a result of Tribunal determinations. Insofar as the payments are required to pay for actual expenditure (approved by the Tribunal where appropriate) that part of any service charge payment is properly retainable by the freeholder as it is in re-imbusement of approved or unchallenged expenditure. Where an element of the sums recovered are referable to reserve fund payments or to on-account charges which have not been fully expended then that part of monies recovered should be paid into a separate account and held on trust for the lessees. It would seem right that this should then be paid to the RTM Company for credit to the service charge account. This should not be too difficult to work out if there are proper accounts for the years in question as these should show what has been demanded, what expended and the balance of any reserve fund. There is, however, no statutory duty on the part of the freeholder to collect historic debts as Mr Carter asserts in his response to the applications.

27. In conclusion, the Management Order shall be varied forthwith to revoke the requirement for the Manager to collect ground rents and to hold the funds on trust and the order of 2 January 2020 and the Management Order will then be discharged in full with effect from midnight on 31 August 2020.

28. Having discussed the arrangements for the winding up of the Management Order with Mr Gerrard there will be an order :-

- a) To approve the Applicant's fees (in addition to his normal, approved, fee structure) for this application and the winding up of the Management Order to be paid from the service charge account
- b) To provide for the manager to prepare a final account of sums received and expended by way of service charge during his period as manager

- c) To provide for the assignment to the RTM Company of contracts
- d) To assign to CX Freehold Limited prior to the discharge of the Management Order the right to collect unpaid ground rents demanded for the twelve months from October 2019
- e) Prior to the discharge of the Management order to transfer to CX Freehold Limited the monies standing to the credit of the trust account for paid ground rents
- f) Assign to the RTM Company the right to recover unpaid service charges demanded during the currency of the Management Order

An order to this effect will accompany this decision.

- 29. I am satisfied that the discharge of the order appointing Mr Gerrard will not result in the situation at the property reverting to how it was before the order was made as Mr Gerrard will continue to manage the property and that it is just and convenient to discharge the order.
- 29. Finally, I would like to take this opportunity of thanking Mr Gerrard and his staff for all their hard work and efforts during the period of the Management Order. It was a daunting task for him to take over at a very difficult time but he has succeeded in righting the ship and has gained the approval of the freeholder and at least 76 of the lessees who are members of the RTM Company and that is no mean feat.

Dated the 10th August 2020

Judge D. Agnew.

Appeals

1. A person wishing to appeal this decision to the Upper Tribunal (Lands Chamber) must seek permission to do so by making written application to the First-tier Tribunal at the Regional office which has been dealing with the case.
2. The application must arrive at the Tribunal within 28 days after the Tribunal sends to the person making the application written reasons for the decision.
3. If the person wishing to appeal does not comply with the 28-day time limit, the person shall include with the application for permission to appeal a request for an extension of time and the reason for not complying with the 28-day time limit; the Tribunal will then decide whether to extend time or not to allow the application for permission to appeal to proceed.
4. The application for permission to appeal must identify the decision of the Tribunal to which it relates, state the grounds of appeal, and state the result the party making the application is seeking