LEASEHOLD VALUATION TRIBUNAL

Case number : CAM/33UF/LOA/2005/0001

Property	:	**Trafalgar Court, 42 Cromer Road, Mundesley, Norfolk**
Application	:	An order that the RTM company is to acquire the right to manage the premises [CLRA 2002, s.84(3)]
Applicant	:	Trafalgar Court RTM Company Ltd, of 70 Tudor Road, Hampton, Middlesex TW12 2NF
Respondents	:	**The Receiver & Manager appointed by the LVT**, Mr Robert Wells, of Robert Wells Property Agents, 2 Duke Street, Norwich NR3 3AJ **The freeholder**, London Land Securities Limited, of 70 Tudor Road, Hampton, Middlesex TW12 2NF **The management company named in the lease**, Trafalgar Court (Mundesley) Management Company Ltd, of 70 Tudor Road, Hampton, Middlesex TW12 2NF
Cross-Application	:	If the RTM Co succeeds in its application, for an order for the appointment of Robert Wells as Receiver & Manager under LTA 1987, s.24; and for an order that the notice requirements under s.22 be dispensed with [LTA 1987, ss.22 & 24]
Cross-Applicants	:	**Crispin Lambert** (on behalf of One Task Limited) ..... Flat 2 **Alan Walter Roper** (& on behalf of Wherry Publishing Limited) ..... Flats 18 & 25 **Eric Pooley** ..... Flat 29

DECISION

Handed down 24th February 2006

Hearing date	:	Friday 27th January 2006, at Norwich
Tribunal	:	**G K Sinclair (Chairman), J R Humphrys FRICS, & R W Marshall FRICS FAAV**
For Applicant	:	**Leroy Bunbury** (counsel)
For Respondents	:	**Stan Gallagher** (counsel) instructed by Cozens-Hardy & Jewson, Norwich (Sarah-Jane Inglis)

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Introduction and decision

1. The Tribunal has before it two applications :

   a. An application by the RTM company under section 84(3) of the Commonhold and Leasehold Reform Act 2002 for a determination that it was on the relevant date entitled to acquire the right to manage the relevant premises (which is opposed); and

   b. A cross-application by three of the leaseholders that, if the RTM company were to succeed in its application, the tribunal should nevertheless order the re-appointment of Mr Robert Wells as Receiver & Manager under section 24 of the Landlord and Tenant Act 1987, and for an order that the notice requirements under section 22 be dispensed with.

2. The tribunal was assisted by the filing of witness statements on behalf of the RTM company, the Receiver & Manager, and the cross-applicant leaseholders. It is particularly grateful to counsel on both sides, in a case where some new ground was being explored perhaps for the first time, for the cogency of their written skeleton arguments and their oral argument. Both parties were well served by their legal representatives.

3. For the reasons which follow the tribunal has already ordered that the RTM company's application be dismissed and that the Receiver & Manager may recover his reasonable costs of the application, assessed by it in the sum of £7,464.00. As the RTM company's

application was dismissed the tribunal was not required to make any separate order on the leaseholders' cross-application.

The RTM company's application

4. By application dated 4th November 2005 the RTM company seeks a determination that on the material date, viz 18th August 2005, it was entitled to acquire the right to manage the premises at Trafalgar Court, Mundesley. On that date the claim notice under section 79 of the Act was served upon the Receiver & Manager, the freeholder and the defunct former management company.

The Counter-notice and Response

5. By a counter-notice dated 19th September 2005 and served under section 84 of the Act the Receiver & Manager alleged that the RTM company was not so entitled because :

   a. Schedule 6 to the Act excludes the premises from the right to manage provisions contained in Chapter 1 of Part 2 thereto because the internal floor area of the non-residential parts exceeds 25% of the internal floor area of the premises taken as a whole

   b. The requirement of section 72(1)(c) of the Act has not been met in that the number of flats held by qualifying tenants is less than two thirds of the total number of flats contained in the premises

   c. The requirement of section 79(5) of the Act has not been met in that the membership of the RTM company on the relevant date did not include a number of qualifying tenants of flats contained in the premises which was not less than half of the total number of flats so contained.

6. By his Response to the RTM company's application to the tribunal under section 84(3) the Receiver & Manager further alleged that, if not already dismissed on any of the above grounds, the application should be dismissed as an abuse of the process of the tribunal.

Relevant law

7. Chapter 1 of Part 2 of the Commonhold and Leasehold Reform Act 2002 gives qualifying tenants of leasehold premises the right to manage their premises if certain criteria are

met, namely if :

a. they consist of a self-contained building or part of a building, with or without appurtenant property,

b. they contain two or more flats held by qualifying tenants, and

c. the total number of flats held by such tenants is not less than two-thirds of the total number of flats contained in the premises.[1]

8. Schedule 6 excepts certain premises from these provisions. In particular, paragraph 1 provides :

(1) This Chapter does not apply to premises falling within section 72(1) if the internal floor area –
  (a) of any non-residential part, or
  (b) (where there is more than one such part) of those parts (taken together), exceeds 25 per cent of the internal floor area of the premises (taken as a whole).

(2) A part of premises is a non-residential part if it is neither –
  (a) occupied, or intended to be occupied, for residential purposes, nor
  (b) comprised in any common parts of the premises.

(3) Where in the case of any such premises any part of the premises (such as, for example, a garage, parking space or storage area) is used, or intended for use, in conjunction with a particular dwelling contained in the premises (and accordingly is not comprised in any common parts of the premises), it shall be taken to be occupied, or intended to be occupied, for residential purposes.

(4) For the purpose of determining the internal floor area of a building or of any part of a building, the floor or floors of the building or part shall be taken to extend (without interruption) throughout the whole of the interior of the building or part, except that the area of any common parts of the building or part shall be disregarded.

9. In order to exercise their right to manage the premises at least the required number of leaseholders must set up a right to manage (or RTM) company as a company limited by guarantee. The regulations affecting the establishment and operation of RTM companies are quite strict.[2] Before making a claim the RTM company must give notice to each person who, at the material time is a qualifying tenant, inviting them to participate in the company.[3] Section 79(5) requires that membership of the company must include not less than half the relevant qualifying tenants on the "relevant date".

1 S.72(1)

2 See s.74 and the RTM Companies (Memorandum and Articles of Association) (England) Regulations 2003

3 See s.78

10. Section 75 defines "qualifying tenant". For the purposes of this application it is one who holds under a long lease, defined in s.76(2)(a). So far as the "relevant date" is concerned, section 79(1) refers to the date on which notice was given. In the instant case that was 18th August 2005.

11. The next step, not earlier than 14 days after giving notice of invitation to participate, is the giving notice of the claim to the freeholder, to any party to the lease other than in the capacity as landlord or tenant, and to any manager appointed under Part 2 of the Landlord and Tenant Act 1987.[4] This claim notice must include the particulars set out in section 80 and in the regulations made under the Act.[5]

12. By section 84 of the Act a person on whom such a claim notice has been served may, by the date specified in the notice, give a counter-notice which either admits that the RTM company was on the relevant date (i.e. the date of giving notice) entitled to acquire the right to manage the premises or alleges that, by reason of a specified provision of that chapter of the Act, the RTM company was on that date not so entitled.

13. If the counter-notice denies the RTM company's entitlement then by section 84(3) the company may apply to a Leasehold Valuation Tribunal for a determination that it was on the relevant date entitled to acquire the right to manage the premises.

Discussion — live issues

14. As Mr Bunbury demonstrated, there are 24 qualifying tenants and there are 24 flats. 14 of the 24 are members of the RTM company, so the Act's requirements clearly appear to have been met. There is therefore no merit in the Counter-notice's second and third grounds of opposition. In fairness it should be recorded that Mr Gallagher, counsel for the Receiver and Manager, stated that upon further consideration he did not pursue those points. The only live issues are therefore Schedule 6 and abuse of process.

Schedule 6

15. On behalf of the Receiver and Manager Mr Gallagher produced plans and a calculation

4 See s.79

5 See the Right to Manage (Prescribed Particulars and Forms) (England) Regulations 2003, SI 2003/1988

which he said demonstrated that the undeveloped part of the building comprising the ground floor west wing (previously the ballroom, kitchens and appurtenant parts of the former Grand Hotel) constituted 532.89 m^2 or 31.77% of the gross internal area., and that the whole of the undeveloped area is neither common parts nor parts occupied or intended to be occupied for residential purposes.

16. The calculation did not include some of the basement areas which had been inspected by the tribunal on at least one previous occasion and were then seen neither to be in residential use nor to form part of the common parts to which leaseholders had legitimate access. However, after Mr Wells (the Receiver & Manager) had carried out a further calculation off the plans Mr Gallagher advised that, even if the basement areas were to be included within the residential or common parts, the undeveloped section of ground floor was still in excess of 28.5% of the gross internal area .

17. On behalf of the RTM Company Mr Bunbury was not in any position to provide an alternative calculation. Indeed the Receiver & Manager had invited the RTM Company to agree to a joint survey of the property but it had declined.

18. Mr Bunbury accepted that the ground floor area which had been intended for the construction of a further eight flats was the part of the premises in issue, but he argued that given the history of this matter the Receiver & Manager was fully aware that planning permission had been granted for residential purposes. No further application had been made for change of use, certainly so far as the Applicant was concerned. The fact that the undeveloped area is not presently in a state for residential occupation does not in itself, he said, exclude the possibility that it may be intended for occupation for residential purposes. He submitted that Schedule 6 para 2(a) envisaged two clear possibilities. The first is that the relevant part is not currently occupied for residential purposes, so clearly occupation on a commercial basis, or some other non-residential basis, would take it outside the Chapter. The second possibility in which part may be deemed to be non-residential is where the relevant part is not currently occupied but there is an intention that it is to be occupied in the future on a non-residential basis. If the landlord intended to attract commercial occupation when the works were completed then that intention

would clearly prevent that part of the premises being subject to the RTM provisions.

19. Mr Bunbury argued that the qualifying rules under the Schedule are the same as under collective enfranchisement under the 1993 Act, and that it is applicable and appropriate that reference is made to an authority on enfranchisement. He referred the Tribunal to paragraph 21-08 of *Hague on Leasehold Enfranchisement* (4th Edition) :

> The word "intended" is not defined. It is considered that a previously occupied residential flat which has been left vacant, even for a long time, will *prima facie* be included as residential premises. In order to rebut the presumption, it would be necessary for the landlord to prove that an intention has been formed to change to non-residential use in the future. In the case of premises without any identifiable existing or previous use, the onus will be on the qualifying tenants to prove that there is an intention to use the premises for residential purposes at some time in the future. It is considered that in order to establish the necessary intention, the cases under section 30(1)(f) and (g) of the Landlord and Tenant Act 1954 will be of assistance. Thus, the intention must be genuine and not colourable, it must be firm and settled, not likely to be changed. It must have moved out of the zone of contemplation and into the valley of decision. Not only must there be a fixed and settled desire to use the premises for residential purposes, but also a reasonable prospect of being able to bring about the desired result. Accordingly, if residential occupation would require planning consent for a change of use, it would be necessary to show that such consent had been obtained, or that there was a reasonable prospect of getting permission.

20. Clearly the 8 unbuilt flats are the flats in issue, and he accepted that the onus will be on the qualifying tenants to prove that there is an intention to use the undeveloped part for residential purposes in the future. In this particular case planning permission was granted as long ago as 1988 or 1989 so that is not an issue. According to Mr Bunbury there is every intention to carry out the works and comply with the building permission granted some time ago and, if necessary, to have the planning permission renewed. Commenting upon what he described as "an interesting submission" at paragraph 14 of Mr Gallagher's skeleton argument, viz that a flat can only be intended for residential occupation if fit for human habitation, he argued that this was a rather curious submission : simply because a flat is not in a condition in which it can be lived in does not negative **an intention** that it may be used for residential purposes.

21. Upon the tribunal querying how, if it was the RTM company's intention to put the undeveloped part of the building into habitable condition, it could lawfully gain access to

it (or indeed carry out such work under the management powers in the lease which it was seeking to acquire), Mr Bunbury stated that it was the RTM company's intention, in accordance with the landlord, to carry out the development. Mr Sharma then interjected that "we would do the work, with our own workforce". He said that they could work from the existing Daniel Connal specification, but then accepted when challenged by the tribunal that that specification (considered by it in 2001) included only fire and smoke alarms, etc for the undeveloped parts – ie the corridors but not the flats themselves. There was therefore no existing specification for the flats to work from. He went on, with some hesitation, to say that recruitment advertisements had gone out for craftsmen about 10 weeks previously, in about October or November; the advertisements being placed only in the Job Centre. Some, he said, had replied that week.

22. Mr Gallagher objected that in his Reply at paragraph 6 he had put the Applicant to strict proof of its intentions, and that if Mr Sharma were now to be called to give evidence without having filed any statement he would have no opportunity properly to cross-examine him on that. No proof of intention, or any evidence apart from the freeholder company's accounts showing its dire financial straits, had been filed. Mr Sharma had by now informed the tribunal of his intentions, although without clarifying which company he was referring to in his use of the term "we". The tribunal regarded the information already divulged as both illuminating and disturbing, but it acceded to Mr Gallagher's objection and declined to hear any formal evidence from Mr Sharma on this subject.

23. Replying, Mr Gallagher argued that the question before the tribunal is whether or not the undeveloped part satisfies the definition of "occupied or intended to be occupied" for the purposes of Sch 6 para 1(2). Obviously it was not at the relevant date, so the question is whether it was intended for use for residential purposes. It was, he said, put by the RTM company that it is its intention which matters, and it must therefore follow that one must consider its intention at the date of the relevant notice, viz 18th August 2005. The burden of proof is on the Applicant RTM company to satisfy the tribunal, and in the absence of evidence the tribunal can do several things. It can ask what the RTM company has the right to do. Unless the application is granted it has no power to do anything.

24. Mr Gallagher urged the tribunal to look at the RTM company's powers once control were obtained. Section 96 of the 2002 Act defines management functions as :

> "functions with respect to services, repairs, maintenance, improvements, insurance and management"[6]

but not

> "functions with respect to a matter concerning only a part of the premises consisting of a flat or other unit not held under a lease by a qualifying tenant"[7]

The question, he said, is how the conversion of the ballroom area into flats would fall within the definition of "management functions". One would not understand this as including the development of individual flats. Even if one could go beyond the way the case was put on behalf of the RTM company there was no satisfactory evidence of any intention by London Land Securities Ltd (LLSL) or the Sharma family companies to do anything. LLSL bought the property in 1999 with the ballroom in its incomplete state. The tribunal had made it clear on the original appointment of the manager that this did not prevent the freeholder from carrying out work on the undeveloped flats. Despite that, nothing at all had been done since spring 2001. None of this evinces an intention to do anything with this property.

25. Mr Gallagher drew the tribunal's attention to the LLSL directors' report and accounts for the year ending 31st December 2004. The profit & loss account[8] showed a loss before taxation of £14,196 for that year, and a loss of £24,780 after tax. The balance sheet[9] shows a deficit of £137,000. On the strength of this financial information, he wondered, where would the funds come from to fund this development? The best the tribunal could do would be to rely on the past 7 years or so since LLSL purchased the property as a predictor of what the future holds. On the evidence, it is clear, this points to inactivity.

26. If there were an intention to do some work in the future this, said Mr Gallagher, would not be enough. There has to be some concept of immediacy or proximity as to when that accommodation would be available for residential occupancy. Otherwise a building site with advertising signs would count.

6 S.96(5)

7 S.96(6)(a)

8 At Tab 15, page 315

9 At page 316

Decision

27. Having considered the evidence and each party's submissions the tribunal dismisses the RTM company's application on the ground set out in Schedule 6 paragraph 1. It is satisfied that the undeveloped part constitutes more than 25% of the gross internal area of the premises and that the Applicant has no genuine or realistic intention to use it for residential purposes because, to quote *Hague* (at 21–08) :

...the intention must be genuine and not colourable, it must be firm and settled, not likely to be changed. It must have moved out of the zone of contemplation and into the valley of decision. Not only must there be a fixed and settled desire to use the premises for residential purposes, but also a reasonable prospect of being able to bring about the desired result.

The tribunal bases its decision on :

a. Its knowledge (from the many previous hearings) of the history of this building, and of the various protagonists, since LLSL first acquired it

b. Mr Sharma's explanation that, despite the absence of any specification for works to the unbuilt 8 flats, he intended (as in 2000, with the major repairs then costed at more than £600,000) to use his own cheap labour, to be found via the Job Centre, despite the Sharma family companies (in the tribunal's experience) lacking any relevant expertise

c. The equivocal nature of the RTM company's observation at paragraph 18 of its response to the three tenants' application for the re-appointment of the Receiver & Manager, viz that it "intends to instruct Chartered Quantity Surveyors Daniel Connal Partnership **or the like**...", when the whole purpose of appointing Mr Dale (of Daniel Connal Partnership) as contract administrator to work alongside Mr Wells was to satisfy Mr Sharma, who had suggested his involvement

d. The inability of the RTM company to carry out such works, as they do not come within the definition of "management functions" in section 96

e. The lack of evidence, from its last filed accounts, that LLSL has any funds with which to carry out the works

f. The tribunal's own view that no competent contractor would regard it as sensible to carry out such development, especially under the flat-roofed ballroom, until the premises were wind and water-tight (although the work could be undertaken at the same time as the major repairs).

Abuse of process

28. Mr Gallagher, in his skeleton argument and oral submissions, declared that the tribunal has an inherent power to regulate its own procedure to avoid injustice, abuse and absurdity. In support, he relied upon two reported decisions of His Honour Judge Rich in the Lands Tribunal, viz *De Campomar & anor v Trustees of the Pettiward Estate*[10] and *Mean Fiddler Holdings Ltd v Islington London Borough Council (No 2)*,[11] and upon the Respondent's ability, under reg. 11(1)(b) of the Leasehold Valuation Tribunal (Procedure) (England) Regulations 2003, to request the dismissal of an application which is "otherwise an abuse of the process of the tribunal".

29. Drawing the tribunal's attention to the corporate structure of LLSL, he noted that the company's registered office was that of the Sharma family home at 70 Tudor Road, Hampton, Middlesex. The directors are R K Sharma and N K Sharma. There are only 2 allotted shares, with one each held by Mr & Mrs Sharma.[12] Turning to the RTM company,[13] Mrs Narinder Sharma is recorded as the company secretary and Mr Ravinder Sharma as a director; the other director being Sonal Sharma. All addresses given are at 70 Tudor Road. Attached as a Schedule to the claim notice[14] is a list of the members of the RTM company on the relevant date. All details given refer only to the flat number at the premises, not to their business or other addresses. On page 33 it can be seen that for all the "connected leaseholders"[15] their addresses are given as "c/o 70 Tudor Road." Save for a few, with earlier dates, all of these leases were granted on 22nd April 2003, for a nominal consideration. These leases post-dated the resignation of the first Receiver & Manager, Mr Woodrow, in June 2002 and the application by the leaseholders' association in February 2003 for a variation in the management order and appointment of a new Receiver & Manager, but took effect before that application could be heard in May 2003.

30. Mr Gallagher submitted that it was abundantly clear, and refreshingly frank of the RTM

10 [2005] 1 EGLR 83 (LT)

11 [2003] 3 EGLR 61 (LT)

12 Tab 15, pages 312–320

13 Tab 17, pages 329–330

14 Page 35

15 Mr Gallagher's expression. The tribunal has in the past referred to them simply as nominees

company to admit, that the RTM company will simply be another company controlled by the Sharma family, just as LLSL and the management company are controlled by them. What that meant in practical terms is that if this application were to succeed then the objecting leaseholders would be in no different position than if the management order were simply discharged. There would be no difference in how the property would be run if there were a successful RTM application or if the management order were simply discharged and management reverted to LLSL. It is clear, he argued, that an application brought by LLSL under section 24(9) of the Landlord and Tenant Act 1987 to discharge the management order dated 30th May 2003 would stand no chance whatever, because of the test to be applied by section 24(9A). The relevant provisions state :

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

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

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

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

31. If LLSL had applied for discharge the tribunal would need to hear clear evidence sufficient to persuade it that LLSL was a reformed company and that all the problems which had caused it to make the order in the first place would not recur. According to Mr Gallagher, the question then becomes : Can it be right that another Sharma family company in the form of the RTM company can succeed in wresting management control of the premises through the back door where they would not succeed through the front door? As a matter of common sense, he submitted, that cannot be right.

32. Mr Gallagher accepted that the draftsman of the RTM legislation has provided that one of the parties on whom a notice can be served is a manager. The consequences of that are that Parliament has established two co-extensive schemes for the management of long leasehold property. The difficulty that produces, if there is no scheme to regulate precedence, is that there could be two active extra-contractual management schemes in force. It is difficult to visualise how that could work in practice. One therefore has to

reconcile the two potentially competing schemes. It may be, he argued, that there are individual circumstances where it is appropriate for an RTM company to take over management from an appointed manager, eg where the sole reason for the appointment was for a purpose such as major works which the manager had been superintending, and that they had been completed. In those circumstances, there could be no real objection to the RTM company taking over everyday management of the property. In the instant case one could not say that the major purpose of the appointment had been satisfied, but as he was finally in funds and had appointed Mr Dale as contract administrator it was now feasible for the works to be carried out by the appointed manager.

33. As a subsidiary argument, Mr Gallagher also referred to Mr Wells' status as an officer of the tribunal. The tribunal's power to appoint a manager is relatively new, being originally vested in the County Court but transferred by the Housing Act 1996. The concept of a tribunal-appointed manager, as opposed to one appointed by the court, is an area where there has yet to be any case law, but he submitted that there is no real difference between them. The manager acts as an officer of the tribunal.

34. Under the general law of receivership, submitted Mr Gallagher, one can only bring a claim against a court-appointed officer with consent of the court. He did not want to rely on technicalities, but in support of that proposition he cited a passage from *Kerr on Receivers*, at page 155 :

> **Action against receiver**. Nobody can bring an action against a receiver, in his capacity as such, without leave of the court,[16] and if such action is brought without leave, its further prosecution will be restrained. In general, a party to an action in which the receiver was appointed may (like any other injured party) obtain any relief to which he is entitled against the receiver by applying in the action[17]...

Any claim brought against the Receiver & Manager would therefore need the consent of the appointing court. In this case it is the tribunal which has that appointing power, and if it does not rely on that power it is in the invidious position that, unless the tribunal has a power to regulate whether or not it entertains applications under the RTM provisions, it would be unable to prevent a landlord from displacing the tribunal's own managership. Mr Wells is the tribunal's appointed Receiver & Manager and, he argued, the tribunal is

16 The authority cited by *Kerr* for this proposition is *Re Kooperman* [1928] WN 101

17 *LP Arthur (Insurance) Ltd v Sisson* [1966] 1 WLR 1384, explaining *Ex P Day* (1883) 48 LT 912; [1883] WN 118

not without a remedy (viz abuse of process) to prevent the management which it thinks is right from being displaced.

35. This RTM company, if it were to bring an application in the receivership action, would involve it in applying in the 1987 Act proceedings to discharge or vary the management order, where s.24(9A) would be brought into play. That is sufficient, submitted Mr Gallagher, for the tribunal to strike out an application which otherwise would be regular under the 2002 Act.

36. Replying, Mr Bunbury submitted that this was just an application by the RTM company to carry out the functions under the Act. The pre–requisites are clear; the statute is clear; the provisions are designed to give qualifying tenants this right. It seems that the essence of the resistance to the RTM company and the subsequent application by the three lessees is that the past conduct or findings against the landlord should somehow be superimposed against the RTM company, which had only recently been formed. There was no reason, he submitted, why the RTM tenants should be prevented from exercising the right which they lawfully have. He stressed that the RTM company had no complaint about, nor was it bringing any action against, the Receiver & Manager.

Decision

37. The tribunal considers that, when serving notice *inter alia* on any manager appointed under the 1987 Act, the RTM company is merely exercising its statutory rights and following a prescribed procedure. It is no more bringing action against a court-appointed receiver than a council tenant is bringing an action against its local authority landlord when purporting to exercise his or her statutory right to buy. The position would be very different if a leaseholder or leaseholders wished to complain about the receiver's standard of management, because the receiver's actions there would be the subject of the dispute.

38. However, where in the tribunal's opinion Mr Gallagher is on stronger ground is in his submission that this landlord, by granting a series of leases for nominal consideration to nominee tenants who form the majority of the tenant body, and hence a sufficient

number of qualifying tenants to become controlling members of an RTM company, is deliberately seeking to pursue by this avenue the restoration of its effective management and control of the premises where, if it sought to do so under section 24(9) of the 1987 Act, its application would be doomed to failure. LLSL once before naively attempted to usurp the tribunal's management order by obtaining in the Companies Court, at great cost to itself (although it sought to recover it from the leaseholders through the service charge), the reinstatement to the Companies Register of the management company named in the leases, which had long before been struck off but over which the landlord held majority control. The tribunal considers that this further attempt by Mr Sharma to subvert the system of supervised management which it had put in place both in May 2001 and again in May 2003 constitutes an abuse of the process of the tribunal.

39. Whether or not this tribunal's finding on the Schedule 6 point were to be upheld on appeal or overturned this tribunal further determines that on the ground of abuse of process the RTM company's application also stands dismissed.

Costs

40. Section 88 of the Commonhold and Leasehold Reform Act 2002 deals with the question of costs arising from the making of an RTM application to the tribunal. It provides :

(1) A RTM company is liable for reasonable costs incurred by a person who is –
   (a) landlord under a lease of the whole or any part of any premises,
   (b) party to such a lease otherwise than as landlord or tenant, or
   (c) a manager appointed under Part 2 of the 1987 Act to act in relation to the premises, or any premises containing or contained in the premises,

   in consequence of a claim notice given by the company in relation to the premises.

(2) Any costs incurred by such a person in respect of professional services rendered to him by another are to be regarded as reasonable only if and to the extent that costs in respect of such services might reasonably be expected to have been incurred by him if the circumstances had been such that he was personally liable for all such costs.

(3) A RTM company is liable for any costs which such a person incurs as party to any proceedings under this Chapter before a leasehold valuation tribunal only if the tribunal dismisses an application by the company for a determination that it is entitled to acquire the right to manage the premises.

(4) Any question arising in relation to the amount of any costs payable by a RTM company shall, in default of agreement, be determined by a leasehold valuation tribunal.

41. The application having been dismissed, the RTM company is liable to pay the Receiver & Manager's costs. At the conclusion of the hearing the tribunal invited and received the parties' respective submissions on costs. The Receiver & Manager produced a costs schedule, similar to a summary costs schedule used in Fast Track cases under the Civil Procedure Rules 1998. The tribunal listened carefully to each party's submissions but, with the exceptions only of £100 claimed as counsel's travelling costs (which he had assumed he would be responsible for) and the VAT element (as the Receiver & Manager is VAT registered), the items on the schedule are accepted. The tribunal accepts Mr Gallagher's submission that much new ground was covered in these applications, the circumstances of which are rather exceptional. Considerable research was required. While counsel's brief fee might ordinarily be considered on the high side it did include time spent one month before the hearing in the preparation of a careful and lengthy skeleton argument. As such, counsel was effectively preparing the case twice.

42. Costs are therefore summarily assessed by the tribunal in the sum of £7,464.00.

43. To the extent that such costs may not be recoverable from the RTM company (which is likely to have few assets) the tribunal directs that they may be recovered by the Receiver & Manager as relevant costs to be taken into account in determining the amount of any service charge payable by the lessees.

The cross-application

44. By their cross-application the three named leaseholders seek an order under section 24(2)(b)[18] of the 1987 Act re-appointing the present Receiver & Manager over the head of the RTM company, and dispensation from service of the preliminary notice under section 22. The grounds are set out in some detail in the application itself, but the leaseholders argue that the effect of granting the RTM company's application would be to put the property back into the hands of the Sharma family. The tribunal found that to be an unsatisfactory state of affairs in its first ruling in spring 2001. There was no evidence that the RTM company has the machinery in place to manage the property professionally or in the interests of all leaseholders rather than the Sharma family, or

[18] (2)(b) where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made

evidence to suggest it would be managed any better than under LLSL. As to why Mr Wells should continue, he now had funds of £500,000 in hand, and had already appointed Mr Dale as contract administrator. If there are to be further difficulties they believed that Mr Wells would be in a far better position to deal with them fairly and professionally than the evidence suggests would be the case with the RTM company. In response Mr Bunbury submitted that the tribunal could instead impose (or invite the RTM company to consent to) conditions governing the management of the property if it had any undue concerns.

45. While it is clear that the tribunal can accede to an application to appoint a manager under section 24 where an RTM company's own management has been seen over a period of time to fail the present application seems unprecedented. Where there are legitimate grounds for concern that the RTM company is unfit to assume the management and control of premises then, in this tribunal's view, such an application may in appropriate circumstances be justified. However, in the instant case the tribunal has dismissed the RTM company's application on two separate grounds and no order need therefore be made on the cross-application. Please note, however, that although the major works have yet to begin the Receiver & Manager's tenure of office is due to expire in a few months, at the end of May 2006, unless either LLSL consents to an extension of his term of office or further application is made to the tribunal for variation of the current order under section 24(9).

Dated 24th February 2006

Graham Sinclair — Chairman

for the Leasehold Valuation Tribunal